No. 05-50754
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; DIRK KEMPTHORNE, in his Official Capacity as Secretary of the Department of the Interior, Defendant- Appellees,

KICKAPOO TRADITIONAL TRIBE OF TEXAS,
Intervenor-Defendant-Appellee

MOTION FOR LEAVE TO FILE BRIEF OF TRIBAL AMICI SUPPORTING APPELLEES' PETITIONS FOR REHEARING *EN BANC*

JENA BAND OF CHOCTAW INDIANS; POARCH BAND OF CREEK INDIANS; COQUILLE INDIAN TRIBE; RINCON BAND OF LUISENO INDIANS; SHOALWATER BAY INDIAN TRIBE; SPOKANE TRIBE OF INDIANS; STANDING ROCK SIOUX TRIBE

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CERTIFICATE OF INTERESTED PERSONS

As governmental parties, the Amici are not required to furnish a Certificate of Interested Persons pursuant to Fifth Circuit Local Rule 28.2.1.

The tribal amici, Jena Band of Choctaw Indians, Poarch Band of Creek Indians, Coquille Indian Tribe, Rincon Band of Luiseno Indians, Shoalwater Bay Indian Tribe, Spokane Tribe of Indians, and Standing Rock Sioux Tribe move pursuant to Fed. R. App. P. 29 for leave to file an amicus brief in support of the Kickapoo Traditional Tribe of Texas's petition for rehearing *en banc*. A copy of the proposed amicus brief has been submitted along with this motion.

I. STATEMENT OF INTEREST

States have no inherent authority to prohibit or even to regulate gaming on tribal lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *see also* 25 U.S.C. § 2701(5). Congress – the only authority other than the tribes themselves with any claim to regulatory authority over tribal gaming – chose to give states a limited voice in the conduct of tribal gaming by enacting IGRA. Rather than giving states a veto over tribal gaming activities, IGRA required states to negotiate in good faith to agree with tribes on procedures for the conduct of gaming and to memorialize agreed-upon procedures by entering into a tribal-state gaming compact. 25 U.S.C. § 2710(d). Congress also provided tribes protection from recalcitrant states in the form of a last-resort remedy – authority granted to the Secretary of the Interior to promulgate procedures under which a particular tribe could game on its lands if the state in which those lands were located refused

to consent to the negotiation/mediation process established by Congress. 25 U.S.C. § 2710(d)(7)(B)(vii).

Every federally recognized tribe in the United States has a stake in the availability of that last-resort remedy, the adoption of Secretarial procedures to permit gaming on its lands. Any tribe that needs, now or in the future, to enter into, amend, or renew a tribal-state gaming compact depends on the existence of the Secretarial procedures remedy prescribed by IGRA. That last-resort option provides both a source of equal bargaining authority for tribes and an essential safeguard for those tribes whose lands are located in states that refuse to participate in IGRA negotiations. If the panel's decision in this case stands, and the remedy is unavailable, every tribe engaged in compact negotiations or renegotiations will be harmed. Some may still be able to obtain compacts, but their bargaining power will have been substantially reduced. Others will be unable to obtain compacts and will therefore be deprived of the valuable opportunity to attain the economic self-sufficiency that tribal gaming represents and that Congress intended tribes to have when it enacted IGRA.

The tribal amici represent a broad spectrum of tribes from across the nation, and the impact of the panel's decision on their individual situations demonstrates the exceptional importance of the issue decided by the panel in this case. Some of

the tribal amici have obtained compacts after long struggles that demonstrate the essential role of the Secretarial procedures, while others, such as the Jena Band in Louisiana, have been unable to reach agreement with the states entirely, and their efforts to utilize the Secretarial procedures remedy have been abruptly terminated by the panel's decision. The specific effects of the panel's decision on each of the tribal amici are set forth in more detail below.

A. Without Either Good Faith Litigation or the Secretarial Procedures, Some Tribes Will Never Be Able to Game.

The tribes most directly and immediately affected by the panel's decision are those that have not yet been able to agree to tribal-state gaming compacts. The Jena Band of Choctaw Indians in Louisiana provide the most stark example of how a state's refusal to negotiate can deprive a tribe of the ability to game unless the Secretarial procedures remain available. The Jena Band is a federally recognized tribe whose tribal offices are located in Trout, LaSalle Parish, Louisiana. Louisiana permits Class III gaming by non-tribal entities and has entered into tribal-state compacts authorizing Class III gaming by Louisiana's three other federally recognized tribes, the Tunica-Biloxi, the Louisiana Coushatta, and the Chitimacha. *See* La. Rev. Stat. Ann. tit. 27; 58 Fed. Reg. 36,264 (July 6, 1993) (Chitimacha Tribe of Louisiana); 65 Fed. Reg. 31, 189 (May 16, 2000) (Louisiana Coushatta Tribe); 57 Fed. Reg. 54,415 (Nov. 19, 1992) (Tunica-Biloxi Tribe of

Louisiana). The Jena Band, which was recognized by the federal government after these tribal gaming compacts were entered, has asked the State of Louisiana to negotiate a compact with it as well, but the Governor of Louisiana refused, stating publicly that she "cannot support the establishment of another gambling casino" and asking the State Attorney General to research all legal avenues open to the state to oppose gaming by the Jena Band. Press Release, Governor Kathleen Babineaux Blanco, *Governor Blanco Responds to Jena Band of Choctaw Indians' Efforts to Establish Gaming in Louisiana* (April 12, 2005), available at http://www.gov.state.la.us/index.cfm?md=newsroom&tmp=detail&catID=1&articleID=639&navID=3. The Jena Band brought suit under IGRA to force good faith negotiations, but Louisiana asserted its Eleventh Amendment Immunity and the suit was dismissed. *Jena Band of Choctaw Indians v. Blanco*, No. 3:05-cv-00852-JJB-DLD (M.D. La. Mar. 8, 2006). The Jena Band then sought Secretarial procedures under the regulatory process invalidated by the panel decision in this case, and it was informed by the Secretary on June 28, 2007 that it was eligible to participate in that process. The Jena Band therefore submitted its proposal for the procedures under which it would conduct gaming operations for a 60-day comment period to expire on September 14, 2007, at the end of which time the Secretary could approve those procedures and the Jena Band could begin the gaming

activities essential to its economic well-being and self-sufficiency. When the panel decision in this case was issued, further action on the Jena Band's proposal was stayed. Without either reversal of the panel's decision or a change of heart by the State of Louisiana, the Jena Band remain unable to game for the foreseeable future, while their sister tribes in Louisiana and other, non-tribal entities are able to raise needed funds through gaming activities.

The Poarch Band of Creek Indians in Alabama – one of the original litigants in the *Seminole Tribe* case – likewise has been struggling for two decades to obtain a tribal-state gaming compact in the face of Alabama's assertion of its Eleventh Amendment immunity. It requested negotiations of a tribal-state compact in 1990, but Alabama refused to negotiate a compact even though Alabama permits Class III gaming by other entities. Alabama asserted its Eleventh Amendment immunity in response to the Poarch Band's IGRA lawsuit and the suit was dismissed. In March 2006, the Poarch Band requested Secretarial procedures. Its request remains pending. Without the availability of that Secretarial procedures remedy, it too will remain without a compact, and its ability to game will remain solely within the control of the state, contrary to Congress' intent.

B. Some Tribes that Are Currently Able to Game Were Only Able to Reach Compacts Because of the Existence of the Secretarial Procedures Remedy.

Other tribes have been able to overcome negotiating difficulties and obtain compacts, but their stories reveal the essential role of IGRA's remedies, including the Secretarial procedures, in the overall statutory scheme. The Spokane Indian Tribe of Washington, whose case gave rise to the Ninth Circuit opinion with which the panel's decision conflicts, spent 18 years trying to obtain a compact. *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (1998). The Ninth Circuit struck down an injunction that would have forbidden the Spokane Tribe to game without a compact, reasoning that the State of Washington could not deprive the Tribe of its gaming rights by refusing to consent to IGRA's negotiation/mediation process. *Id.* Only in 2007 was the Spokane Tribe able to secure the compact it sought in 1989, and only after the State of Washington was confronted with the reality that it could not stop the Tribe from offering Class III gaming. Without the availability of either a judicial determination of bad faith (and the resulting arbitration process) or the Secretarial procedures, the Spokane Tribe would never have been able to game.

Other Washington tribes have likewise required the existence of the Secretarial procedures in order to game. The Confederated Tribes of the Colville

Reservation took the State of Washington to court in an action that resulted in a District Court's decision that all compacting provisions (not just the tribal remedies) had to be stricken from IGRA to effectuate Congress' intent. *Confederated Tribes of the Colville Reservation v. Washington*, No. CS-92-0426, slip. op. at 4-5 (E.D. Wash. June 4, 1993). While that decision would have permitted them to game without a compact, they nonetheless sought Secretarial procedures and ultimately agreed to a compact with Washington because of the threat of enforcement actions. Without at least the possibility of Secretarial procedures as a recourse for the Tribes, it is not clear that Washington would have ever consented to a compact for the Colville either.

C. Even Tribes with Existing Compacts Need the Secretarial Procedures to Ensure a Level Playing Field During Future Negotiations to Renew or Amend Compacts.

Compacts do not last forever. Every state except for Washington and Minnesota includes expiration dates in its compacts, and even those without pending expiration dates require occasional amendments to adjust to changing circumstances. Without the availability of a Secretarial procedures remedy, tribes have no real bargaining power in their negotiations to renew or amend compacts. The panel decision in this case tells states that, if they wish to oppose tribal gaming or a particular amendment to its conditions, they can simply refuse, even if they

lack a good faith basis for their refusal that would stand up to judicial scrutiny in the 25 U.S.C. § 2710(d)(7) process. What remaining bargaining authority can tribes have if they lack access to either the judicial protection or the Secretarial procedures prescribed by Congress? The panel's decision, if permitted to stand, permanently poisons the well for all tribes.

Other tribes, such as the Coquille Tribe in Washington, have compacts that are currently the subject of legal challenges under state law. *State ex. rel Dewberry v. Kulongoski*, No. A124001 (Or. App.); *cf. Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997); *Warren v. United States*, No. 06-CV-00226 (W.D.N.Y., filed Aug. 16, 2006). If their compacts are struck down by the courts and they must return to the negotiating table to reach new ones, they will be without recourse if the states take advantage of the imbalance of power created by the panel's decision. The Rincon Band of Luiseno Indians, the Shoalwater Bay Indian Tribe, and the Standing Rock Sioux Tribe, each of whom presently have tribal-state compacts, have chosen to participate in this amicus brief because they anticipate the panel decision will impact their ability to negotiate necessary compact amendments and renewals. Each of these tribes has been a party to contentious compact negotiations and has faced the Hobson's choice of making concessions in compacts or initiating uncertain and protracted litigation regarding

the availability of a remedy to hold states accountable at the negotiation table for the good faith Congress required. These tribes have seen firsthand the effect that the existence of the tribal remedies prescribed in IGRA have in keeping states at the negotiating table and allowing the tribes and the states to reach agreement on compact terms. All of these tribes have a stake in the continued availability of fair negotiations with states, negotiations that are guaranteed by the existence of a last-resort remedy for tribes that face uncooperative states.

II. DESIREABILITY AND RELEVANCE OF AMICUS BRIEF

As tribes subject to IGRA, amici are at the mercy of the states in which their tribal lands are located to the extent that their current or proposed gaming activities require a tribal-state gaming compact. The amici are uniquely situated to provide this Court with information about the importance of the Secretarial procedures at issue in this case in a wide variety of factual circumstances affecting tribes both in this Circuit and around the country. The proposed amicus brief focuses on the experiences of the tribal amici in attempting to negotiate compacts and the importance of the Secretarial procedures remedy to their continued ability to do so. The dynamics of these negotiations illustrate the importance of the remedy at issue to the overall Congressional plan set forth in IGRA, a key factor in the severance analysis conducted by the panel decision. The information contained in the

proposed amicus brief, we respectfully suggest, will assist the members of this Court in evaluating the petition for panel rehearing.

RESPECTFULLY SUBMITTED this 15th day of November, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2007, I caused a paper copies of the above Motion for Leave to File Brief of Tribal Amici to be served on the counsel listed below via First Class Mail.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION,

Plaintiff,

-vs-

STATE OF WASHINGTON, and BOOTH GARDNER, et al.,

Defendants.

NO. CS-92-0426-WFN

ORDER

001682

Before the court is defendants' Motion for Dismissal or, in the Alternative, for a Stay, Ct. Rec. 5, heard on May 28, 1993. Appearing on behalf of plaintiff was Reservation Attorney Bruce Didesch; appearing on behalf of defendants was Assistant Attorney General of Washington State Jonathan McCoy. Having reviewed the record, having heard the oral argument of counsel and being fully informed, this court GRANTS the Motion for Dismissal.

Plaintiff Confederated Tribes of the Colville Reservation [Tribe] initiated this action to compel defendants Washington State [State] and certain officials to comply with the provisions of the Indian Gaming Regulatory Act [IGRA], 25 U.S.C. § 2701 et seq. Under the terms of the Act, the State shall negotiate in good faith in an attempt to reach a compact with the Tribe regarding regulation of class III gaming activities on the reservation. If a compact cannot be reached within 180 days, IGRA provides for court intervention to resolve any impasse.

The State requests dismissal on three grounds: (1) sovereign immunity under the Eleventh Amendment; (2) state sovereignty under the Tenth Amendment; and (3) failure to state a claim against the individual defendants. The State in the alternative also requests a stay pending the outcome of *Spokane Tribe of Indians* v. *Washington*, 790 F. Supp. 1057 (E.D. Wash. 1991) currently on appeal to the Ninth Circuit.

The argument regarding the Eleventh Amendment jurisdictional bar to this suit is identical to that presented in *Spokane Tribe*. This court concurs with the well-reasoned opinion of Judge Van Sickle in the *Spokane Tribe* case and concurs with the determination that sovereign immunity preserved in the Eleventh Amendment bars this action against the State.

As the *Spokane Tribe* rationale does not dismiss the individual defendants, the court looks to the Tenth Amendment challenge as it applies to the individual defendants, an issue not raised in *Spokane Tribe*. For the purposes of this discussion, the court will continue to address the State as the defendant. Any enforcement action by the Tribe against the individual state officers would necessarily be in their official capacity and would thus be against the State.

The State claims IGRA impermissibly compels the State to negotiate with the Tribe. The Tribe counters by arguing that the State can simply elect to do nothing and then, in due course, the federal government will step in and do the regulating the State is avoiding.

IGRA provides that a tribe desiring to initiate class III gaming shall request the state to negotiate a compact and "[u]pon receiving such a request, the State shall negotiate with the Indian tribe." 25

U.S.C. § 2710(d)(7)(A). The State is required to negotiate in good faith. *Id.*

The Tenth Amendment limits the power of the federal government "to use the states as implements of regulation." *Board of Natural Resources v. Brown*, No. 92-35004, slip op. at 4401 (9th Cir. May 4, 1993). In *Board of Natural Resources*, the Ninth Circuit held as violative of the Tenth Amendment a statute which required Washington State to issue regulations to carry out the federal ban on the export of logs from public lands. Similarly, IGRA violates the Tenth Amendment because the State must negotiate a tribal/state compact "in good faith," this requires the State to endeavor to create a regulatory scheme.

The Tribe asks the court to look beyond the literal words of the statute and to its overall effect. The Tribe claims that if the State elects to do nothing, it is not in violation of the federal law and thus is not compelled to regulate for the federal government. However, this argument was advanced and rejected in *Board of Natural Resources*. *Id.* at 4402-03 (unconstitutional statutory directives cannot be construed as merely precatory admonitions). This court, having found the Act unconstitutional, cannot simply choose to ignore the mandatory language which forces the State to take part in this regulatory scheme.

The court is aware of the case of *Yavapai-Prescott Indian Tribe v. Arizona*, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) which holds that IGRA's "terms do not force the state to enter into a compact." However, *Yavapai* was decided without the benefit of *Board of Natural Resources*.

In finding that IGRA violates the Tenth Amendment, this court is faced with the issue of severability of the unconstitutional portions of

IGRA. The Act contains a severability clause. 25 U.S.C. § 2721. T Tribe requests that the entire Act be held unconstitutional whereas t State requests merely severing the offending mandatory language; i.e "the State shall negotiate . . . ." *Id.* at § 2710(d)(3)(A).

"A court should refrain from invalidating more of the statute th is necessary." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (198 (internal quotes omitted). When there is a severability clause, the is a presumption that "the objectionable provision can be excised fr the remainder of the statute." *Id.* at 686. The severability analys involves a two step process: (1) if severed, are the remaini provisions fully operative; and (2) if fully operative, would Congre have enacted IGRA without the deleted provisions. *Board of Natur Resources*, slip op. at 4403-04.

If this court were to only sever the mandatory language from IGR the Tribe would be left without recourse if they are unable to reach agreement with the State. Thus subsection (d) regarding class I gaming is not fully operable without the unconstitutional languag Further, even if subsection (d) were fully operable without t unconstitutional portions, the language of the act and the legislati history indicate State participation and speedy resolution of a impasse were key components of the bill. *See*; e.g., 25 U.S. § 2710(d)(7)(B)(i) (court assistance may be invoked if a compact is n reached within 180 days); Senate Report No. 100-466, 100th Cong., 2 Sess., *reprinted* in 1988 U.S.C.C.A.N. 3071, 3076 (the Act "does n contemplate and does not provide for the conduct of class III gami activities on Indian land 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.

Because of the above holding, this court finds it unnecessary to address the State's allegation of a failure to state a claim against the individual defendants and its request for a stay. Accordingly,

IT IS ORDERED that defendants' Motion to Dismiss, Ct. Rec. 5, be and the same is hereby GRANTED. The Clerk is directed to file this Order, forward copies to counsel and CLOSE THIS FILE.

DATED this 3 day of June, 1993.

WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

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