Nos. 14-2222/14-2219

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 REPLY BRIEF

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I. OVERVIEW

This case is about the effectuation of Congress' intent in the passage of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et. seq. ("IGRA"). The interpretation advocated by 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") and by Appellant-Intervenor-Defendant, the Pueblo of Pojoaque (a federally-recognized Indian tribe) (referred to herein as "Pueblo" or "Pojoaque") effectuate Congressional intent. The interpretations embraced by the District Court and by Appellee-Plaintiff, State of New Mexico (referred to herein as "State"), do not.

The District Court erred in adopting the State's revisionist history of Congress' intent in the passage of IGRA. Pojoaque in its Opening Brief, sets forth very extensive and detailed analysis, supported by case law, legislative history, the text of IGRA and argument establishing an overarching principle that permeates and guides the result in this litigation: Congress did not intend for, and federal courts cannot allow for, IGRA to be interpreted in a manner that allows a state to deprive a tribe of its sovereign and statutory right to conduct gaming activities on its Indian lands simply by refusing to consent to the negotiation/mediation scheme established by Congress.

The State in its Opposition Brief, summarily avoids 27 pages of authority and argument regarding a court's responsibility to apply severance analysis to the interpretation of a statute, a material part of which has been rendered void or unconstitutional. The State suggests that such severance analysis is irrelevant to the narrow issue it presented to the District Court: whether DOI had the authority to promulgate the regulations set forth at 25 C.F.R. Part 291. The State misses the point: the promulgation of 25 C.F.R. Part 291 must be viewed in the context of such severance analysis. In determining what provisions of IGRA remain, or whether IGRA in its entirety should be struck down as void, DOI's Part 291 regulations are a reasonable interpretation that preserves that vast majority of IGRA, consistent with Congress' intent. Accordingly, the Part 291 regulations should be upheld.

The Pueblo joins the Opening Brief and Reply Brief of the Federal Defendants in this appeal. Those briefs set forth legal arguments regarding (i) 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 Administrative Procedure Act, 5 U.S.C. §§ 702, 704 ("APA"). The Pueblo supports DOI's reasoning set out in the Opening Brief and the Reply Brief, and rather than provide duplicative argument to this Court, incorporates that

analysis by reference as if fully set forth herein. The Pueblo does, however, expand on the Federal Defendants' analysis on certain issues at the end of the Argument section of this Reply Brief.

The Pueblo is compelled to take issue with much of the State's Statement of the Case due to the frequency of improper factual statements not supported by the record.

The Pueblo focuses its argument in this Reply Brief, as it did in its Opening Brief, on the severance analysis, or lack thereof, employed by the District Court. More particularly, the faulty severance analysis employed by the District Court leads to an absurd result and reinforces the primary error identified in the Federal Defendants' briefs: the District Court should apply *Chevron*[1] deference to DOI's interpretive regulations that fill the gap in IGRA regarding a tribe confronted by a recalcitrant state that refuses to consent to the negotiation/mediation scheme established and intended by Congress.

II. STATE'S STATEMENT OF THE CASE IS NOT SUPPORTED BY THE RECORD.

The State's Statement of the Case includes several assertions regarding prior tribal-state gaming compacts. The Pueblo takes issue with those statements as being unsupported by the Record or other authority. To understand the history and

[1] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984)

context of the prior compacts, the Court is better advised to review prior court decisions discussing the early history of New Mexico's tribal state compacts including *Pueblo of Sandia v. Babbitt*, 47 F.Supp.2d 49, 50-52 (D.D.C. 1999), and *Pueblo of Santa Ana, et al. v. Kelly*, 104 F.3d 1546, 1548, 1560 (10th Cir. 1997). They more properly inform this Appeals Court of the history and context of prior compacts than does the State's Statement of the Case.

Many tribes in New Mexico reluctantly agreed to the 1997 compacts following several years of negotiation, litigation, and uncertainty. After IGRA was enacted, tribes in New Mexico repeatedly attempted to negotiate a gaming compact with the State. But the tribes faced a Governor who refused to negotiate. *See Pueblo of Santa Ana,* 104 F.3d at 1549. In 1995, compacts that were eventually negotiated with the subsequent Governor and approved by the Department of the Interior were invalidated by the New Mexico Supreme Court shortly after taking effect. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 904 P.2d 11 (1995).

New Mexico tribes, including Pojoaque, had spent millions of dollars on the development of gaming facilities and various tribal programs in anticipation of gaming revenues. *Pueblo of Santa Ana*, 104 F.3d at 1550. In this environment and also in the aftermath of the *Seminole Tribe* decision, "the New Mexico Legislature enacted a bill making a 'take it or leave it' offer to the tribes." *Pueblo of Sandia*, 47 F. Supp. 2d at 50-51 (D.D.C. 1999). Though the tribes had been at the negotiating

table at the beginning of the process, the final 1997 compact was part of a comprehensive gaming bill that had undergone numerous revisions by State legislators and which "legislated nonnegotiable terms for compacts with the tribes." *Id.* at 51; *see* H.B. 399, 43rd Leg., 1st Sess. (N.M. 1997)[2]. The tribes thus reluctantly chose to sign the compacts but did so under protest, with reservations specifically as to the legality of the revenue sharing and regulatory fee provisions. *Pueblo of Sandia*, 47 F. Supp. 2d at 51.

The State's Statement of the Case, particularly Sections II, "New Mexico's gaming compacts," (Resp. at 10-12) and III, "The Pueblo of Pojoaque seeks more favorable terms than those agreed by other tribes," (Resp. at 12-13) are not supported by the record and are improper. The recitation includes many inaccurate and prejudicial statements designed to challenge the credibility of the Pueblo's underlying legal disputes with the State.

First, there is no evidence in the record to suggest that the 1997 compacts were "negotiated". The State only cites to DOI compact decisions in the Federal Register, which do not support the factual allegations for which they are cited. Those publications merely establish that those compacts are in effect, and nothing more. Indeed, for the reasons set forth in the argument below, the sentence would

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[2] http://www.nmlegis.gov/Sessions/97%20Regular/bills/house/HB0399.pdf.

be more accurate to read, "In 1997, the State imposed compact terms on more than a dozen tribes".

Second, there is no evidence in the record that the purpose or the effect of the legislation enacted shortly after the 1997 compacts, the New Mexico Compact Negotiation Act, NMSA 1978. §§ 11-13A-1 through 11-13-A-5 (1999, amended 2007), was "to ensure that all tribes are treated fairly". Indeed, the State later in its Response Brief asserts that the same legislation now prevents the State from agreeing to the Pueblo's requested terms (Resp. at 12-13). The State is conceding that it imposed a state statute upon itself that renders it impossible to meet its good faith negotiation obligations under IGRA. It is ironic that the State would cite to one of the very facts that evidences its failure to meet its obligations under federal law requiring compact negotiations with the Pueblo in good faith to suggest it has a policy of "fairness". A state statute that restricts the State from meeting its good faith negotiation requirements of federal law is bad faith, *per se.*

Third, there is no evidence that the 1997 compacts included a bargained-for "exchange" between the State and the Tribes. Indeed, DOI expressed "particular concern" for the revenue provisions in formal letters explaining why DOI was not affirmatively approving the compacts. *See, e.g.*, August 23, 1997 Letter from Hon.

Secretary Brice Babbitt to Hon. Jacob Viarrial, Governor, Pueblo of Pojoaque.[3] The Secretary's letter to Pojoaque explained DOI's view was "that the payment required pursuant to the Revenue Sharing Agreement resembles more a fee or assessment imposed by the State on the Pueblo as a condition to engage in class III gaming activities rather than a bargained-for payment for a valuable privilege, and thus appears to violate Section 11(d)(4) of IGRA, 25 U.S.C. § 2710(d)(4)."

Finally, the State's title to number III, "The Pueblo of Pojoaque seeks more favorable terms than those agreed by other tribes" and the suggestion that agreeing with the Pueblo's proposed terms would be "undermining negotiations with the other tribes" (Resp. at 12-13) is misleading and prejudicial. As evidenced in the Complaint filed by the Pueblo against the State, Pojoaque is challenging the legality of the State's imposition of a tax on tribal gaming revenue and other compact provisions. The Pueblo, through this litigation, is only seeking what it is entitled under IGRA, meaning a compact without illegal and improper provisions. The Pueblo is not seeking terms more favorable to the Pueblo; rather, the Pueblo is seeking terms that the State should, and if it met its good faith negotiation obligation, would agree upon in all compacts with all New Mexico tribes.[4] The

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[3] The referenced letter is on the official web page for the Department of the Interior, Office of Gaming Management at http://www.bia.gov/cs/groups/xoig/documents/text/idc-038359.pdf.

[4] Although the question of the State's failure to negotiate in good faith is not at issue in this litigation, it should be noted that the State's agreement with the other

State's unsubstantiated factual assertions in Section III underscore the crux of the instant appeal. The State chooses to be judge and jury on the Pueblo's allegation that the State failed to conclude compact negotiations in good faith. If the State believes its own words, it should defend them in an IGRA lawsuit. The State's unsubstantiated factual assertions in litigation, which litigation is caused by the State's refusal to defend its actions in the forum and manner Congress intended, are hollow.

III. ARGUMENT

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

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

The State's Response Brief is wholly unresponsive to the Pueblo's argument that the District Court erred by not applying the "well established" two-part test for severability analysis set forth in the Pueblo's Opening Brief at 10-13. Part One: if the Court holds a statutory provision unconstitutional, it then determines whether

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tribes include the gaming tax that the Pueblo alleges to be illegal is not probative of the State's good faith. A tribe and a state may agree upon a gaming tax in circumstances where the tribe seeks a meaningful concession from the state beyond the state's obligations to negotiate in good faith and the meaningful concession has a value commensurate with the amount of the gaming tax. However, if the tribe is not seeking such a meaningful concession, the State cannot impose it upon a tribe. 25 U.S.C. § 2710(d)(4); *Rincon Band v. Schwarzenegger*, 602 F.3d 1019, 1039 (9th Cir. 2010). Accordingly, even if the other tribes sought such a meaningful concession, the State may not impose such terms upon the Pueblo.

the now truncated statute will operate in the manner Congress intended. If not, the remaining provisions must be invalidated. 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. Part Two: 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.

The State's Response fails to respond to the analysis of several opinions of the Supreme Court and the Ninth Circuit decision in *United States v. Spokane Tribe*, 139 F.3d 1297 (9th Cir. 1998) which, succinctly summarized the task that is now before this Court:

> IGRA does contain a severability clause. *See* 25 U.S.C. § 2721, which 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? (Citations 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.

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 of Florida v. Florida*, 517 U.S. 44, 72, 116 S.Ct. 1114, 1131 (1996) ("[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."). *See also*, *Spokane Tribe* at 1299 ("The Supreme Court did not consider whether the rest of IGRA survives"). The District Court had an obligation to properly apply severance analysis to IGRA to determine whether the broken statute allows for DOI's promulgation of the Part 291 regulations. The State's Response suggests that the District Court did not and should not apply such severance analysis (Resp. at 69-70). The District Court did conclude that IGRA remains intact such that the Pueblo's negotiation position is "seriously weakened" (October 17, 2014 Opinion and Order at p.5, Aplt. App. at 43). Whether the District Court erred by not applying severance analysis mandated by established Supreme Court precedent, or whether the District erred by improperly applying the well-established two-part

test for severability analysis, or whether the District Court erred by going beyond the scope of the State's request for declaratory relief, all three readings of the District Court's opinion conclude that the District Court erred. Accordingly, the decision should be vacated and the District Court should be directed on remand to properly apply the severance analysis set forth in the Pueblo's Opening Brief at 24-31, or, in the alternative, this Appeals Court should apply the severance analysis and direct the District Court to enter Summary Judgment in favor of the Pueblo and the Federal Defendants.

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

The Pueblo's Opening Brief at 13-21 provides extensive support establishing 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*[5] decision, and more specifically that Congress did not intend to allow for a state to deprive a tribe of its sovereign and statutory right to conduct gaming activities on its Indian lands simply by refusing to consent to the negotiation/mediation scheme established by Congress. The Pueblo cites to the relevant text of IGRA, thoroughly canvases IGRA's legislative history including the Senate Report, Committee Hearing testimony and statements on the floors of the Senate and House,

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[5] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083 (1987).

thoroughly canvases case law and even cites on-point post-*Seminole Tribe* statements of IGRA's key sponsors. The State's Response Brief does not directly refute any of this extensive and well-documented authority of Congress' intent that the compact process not be used by states to deprive tribes of their inherent and statutory gaming rights. Instead, sporadically throughout the State's Response Brief, however, the State does refute the Pueblo's and the Federal Defendants' authority and analysis of Congress' intent. None of the refutation is availing.

In its most direct refutation of Congress' intent, the State improperly reframes the question as whether Congress intended to provide a "guarantee" to tribes (Resp. at 56-58). First, the State notes that a tribe may not game under IGRA where the state prohibits all forms of Class II or Class III gaming for all persons, organizations, or entities for all purposes, citing 25 U.S.C. § 2710(d)(1)(B) (Resp. at 57). That circumstance is not present here. New Mexico offers the full range of casino games, including slot machines and traditional table games of cards, roulette and craps, horse racing and an aggressive State Lottery. Second, the State notes that a tribe may not game where a state has negotiated in good faith and the tribe fails to reach an agreement (Resp. at 57). This scenario begs the question of whether a state did negotiate in good faith, and in reality it would lead to a scenario of tribal gaming. The applicable tribe would simply provide a new request under IGRA and agree to the "good faith" terms.

The State's two arguments prove the Pueblo's point. Congress did intend to protect a tribe's right to engage in Class III gaming where a state does permit Class III gaming for any person, organization, or entity for any purpose and the state fails to negotiate in good faith. It is indeed ironic that the State avers to this Appeals Court the very Congressional intent that the Pueblo advocates if the state is not negotiating in good faith, the state is unable to deprive the tribe of its gaming rights.

Refuting the heavy weight of legislative history cited by the Pueblo and the Federal Defendants, the State attempts the same twisted reasoning by quoting from IGRA's Senate Report that a tribe gives up the right to game if either it chooses to forego gaming rather than seek a compact, or it seeks a compact and "for whatever reason" a compact is not successfully negotiated (Resp. at 57). When being debated, many prominent tribal leaders opposed IGRA because of the Class III compacting process. These leaders did not trust that state governments would respect their federal obligation to negotiate in good faith, or more fundamentally—to even negotiate. The Committee Report relied upon by the State, actually sought to alleviate these concerns:

> [IGRA] 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 of States in regulating such gaming. Under this Act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than to opt for a compact that may involve State

> jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated. In contrast, States are not required to forgo any State governmental rights to engage in or regulate class III gaming except whatever they may voluntarily cede to a tribe under a compact. Thus, given this unequal balance, the issue before the Committee was how to best 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 and chose to apply the good faith standard as the legal barometer for the State's dealing with tribes in class III gaming negotiations…. The Committee recognizes that this may include issues of a very general nature and, and course, trusts that courts will interpret any ambiguities on these issues in a manner that will be most favorable to tribal interests consistent with the legal standard used by courts for over 150 years in deciding cases involving Indian tribes.

S.Rep. 100-446, at 14-15 (Aug. 3, 1988). Thus the compacting process was a compromise that envisioned tribes having the ability to sue a state for not negotiating in good faith. The State's selective usage of the Committee Report's words does not accurately portray the intent of Congress.

Here, the Pueblo is seeking a compact. Indeed, the Pueblo has done everything IGRA requires it to do in that regard, and more. To the date of this filing, the Pueblo remains at the negotiation table, seeking a compact which complies with IGRA. The State's argument that the Senate Report's reference to "for whatever reason" includes a state's blatant defiance of Congress' directive to negotiate in good faith and/or a state's refusal to consent to the remedial process intended by Congress, is without merit.

In an even more tenuous argument, the State contends that the *Seminole Tribe* Court's analysis regarding *Ex parte Young,* 209 U.S. 123, 28 S. Ct. 441 (1908), is evidence that Congress did intend to allow states to deprive tribes of their gaming rights (Resp. at 58-59). The *Seminole Tribe* Court reasoned that the limited manner in which Congress abrogated the states' Eleventh Amendment immunity further limited the ability of a tribe to sue the responsible officials of the recalcitrant state under *Ex parte Young*. 517 U.S. at 71. That analysis only addresses the Pueblo's inability to sue the State. It does not address or in any way restrict other recourse available to the Pueblo. Indeed, the State fails to refute the point raised in the Pueblo's Opening Brief at 13, and repeated above at p. 8 that the *Seminole Tribe* Court expressly noted that it did not consider whether the rest of IGRA remains intact. *Id.* at 75 n.18.

The State even goes so far in its distortion of Congress' intent to suggest that "Congress granted the State a statutory right in the regulation of class III gaming and to participate in the compacting process" (Resp. at 66). In the context of the standing argument, the State asserts that it has:

> The right to be free from secretarial interference when conducting compact negotiations with the Pueblo and from compelled mediation with a tribe in the absence of a judicial determination of bad faith. IGRA grants the State the right to negotiate with tribes the terms under which gaming will take place within its borders without the Secretary intruding on those negotiations. And IGRA establishes that the State maintains that right until a court determines that the State has abused it.

(Resp. at 21-22). Any supposed "right" created by IGRA for the State to be involved in Indian gaming goes hand-in-hand with the State's participation in the process as Congress intended, including the Pueblo's ability to sue the State for failure to negotiate in good faith. The State now distorts Congress' intent to a new level: that somehow Congress intended in the passage of IGRA to grant states the right to impose their demands on tribes, regardless of good faith, and that such rights come with the state's sole prerogative to choose when it will act within the process established by Congress and when it will not. If the State were correct, IGRA should be retitled as The Indian Gaming Termination Act.

But the State does not stop there. The State stretches its revisionist history even further to suggest that Congress in 1988 knew full well that it lacked authority to abrogate states' Eleventh Amendment immunity, and thus intentionally established a negotiation/mediation scheme that a state could abuse with impunity (Resp. at 50-53). Despite all legislative history to the contrary (*see* Pueblo's Opening Brief at 13-21), the State references case law that limits Congress' authority to abrogate Eleventh Amendment immunity suggesting that the 5-4 holding in *Seminole Tribe* was a foregone conclusion. The State even goes so far to suggest that Congress knew that a more contemporaneous but yet-to-be-decided 1989 opinion of the Supreme Court upholding Congressional abrogation

of state Eleventh Amendment immunity, *Pennsylvania v. Union Gas Co*., 491 U.S. 1, 109 S.Ct. 2273 (1989), would be overturned in *Seminole Tribe*. The State's analysis defies reality. At the time IGRA was enacted, the Supreme Court had recently affirmed Congress' authority to abrogate Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S. Ct. 2666 (1976). Just three years prior to the enactment of IGRA, the Supreme Court had issued opinions stating that for Congress to abrogate states' Eleventh Amendment immunity it must expressly set forth its intent to do so. *Atascadero State Hospital v. Scanlan,* 473 U.S. 234, 242-243, 105 S. Ct. 3142, 3147-3148 (1985). If Congress lacked the authority, it would not matter whether Congressional intent was expressed or not. If the State is to be believed, Congressional leadership spoke of a federal law benefitting tribes, advancing self-government, strong tribal governments and economic self-sufficiency while all along knowingly sending tribes into a trap wherein states may act with impunity. Nonsense.

Yet the State does not even stop there. In briefing the standing issue, the State alleges that the Part 291 regulations weaken its bargaining position (Resp. at 27-29). For the State to argue that the Part 291 procedures weaken the bargaining position that Congress intended when balancing the interests of the governments in the passage of IGRA is surreal. By arguing that changing the relative bargaining position of the parties should be considered, the State is conceding that Congress

intended to strike a balance. Simply by consenting to IGRA's process and defending its negotiation positions in federal court, the State can avert any effort of its hypothetical scenario that a tribe would deliberately set a course for Secretarial Procedures that will contain superior terms. The State has it solely within its own ability to stop a tribe from taking advantage of the Part 291 regulations by merely consenting to IGRA's remedial process as Congress intended. By making this argument in the context of the standing issue, the State proves the Pueblo's case on the merits that the District Court's decision defies Congress' intent.

If the State is alleging that the Part 291 procedures alter the negotiation positions of tribal and state governments in the wake of *Seminole Tribe,* then the State is absolutely correct. The regulations, if in place, will effectively obliterate the State's ability to dictate compact terms with impunity. That is why they are needed.

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

Even the District Court, which the State is seeking to affirm, recognized that its decision was inconsistent with Congress' intent. The Pueblo's Opening Brief at 21-24 directs this Appeals Court to several passages in the opinion recognizing that the District Court ruling defies Congress' intent, for example:

> 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 State's Response Brief fails to respond, and instead takes its own distortion of Congress' intent to a new level, discussed above.

4. Severance analysis, properly applied, allows the Pueblo to proceed with the governance of Class III gaming on its Indian lands.

The Pueblo in its Opening Brief at 24-31 spells out how the District Court erred in applying the well-reasoned two-part guidance of the Supreme Court, to allow the Pueblo to govern Class III gaming activities on its Indian lands in the absence of a tribal-state compact. *See Alaska Airlines v. Brock*, 480 U.S. 678, 684, 107 S.Ct. 1476, 1480 (1987).

The State in its Response Brief, summarily avoids the Pueblo's analysis regarding a court's responsibility to apply severance analysis to the interpretation of a statute, a material part of which has been rendered void or unconstitutional. The State suggests that such severance analysis is irrelevant to the narrow issue it presented to the District Court: whether DOI had the authority to promulgate the regulations set forth at 25 C.F.R. Part 291 (Resp. at 69-70). The State misses the point: the promulgation of 25 C.F.R. Part 291 must be viewed in the context of such severance analysis. In determining what provisions of IGRA remain, or

whether IGRA in its entirety should be struck down as void, DOI's Part 291 regulations are a reasonable interpretation that preserves that vast majority of IGRA, consistent with Congress' intent.

The District Court, the State's Response Brief, and even the Federal Defendants' briefing looks at the issue before this Court under the traditional *Chevron* deference paradigm looking to authority, ambiguity and statutory gaps. The Pueblo certainly agrees with the Federal Defendants that the *Chevron* paradigm leads to the conclusion that DOI has the requisite authority, that the requisite gap exists, and that the Part 291 regulations are reasonable interpretation for filling the gap. However, the severance paradigm is separate and apart from the *Chevron* paradigm, and the severance paradigm independently directs the federal courts to uphold the Part 291 regulations. The District Court in its own orders struggled with the question of whether a court ruling that reveals[6] a gap in the statute allows for the federal agency to fill the gap. The severance paradigm, however, asks and answers a different question: given that part of the statute is unconstitutional, is there a reasonable interpretation of what remains that effectuates Congress' intent? As the Pueblo demonstrates in its Opening Brief,

[6] More accurately, the District Court struggled with the question of whether a court creates a gap in the statute. *See* Order of September 11, 2013, State's Appendix, Doc 31 at 9, S.A. 61. This reveals a critical part of the District Court's error in applying the *Chevron* paradigm. Courts do not create gaps, they reveal gaps that were already there.

which the State ignores rather than refutes, severance analysis leads to a conclusion that the Part 291 regulations are a reasonable interpretation of what remains in IGRA in the wake of the *Seminole Tribe* decision.

The State makes several references to the ability of the United States to file suit on behalf of a tribe as being sufficient to save IGRA in the application of severance analysis (Resp. 57-58 and 68). Those statements are inconsistent with the State's position regarding Congress' limited intent as to IGRA's narrow circumstances in which the State may be burdened. Imposing collateral estoppel on the State taking a different position in the event it is sued by the United States on behalf of the Pueblo creates an interesting, but unresolved, question. Certainly, the Pueblo prefers that the State's assertions regarding such a lawsuit to be correct if no other remedy is available, but the United States' ability or inability to file suit against the State on behalf of the Pueblo does not excuse the District Court from applying severance analysis to determine whether it allows for the promulgation of the Part 291 regulations.

Allowing for DOI to promulgate the Part 291 regulations in a manner that does not further impose upon an unwilling state is consistent with Congress' intent in the passage of IGRA and is a reasonable application of the well-established two-part severance analysis. Indeed, allowing for the promulgation of the Part 291 regulations is far more consistent with Congress' intent than the United States'

filing of a lawsuit. Congress intended for tribes to be able to pursue on their own behalf a remedy against a recalcitrant state, rather than be at the mercy of the discretionary authority of a Department of Justice with greatly limited resources, to file a lawsuit on the tribe's behalf. Congress intended for states to be burdened in the manner set forth in 25 U.S.C. § 2710(d)(7), rather than be subject to additional lawsuits brought by additional parties. Allowing for lawsuits to be brought by the United States on behalf of tribes may indeed save the statute, but allowing for the Part 291 regulations under severance analysis more closely tracks Congress' intent. It is Congress' intent that should be driving the result in this litigation. *Alaska Airlines,* 480 U.S. at 684, 107 S. Ct. at 1480.

The Supreme Court makes clear that the severance 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 simply concluding IGRA can function without the ability of tribes to sue states for failure to conclude compacts in good faith. The error is exacerbated by the District Court also concluding that under its ruling, IGRA is not operable consistent with Congress' intent.

B. 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 concurs with the Federal Defendant's Reply Brief at 19-20 that Congress' empowerment of the NIGC to promulgate interpretive regulations regarding IGRA does not divest DOI of its authority. The Pueblo expands on the Federal Defendant's analysis however. The State's argument (Resp. at 42-48) merely demonstrates that the two agencies possess concurrent authority as it relates to Indian gaming. At best, DOI's exercise of authority is lacking only where Congress expressly provided authority to be exercised by the NIGC. "Until such time" is not rendered superfluous, but rather is limited to that authority expressly vested in the NIGC. See *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134 (D.C. Cir. 2006) (Congress expressly limits authority of the NIGC such that it cannot encroach upon authority reserved to the compact process). The State's analysis certainly fails to establish that no agency within the Administration has authority to promulgate the Part 291 regulations. Tying into the reasoning of the Federal Defendants because Congress did not repeal DOI's rulemaking authority, and because allowing for the exercise of that authority does not encroach on those areas that IGRA expressly reserved for the NIGC, DOI's

interpretation regarding Secretarial Procedures should be afforded *Chevron* deference.

If the argument being made is that the wrong agency promulgated the Part 291 regulations, then the District Court erred in not applying severance analysis to determine that NIGC has the authority to issue substantially similar regulations. It is ironic that the State argues its interpretation must be valid in order to drive meaning into the words "until such time," while arguing for an interpretation of IGRA that renders the whole of IGRA's good faith negotiation requirements and IGRA's gaming tax prohibitions to be superfluous. If the State's argument is correct, the District Court should have applied severance analysis to clarify that NIGC possesses the requisite authority to promulgate substantially similar regulations.

C. The State's Argument that Part 291 Regulations Violate the Johnson Act is Incorrect.

The Pueblo concurs with the Federal Defendants' Reply Brief at 25-26 that the State's argument that IGRA's exemption to the Johnson Act, 15 U.S.C. §§ 1171 et seq. (governing the shipment of gaming devices) would apply to Secretarial Procedures issued under 25 C.F.R. Part 291 in the same manner as it applies to Secretarial Procedures issued under 25 U.S.C. § 2710(d)(7)(B)(vii). The Pueblo expands on the Federal Defendants' analysis however, by noting in the context of Procedures promulgated under 25 U.S.C. § 2710(d)(7)(B)(vii), the

Secretary has included provisions making clear that gaming pursuant to the Procedures does not violate the Johnson Act. *See* Secretarial Procedures for the Rincon Band of Luiseno Indians at Section 15.4.[7]

Since the passage of IGRA, challenges have been made that the Johnson Act applies to any gaming activity on Indian land unless authorized by a tribal-state compact. This contention has been repeatedly rejected by the courts. 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).

Additionally, the State's assertion provides another example of why the issue should be reviewed and resolved in the context of severance analysis. Congress intended for tribes to be exempted from the Johnson Act in those states

[7] February 8, 2013 Approval Letter and Attached Secretarial Procedures from Kevin K. Washburn, Assistant Secretary – Indian Affairs, Department of the Interior, posted on Official Webpage of Department of the Interior, Office of Indian Gaming, http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026439.pdf.

where they are entitled to a compact that allows for the play of such devices. Severance analysis should lead to the conclusion that the exemption applies to tribes in such circumstances.

D. The State's Argument that the Part 291 Regulations Do Not Sufficiently Track Congress' Intended Remedy is Incorrect.

The Pueblo concurs with the Federal Defendants' Reply Brief at 21-25 disassembling the State's argument (Resp. at 38-42) that the Part 291 regulations do not sufficiently track Congress' intended remedy. The Pueblo expands on the Federal Defendant's analysis, however, in one critical aspect. The State asserts: "[t]he statute provides that before any remedial process can begin, the court must find that the State violated its obligation to negotiate in good faith; if the State has acted in good faith, the court may proceed no further." citing 25 U.S.C. § 2710(d)(7). The State then distinguishes the statute from the Part 291 regulations that require the tribe to demonstrate that the state has asserted its Eleventh Amendment immunity (Resp. at 38-39). The State's explanation of the process overlooks 25 U.S.C. § 2710(d)(7)(B)(ii). Upon a showing by the complaining tribe of the requisite passage of 180 days from the request to negotiate a compact and evidence of the state's lack of good faith, Congress expressly shifts the burden of proof to the state to demonstrate that it has negotiated in good faith. Accordingly, it is not that a court is compelled to make a finding of bad faith on the part of the state before appointing a mediator to choose between last best offers rather it is the

state failing to meet its burden of proving that it has negotiated in good faith. When the state asserts Eleventh Amendment immunity, it is avoiding or rejecting its opportunity to meet its burden to prove that it has negotiated in good faith. The State identifies a distinction without a difference. Asserting Eleventh Amendment immunity under the regulations closely tracks the State's failure to meet its burden under the statute.

CONCLUSION

Congress did not intend for, and federal courts cannot allow for, IGRA to be interpreted in a manner that allows a state to deprive a tribe of its sovereign and statutory right to conduct gaming activities on its Indian lands simply by refusing to consent to the negotiation/mediation scheme established by Congress. For the reasons set forth herein, in the Pueblo's Opening Brief, in the Opening and Reply Briefs submitted by the Federal Defendants and the record below, the decision of the District Court should be vacated with direction to enter summary judgment in favor of the Federal Defendants and the Pueblo.

DATED: June 9, 2015 Respectfully submitted,

s/ *Scott Crowell*

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CERTIFICATES

I hereby certify that a copy of the above and foregoing was served on the Court and opposing counsel via the CM/ECF system on June 9, 2015 and 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 6, 789 words and complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify, that this brief has been prepared in a proportionally spaced typeface using Word Mac 2011 in a 14-point New Times Roman font, and that it complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6).

I certify that with respect to the foregoing that all required privacy redactions have been made per 10th Cir. R. 25.5.

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 Reply Brief, which will be exact replicas of the electronically filed version.

I certify that, prior to filing, the digital submissions have been scanned for viruses with the most recent version of a commercial scanning program, SOPHOS

ANTIVIRUS, version 9.2.2, updated June 9, 2015, and according to the program is free of viruses.

/s/ Scott D. Crowell
SCOTT D. CROWELL