No. 05-50754

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS,
Plaintiff - Appellant
v.
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; and GALE NORTON, in her Official Capacity as Secretary of the Department of Interior
Defendants - Appellees
KICKAPOO TRADITIONAL TRIBE OF TEXAS
Intervenor-Defendant-Appellee

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

REPLY BRIEF OF APPELLANT

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October 7, 2005

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REPLY BRIEF OF APPELLANT

TO THE HONORABLE COURT OF APPEALS:

NOW COMES the State of Texas and files this Appellant's Reply Brief and in support thereof would respectfully show this Court the following:

STANDARD OF REVIEW

The appropriate standard of review on cross-motions for summary judgment is *de novo,* and not, as suggested by the United States of America United States of America; United States Department of the Interior; and Gale Norton, in Her Official Capacity as Secretary of the Department of Interior, ("U.S. Defendants,") "clearly erroneous for facts and *de novo* for legal issues." *Meditrust Financial Services Corp. v. The Sterling Chemicals Inc.,* 168 F.3d 211,213 (5th Cir. 1999).

ARGUMENT

1. The State has standing to bring this suit because the *existence* of the Secretarial Procedures causes the State to suffer an actual concrete harm which can only be remedied by voiding the Secretarial Procedures in this action.

The State suffers actual, concrete harm by Secretarial Procedures

At page 18 of the U.S. Defendants' Brief, the U.S. Defendants argue that Plaintiff lacks standing because "The State's complaint alleges harm that might result from the application of the Gaming Procedures, but if the Secretary were to deny the Tribe's gaming application, none of these harms would come about." At the same page, the U.S. Defendants without any explanation as to the obvious conflict, correctly identify the two harms the State has raised in this case, viz., (1) the existence of the Secretarial Procedures "changed the way the Plaintiff State of Texas negotiates with the Tribe...the State is placed in a lesser bargaining position...." and

(2) the State has lost the "procedural safeguard" of the Indian Gaming Regulatory Act, ("IGRA") requirement that "the Tribe and Department of Interior could only enter into a compact without the State's participation if a federal court first found that the State had refused to negotiate in good faith with the Tribe." U.S. Defendants' Brief at page 18. To support their argument of no harm with respect to the change in bargaining position, the U.S. Defendants offer the testimony from the April 20, 2004 injunction hearing[1] of the Governor's General Counsel, David Medina, which occurred nine days *before* the Kickapoo Traditional Tribe of Texas ("Tribe") initiated *new* negotiations with the State which is more fully described in ¶ 22 of the First Amended Complaint and the Affidavit of David Medina attached to the Plaintiff's Motion for Summary Judgment Response. Specifically, ¶ 22 of the First Amended Complaint provides that "On April 29, 2004, nine days after the April 20, 2004 hearing on Plaintiff's Application for Preliminary Injunction, the Kickapoo Tribe initiated new negotiations with the State of Texas. In his Affidavit, David

[1]Since the initial negotiations occurred years before the April 20, 2004 hearing, David Medina could only describe them in terms of the documentation at the hearing. However, by the time of submission of his affidavit in support of summary judgment, the State had received a new offer to negotiate from the Tribe which is documented in the first amended complaint as being received just nine days after the April 20th hearing. Now David Medina could, through his Affidavit in support of the summary judgment, be more specific about the effects on the State of the Secretarial Procedures on the State's negotiations with the Tribe. The U.S. Defendants fail to address this new affidavit testimony nor acknowledge the April 29th communication from the Tribe seeking to reopen negotiations with the State.

Medina[2] states that the balance between the Federal-State-Tribe relationship is now changed by the existence of the Secretarial Procedures in that current and future negotiations with the Tribe are now opened "with the threat that notwithstanding the prohibition of the use of the remedial Secretarial Procedures under IGRA, they intend to use these Secretarial Procedures to circumvent the requirements of federal law for a finding by a court of failure to negotiate in good faith....This immediate threat is enduring and changes the relative bargaining positions of the parties. The existence of the Secretarial Procedures causes an immediate change in the daily affairs of my office in dealing with the Kickapoo Tribe. For example, the State of Texas is very aware that in devising any bargaining strategy to deal either with the original offer or the renewed April 29, 2004, offer, that just bargaining in good faith is not enough." R.E. 9, p. 5.

Thus, the Secretarial Procedures drastically alter the balance of power between the State and the Tribe.

As to the second harm identified by the State, the loss of the "procedural safeguard" addressed at page 21 of the U.S. Defendants' Brief, this is a reference to the compact requirement of IGRA which balances the respective interests of the Tribe and State regarding Class III gaming and mandates a negotiation between the

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[2]Justice David Miguel Medina is currently a member of the Texas Supreme Court.

sovereigns to address these interests. This is a right and a power extended to the sovereign states by IGRA which was otherwise withheld from them by the Constitution. *Seminole Tribe v. Florida,* 116 S.Ct. 1114, 1124 (1996). Having this procedural safeguard granted by law in IGRA is significant, as is the loss of it. David Medina testified in his affidavit that "The existence of the Secretarial Procedures causes severe harm to the State of Texas and every other state that has any federally recognized tribes since we now know that the protections afforded the states under IGRA can be lost by the very existence of the Secretarial Procedures. This is an immediate threat, a plea to give the Tribe what it seeks, 'or else' they circumvent the State and seek help in the Secretarial Procedures." R.E. 9, p. 5.

To suggest that the IGRA safeguard of no compact being possible without State participation and consent is compatible with the U.S. Defendants' argument that participation is "entirely of the State's own making" is counter intuitive. Only Congress can both extend and withdraw this procedural safeguard right to the states, and nothing in the U.S. Defendants' Brief explains how it is that the Secretary, through promulgation of the Secretarial Procedures, is empowered to remove this right previously granted to the states, and recognized by the Supreme Court in *Seminole Tribe v. Florida,*[3] 116 S.Ct. 1114, 1124 (1996).

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[3]In fact, the Supreme Court in *Seminole Tribe* declined to bridge the gap by inserting new (continued...)

Although the U.S. Defendants' Brief acknowledges the sworn testimony of David Medina in his affidavit, the U.S. Defendants' Brief offers no testimony or evidence to contradict this position of the State. *See* pp. 21-22 U.S. Defendants' Brief.

Moreover, to the extent that the U.S. Defendants' Brief argues that economic harm is required, the State's evidence shows by David Medina's testimony in his affidavit that an economic injury occurs to the State by the existence of the Secretarial Procedures. In addition, Congress in the process of adoption of IGRA also recognized the economic harm to the State should tribes be allowed to conduct Class III gaming. *See* S.REP. NO. 100-446, 1988 U.S.C.C.A.N. 3071, 3076, which states:

> [A] State's governmental interests with respect to Class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its *economic interest* in raising revenue for its citizens.

id. at 3083 (emphasis supplied). Thus, the legislative history of IGRA supports the State's economic interest in Class III gaming by the Tribe, and the loss of this valuable interest by the existence of the Secretarial Procedures. As a result, the State

---

[3](...continued)
remedies for the tribes, since under separation of powers doctrine, the Supreme Court acknowledged it is a *legislative act*, not *judicial,* to amend IGRA with a new remedy. Here the U.S. Defendants argue that somehow the *executive* branch has the *legislative* authority that the Supreme Court lacked.

has shown an actual, concrete harm that supports both standing and ripeness in this case.

The State has met the causation and redressability standard for standing

To show that the injury to the State can be fairly traced to the U.S. Defendants' conduct in issuance of the Secretarial Procedures and to show that the injury likely will be redressed by a favorable decision from this Court, the State relies on the Joint Stipulations entered into by the parties to this suit, including the U.S. Defendants, including the following:

> "FOF No 14: The Department published its Final Rule for Class III Gaming Procedures on April 12, 1999. 64 Fed. Reg. 17535 (Apr. 12, 1999) (codified at 25 C.F.R. Part 291)."
>
> "FOF No. 17: On January 20, 2004, the Secretary of Interior, acting through the Acting Deputy Assistant Secretary – Policy and Economic Development, gave the State and the Tribe notice that the Secretary determined the Tribe's proposal was complete and met the eligibility requirements in 25 C.F.R. pt. 291 and invited the State to comment on the proposal and to submit an alternative proposal."

Those two Stipulations show that the Secretary intends to administer the Secretarial Procedures, which in turn is the source and causation of the harm alleged by the State in this lawsuit. In fact, the FOF No. 17 shows that the bargaining power harm is also a financial harm since it demonstrates that the State is now subject to additional administrative steps in the purported process of the Secretarial Procedures–which IGRA would never have permitted. This causes economic harm

to the State because the Secretarial Procedures allow the Tribe to go forward on its application for a Class III license, while under IGRA, without a judicial finding of lack of good-faith negotiation and without the appointment of a mediator by the Court, these remedial Secretarial Procedures could not be applied to the State. Here, however, the Secretarial Procedures are not informal, but final, and the Joint Stipulations show a clear intent to apply them to the State, as the same is conceded in the U.S. Defendants' Brief. Just as in *Abbott Lab.* where the regulations put the lab in a "dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *id.*, here, the Secretarial Procedures require an immediate change in the conduct of the State, *i.e.*, participation in the process required by the Secretarial Procedures and, more importantly, the loss of the procedural safeguard described above. This valuable right guaranteed under IGRA has now been lost by the mere existence of the Secretarial Procedures. As a result, the State has been injured and has standing to pursue these constitutional claims.

2. **This case is ripe for determination because the legal issues concerning the constitutionality of the Secretarial Procedures is fit for judicial review without further factual development and failure to immediately review them results in undue hardship to the State because the Secretary has already implemented them and applied these remedial Secretarial Procedures to the State without a judicial finding of bad-faith negotiation as required by IGRA.**

In *Abbott Lab. v. Gardner*, 387 U.S. 136 (1967), the Supreme Court set the standards for determining ripeness to be "... to evaluate both the fitness of the issues for judicial decision and the hardship of the parties of withholding court consideration." *id.* at 148-49.

The State's claims are fit for review

At page 26 of the U.S. Defendants' Brief, the U.S. Defendants rely on *Lujan* for the proposition that there is a presumption against pre-enforcement review. However, that argument is weakened by the fact that the U.S. Defendants quoted only the first part of the opinion in *Lujan v. Nat'l Wildlife Federation,* 110 S.Ct. 3177, 3190 (1990), and omitted the rest of the quoted opinion which is relevant to the ripeness question in this appeal. The omitted portion in *Lujan* held "The major exception, of course, is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately. Such agency action is 'ripe' for review at once, whether or not explicit statutory review apart from the APA is provided." *id.* Here, the "major exception" noted in *Lujan* applies because the claims made by the State will not benefit from further factual development, unlike the BLM rules in *Lujan.* Here the scope of constitutional attack is limited to the final agency rule published in the Federal Register as the Secretarial Procedures. None of the Defendants' Briefs suggest that any new amendments to the Secretarial Procedures

are forthcoming, nor do they suggest that any action on their part concerning the Tribe's Class III gaming application will be taken other than as provided in the Secretarial Procedures. As a result, the exception in *Lujan* providing for pre-enforcement review controls this case. In *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 121 S.Ct. 903 (2001) the Supreme Court was faced with an analogous argument under the Clean Air Act Section 307(b)(1). The Supreme Court found that statute to be analogous to the Administrative Procedures Act, 5 USC § 704 and held that the regulation was "final" (and presumably ripe for review) once the "decisionmaking process" which began with "public comments" and ended with the publication in the Federal Register of the final agency regulation was complete. As shown in the Joint Stipulations, the Secretarial Procedures went through the exact same public comments and issuance process as the CAA regulation at issue in *Whitman*. The Supreme Court found in *Whitman* that the agency regulation was ripe for review and that the "question before us here is purely one of statutory interpretation that would not 'benefit from further factual development of the issues presented.'" *id.* at 915.

In fact, the instant case involving the Secretarial Procedures is distinguished factually and legally from the cases relied upon by the U.S. Defendants and the Tribe because their cases require more factual development to comprehend the effects of

the regulation on the plaintiffs. For example, at page 27 of the US Defendants' Brief, they rely on *Toilet Goods Assoc. v. Gardner,* 387 U.S. 158, (1967) for the proposition that the "plaintiffs could not know the regulation's effect until it had been applied, and until that time the case was not ripe." Yet, a closer reading of that case shows that the facts are not similar to the facts in this case. To begin with, the regulation in *Gardner* provided that "the Commissioner may under certain circumstances order inspection of certain facilities and data, and that further certification of additives may be refused to those who decline to permit a duly authorized inspection until they have complied in that regard." The Court stated that any constitutional analysis requires inquiry into the statutory purpose and "concurrently an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets." *id.* at 163-164. The instant case is not analogous since the final agency action, the Secretarial Procedures, are clearly defined in their procedure and published in the Code of Federal Regulations at 25 CFR Part 291[4] as a final agency action. The U.S. Defendants do not identify what ambiguities they believe exist in the Secretarial Procedures nor any "facts"[5] needed to be developed

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[4]See FOF 14 in the Joint Stipulations.

[5]The U.S. Defendants' Brief also suggests that the Secretary's determination of scope of (continued...)

that would prevent immediate judicial review of the same for a constitutional challenge to the Secretary's authority to promulgate the Secretarial Procedures.

Likewise, FOF 17 in the Joint Stipulations described above forecloses the argument advanced by the U.S. Defendants at page 26 of their Brief that this case is not fit for judicial determination because "we have no idea whether or when such a sanction will be ordered." *Texas* v. *United States*, 523 U.S. 296, 118 S.Ct. 1257, 1260 (1998).[6] This is not a case of a "future harm that may never occur" since the final regulations (the Secretarial Procedures in this case) as in *Whitman* and *Abbott* are already in existence and already affecting the behavior of Texas officials[7]. Moreover, in *National Association of Home Builders v. United States Army Corps of Engineers,* 417 F.3d 1272 (D.C. Cir. 2005), the Court found that an APA challenge of whether or not the Corps had exceeded its statutory authority in drafting the

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[5](...continued)
gaming permitted the Tribe in its Class III gaming application in some fashion will determine the constitutional questions brought by this appeal on the power of the Secretary to issue the Secretarial Procedures, but their Brief fails to explain how that might occur, or why it would be relevant to the constitutional issues of this appeal.

[6]In contrast to the instant case, in *Texas,* there was no immediate threat that the State would appoint a master for a school district and therefore no immediate need to analyze the application of the statute in question. *id* at 1260.

[7]The trial court made the same error at pages 12-13 of the Memorandum Opinion, R.E. 2, that the State of Texas' claims "are not ripe for judicial review at this time because Texas' claims are contingent upon future events that may or may not occur (i.e., the Secretary's approval of the Kickapoo Tribe's Class III gaming application)."

regulations in question was "purely legal" *id.* at 1281, and further found that "No further factual development is necessary to evaluate the appellant's challenge" especially where, as here, the action questions "its statutory permitting authority under the CWA." *Home Builders* also found that its review of the authority in question was consistent with the "major exception" in the *Lujan* opinion for pre-enforcement determination under the APA, especially where the other party's conduct is altered as a result thereof.

The U.S. Defendants' last attack on the fitness issue is found at page 29 of their Brief where they attempt to distinguish the facts and holding of *Alaska Dep't of Envtl. Conservation v. EPA,* 124 S.Ct. 983, 998-99 (2004). In *Alaska,* the Supreme Court rejected the federal defendant's identical contention that until the regulation was applied, it was not subject to review. *Alaska* held instead that the "final agency action" was the published regulations–just as are found in this case in the final Secretarial Procedures published at 25 CFR Part 291. R.E. 8.

At page 29 of U.S. Defendants' Brief, the U.S. Defendants further attempt to distinguish the *Alaska* case by quoting from the opinion on the issue of "finality" of the regulation. However, just as in the discussion of *Lauderbaugh v. Hopewell Township,* 319 F.3d 568 (5th Cir. 2002) where this Court distinguished exhaustion of remedies procedures from the finality required for ripeness determinations and held

that plaintiff's case was ripe even though no final zoning determination had been made by the city because "the finality rule allows a suit whenever a 'decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury...This case is therefore ripe for adjudication." *Lauderbaugh id.* at 575. The present case has that same finality for determination of fitness. Here, the Secretarial Procedures were published in the Federal Register following public comments and as held in *Whitman id.* above, such publication results in a final regulation, *viz.*, the Secretarial Procedures, that is fit for judicial review. The Affidavit of David Medina described above shows the concrete injury inflicted upon the State of Texas. A change in Plaintiff's and Defendant Tribe's behavior was directly caused by the existence of the Secretarial Procedures, which was sufficient to trigger judicial review.

The State meets the hardship requirements for ripeness

The State incorporates the argument and evidence recited on pp. 3-5 of this Reply Brief to show hardship to the State if these issues on appeal are not now decided.

3. **The Secretarial Procedures may not be inferred from IGRA because they violate the Separation of Powers doctrine and are manifestly contrary to IGRA in that they allow the Secretary to apply these remedial Secretarial Procedures to the State of Texas without a prior judicial finding of bad-faith negotiation.**

The State incorporates its original Brief of Appellant on these points as the same is adequately briefed. Alternatively, if the trial court lacked standing or ripeness, then Plaintiff would show that there is no jurisdiction to make these findings concerning the Secretarial Procedures.

4. The General Authority Statutes, 25 U.S.C. §§ 2, 9, do not authorize the promulgation of the Secretarial Procedures because Congress has preempted the subject of Class III gaming by adoption of IGRA and no delegation of Congress' legislative powers is present in the General Authority Statutes to issue the Secretarial Procedures.

The State incorporates its original Brief of Appellant on these points as the same is adequately briefed. Alternatively, if the trial court lacked standing or ripeness, then Plaintiff would show that there is no jurisdiction to make these findings concerning the Secretarial Procedures.

5. The *Seminole Tribe* decision did not find the severed IGRA unconstitutional.

As to Intervenor-Defendant Tribe's contention at page 46 of its Brief that without the Secretarial Procedures, "all of the Class III Provisions of the IGRA would fail as unconstitutional", Plaintiff State would show that the Supreme Court in *Seminole Tribe*[8] did not find IGRA unconstitutional in its opinion, and to the extent that the Tribe suggests that IGRA as enacted had only one outcome–the granting of

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[8] *Seminole Tribe v. Florida,* 116 S.Ct. 1114, 1124 (1996).

a Class III license to the Tribe -- the same is more fully addressed at pages 21-23 of the Brief of Appellant, which is incorporated herein. In addition, *Whitman v. American Trucking Assoc., Inc.* 121 S.Ct. 903, 916 (2001) applying the *Chevron*[9] doctrine, held the agency's regulation "contradicts what in our view is quite clear. We therefore hold the implementation policy unlawful." *Whitman, id.*

CONCLUSION

IGRA sets forth Congress' intent that an impartial forum, *viz.*, the federal courts, must first determine if the State failed to negotiate with the Tribe in good faith before IGRA permits the application of any remedial procedures to the State. IGRA § 2710(d)(7)(iii). With the promulgation of the Secretarial Procedures, however, that process is drastically altered since they allow the remedial process to continue without a judicial determination of failure to negotiate in good faith and based instead on the assertion by the State of its Eleventh Amendment immunity. Secretarial Procedures § 291.3.

Here, the trial court's finding of lack of ripeness and the finding that the Secretarial Procedures are authorized by IGRA is clearly in error and this Court should reverse and render a decision affirming the State of Texas' motion for summary judgment, and deny the Defendants' motions for summary judgment.

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of Fed R. App. P. R. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2, THE BRIEF CONTAINS:

   A. 4740 words.

2. THE BRIEF HAS BEEN PREPARED:

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3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE- VOLUME LIMITS IN Fed. R. App. P. 32(a)(7), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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