American Indian Law Review

Volume 33 | Number 2

1-1-2009

Texas v. United States: The Legality of the Secretarial Procedures Following Seminole Tribe of Florida v. Florida

Gregory R. Mulkey

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr

Part of the Indian and Aboriginal Law Commons

Recommended Citation

Gregory R. Mulkey, *Texas v. United States: The Legality of the Secretarial Procedures Following Seminole Tribe of Florida v. Florida*, 33 Am. Indian L. Rev. 525 (2009),
https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

NOTES

TEXAS V. UNITED STATES: THE LEGALITY OF THE SECRETARIAL PROCEDURES FOLLOWING *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*

Gregory R. Mulkey[*]

I. Introduction

Class III gaming, which includes slot machines and other high-stakes games, has become a major source of revenue for Indian tribes. The national revenues from Indian gaming in 2007 were $26.5 billion.[1] Until 1988, States did not have any authority to regulate gaming on Indian reservations. With the enactment of the Indian Gaming Regulatory Act (IGRA), Congress changed the regulation of Indian gaming and expressly granted states limited control over Class III gaming.[2]

IGRA provides Indian tribes the ability to negotiate with the states to come to an agreement about the procedures governing Class III gaming on a tribe's reservation.[3] Congress also put in safeguards for tribes in case states did not want to negotiate or negotiated in bad faith, which allows tribes to bring suit against states.[4] In *Seminole Tribe of Florida v. Florida*,[5] the Supreme Court found that Congress did not have the authority to take states' sovereign immunity under the Eleventh Amendment. After *Seminole Tribe*, a tribe's only remedy for a state not negotiating in good faith was to have the state waive its immunity or have the United States bring suit against the state on the tribe's behalf.[6] The Secretary of the Interior (the Secretary) created new procedures for tribes to use when a state did not negotiate or negotiate in good

* Third-year student, University of Oklahoma College of Law.

1. Joe Nelson, *Indian Gaming Revenue Growth Dips*, INLAND VALLEY DAILY BULL., Aug. 20, 2008, *available in* LEXIS, News & Business Directory, All News File.
2. *See* 25 U.S.C. §§ 2701-2710 (2006).
3. *Id.* § 2710(d).
4. *Id.* § 2710(d)(7).
5. 517 U.S. 44 (1996).
6. *See id.*

Published by University of Oklahoma College of Law Digital Commons, 2009

faith and claimed sovereign immunity.[7] In *Texas v. United States*, the Fifth Circuit found the Secretarial Procedures invalid.[8]

This note consists of four parts, each addressing various aspects of *United States v. Texas* and IGRA. To start, Part II discusses IGRA, the Secretarial Procedures, and the case law leading to *Texas*. Part III contains the factual background, issue, and holding of *Texas*. Then Part IV provides the Fifth Circuit's rationale in the case. Part V examines the accuracy of the court's analysis and holding in the case, discusses the need for congressional action, and possible actions Congress could take.

II. Law Before Texas v. United States

A. The Law Before IGRA

Tribal Indians on their reservations were not subject to state gaming laws before the enactment of the IGRA.[9] The Supreme Court has held "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States."[10] While tribes are not subordinate to the states, Congress can expressly provide that certain state laws can govern tribes on their reservations.[11]

The Supreme Court determined states could not regulate tribal gaming in *California v. Cabazon Band of Mission Indians*.[12] The Court held California could not regulate tribal gaming on the reservations because "[s]tate regulation would impermissibly infringe on tribal government."[13] In *Cabazon*, California argued Congress had given the State authority to apply the State's gaming laws to tribal gaming through Public Law 280 and the Organized Crime Control Act (OCCA).[14]

The Supreme Court held Public Law 280 and the OCCA did not grant California the authority to regulate tribal gaming.[15] "In Pub. L. 280, Congress

---

7. *See* Class III Gaming Procedures, 63 Fed. Reg. 3289 (proposed Jan. 22, 1998) (codified at 25 C.F.R. pt. 291).

8. *See* Texas v. United States, 497 F.3d 491 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).

9. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

10. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

11. *Cabazon*, 480 U.S. at 207.

12. *See id.* at 202.

13. *Id.* at 222.

14. *Id.* at 207.

15. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

expressly granted . . . California . . . broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State" and a more limited civil jurisdiction.[16] A civil state law only applies to tribes, under Public Law 280, when private civil litigation is brought against "reservation Indians" in state court.[17] The Court found California's law regulating bingo, which the State sought to apply to tribes, was meant to regulate gaming.[18] State laws that regulate, instead of prohibit, are considered civil laws under Public Law 280; therefore, Public Law 280 did not give California the authority to regulate tribal gaming on reservations.[19]

The OCCA makes a gambling business operated contrary to state law a violation of federal law.[20] The Court determined the OCCA did not give states authority to enforce federal law on Indian reservations, if states could not do so without the OCCA.[21] The Court's rejection of California's two premises of expressly granted congressional authority to regulate tribal gaming on Indian reservations left states with no power to regulate tribal gaming on Indian reservations.[22] After *Cabazon* was decided, Congress enacted IGRA to give states a limited role in tribal gaming and to establish procedures governing tribal gaming.[23]

B. The Enactment of IGRA

In 1988, Congress enacted IGRA to give Indian tribes a statutory basis for gaming operations and to allow the federal government to regulate tribal gaming.[24] IGRA established three classes of tribal gaming.[25] Class I and II gaming includes social games with "prizes of minimal value," as well as bingo and card games authorized by state law.[26] Class III gaming includes anything that is not Class I or II gaming.[27]

---

16. *Id.*
17. *Id.* at 208.
18. *Id.* at 211.
19. *See id.* at 207-13.
20. *Id.* at 212-13.
21. *Id.* at 213-14.
22. *See generally id.* at 202.
23. *See* Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701-2710 (2006)).
24. *See* 25 U.S.C. § 2702 (2006).
25. *Id.* § 2710(a)-(d).
26. *Id.* § 2703(6), (7).
27. *Id.* § 2703(8).

Published by University of Oklahoma College of Law Digital Commons, 2009

Class I and II gaming activities remain within the jurisdiction of Indian tribes, with Class II gaming also subject to the provisions within Chapter 29.[28] On the other hand, Congress granted states some power with respect to Class III gaming.[29] In addition to the adoption of an ordinance or resolution by the Indian tribe with jurisdiction over the land, and approval by the Chairman of the National Indian Gaming Commission, the Indian tribe and the state where the reservation is located must enter a tribal-state compact for Class III gaming activities to be lawful.[30]

An Indian tribe can enter a tribal-state compact in two ways.[31] First, the tribe can request that the state enter good-faith negotiations with the tribe, and the state can agree and enter into a negotiated tribal-state compact.[32] Second, the tribe can sue the state after 180 days from the time of the tribe's request for negotiations of a tribal-state compact.[33] For the tribe to bring suit against the state, the parties must not have entered a tribal-state compact and the state must have failed to respond to the tribe's request or failed to negotiate in good faith.[34]

After a tribe sues the state, the court must determine if the state negotiated in bad faith. "If . . . the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact . . . the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period."[35] If the state and tribe cannot come to an agreement within the sixty-day period, then each party must submit their last best offer to a court-appointed mediator.[36] The mediator will select the proposition that best meets the terms of IGRA and Chapter 25, and the state can either consent or refuse to consent to the proposition selected.[37] If the state does not consent to the chosen proposal, the Secretary will prescribe procedures, with the consultation of the tribe and based on the mediator's chosen proposal, that will govern the proposed Class III gaming.[38]

---

28. *Id.* § 2710(a).
29. *See id.* § 2710(d).
30. *Id.* § 2710(d)(1).
31. *See id.* § 2710(d).
32. *Id.* § 2710(d)(3)(A).
33. *Id.* § 2710(d)(7)(B)(i).
34. *Id.* § 2710(d)(7)(B)(ii).
35. *Id.* § 2710(d)(7)(B)(iii).
36. *Id.* § 2710(d)(7)(B)(iv).
37. *Id.* § 2710(d)(7)(B)(iv)-(vii).
38. *Id.* § 2710(d)(7)(B)(vii).

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

The tribal-state compact is required for Class III gaming to comply with federal criminal law.[39] It is illegal under 18 U.S.C. § 1166 to conduct Class III gaming in opposition to state laws without a tribal-state compact.[40] The second course used by tribes to enter a tribal-state compact, through a court action against the state, was constitutionally challenged in *Seminole Tribe of Florida v. Florida*.[41]

C. The Constitutionality of IGRA

In accordance with the jurisdiction granted in 25 U.S.C. § 2710(d)(7)(A), the Seminole Tribe of Florida (the "Seminole Tribe") sued the State of Florida and its Governor (the "respondents"), alleging the State refused to enter negotiations for a tribal-state compact.[42] The "[r]espondents moved to dismiss the complaint, arguing that the suit violated the State's sovereign immunity from suit in federal court."[43]

The Supreme Court had to determine if Congress could authorize suits by Indian tribes against states without violating the Eleventh Amendment.[44] To determine if Congress had abolished states' immunity from suit, the Court determined if it was Congress's intent to abrogate states' sovereign immunity and whether Congress had the power to take away the immunity.[45] The Court found Congress clearly intended to abrogate the states' immunity in IGRA; however, the Court found Congress did not have the power through the Indian Commerce Clause to abrogate the states' immunity.[46] The Court's holding that the Eleventh Amendment prohibits Indian tribes from suing a state claiming sovereign immunity invalidated the second course of entering a tribal-state compact. The holding left tribes with only two alternative courses of action if a state refused to negotiate in good faith: (1) have the state waive its immunity, or (2) have the United States sue the state on the tribe's behalf.[47]

39. *See* 18 U.S.C. § 1166 (2006).

40. *Id.*

41. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

42. *Id.* at 51-52.

43. *Id.* at 52.

44. *Id.* at 53. The Court also examined the doctrine of *Ex parte Young* to determine if a suit for bad-faith negotiation could be brought against the Governor. *Id.* This question is not relevant to this article and will not be discussed further.

45. *See id.* at 55-73.

46. *Id.*

47. Texas v. United States, 497 F.3d 491, 494 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).

Published by University of Oklahoma College of Law Digital Commons, 2009

D. The Changes Made After Seminole Tribe of Florida v. Florida

In response to *Seminole Tribe*, the Secretary proposed rules that would allow the Secretary to end the "stalemate" between Indian tribes and states that could not agree to a tribal-state compact by allowing the Secretary to prescribe the procedures governing Class III gaming.[48] The Secretary claimed Congress delegated to the Secretary the authority to make these prescriptions of Class III gaming procedures through 25 U.S.C. §§ 2710(d)(7)(B)(vii), 2, and 9.[49] The Secretarial Procedures state that after the 180-day period following an Indian tribe's request for negotiations, and a state's refusal to negotiate or negotiating in bad faith, the tribe should contact the Secretary and the Secretary will prescribe the regulations of Class III gaming on the tribe's land.[50] The procedures adopted by the Secretary led to the dispute in *Texas v. United States*.[51]

III. Texas v. United States

A. Factual Background

In 1995, the Kickapoo Traditional Tribe of Texas (the Kickapoo) petitioned the State of Texas to enter negotiations for a Class III gaming compact.[52] Texas would not negotiate with the Kickapoo.[53] The Kickapoo originally filed suit against Texas; however, the suit was later dismissed after the Supreme Court decided *Seminole Tribe*.[54] "In 2004, the Kickapoo submitted a proposal to the Secretary, who followed the Secretarial Procedures and invited Texas to comment. Texas responded with [a] lawsuit asking the court to declare the Secretarial Procedures unauthorized and unconstitutional."[55]

The district court found Texas had standing, but the claims were not ripe.[56] The court still "opined that the Secretary had implied authority under IGRA and his general statutory responsibility for Indian tribes to promulgate the Procedures."[57] The district court used the *Chevron* test to determine if the

---

48. Class III Gaming Procedures, 63 Fed. Reg. 3289, 3290 (proposed Jan. 22, 1998) (codified at 25 C.F.R. pt. 291).

49. *Id.*

50. *Id.*

51. *See Texas*, 497 F.3d 491.

52. *Id.* at 495.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

Secretary had the authority to enact the procedures for Class III gaming and if they were reasonable.[58]

Under the first step of the *Chevron* test, the district court had to determine if Congress had spoken directly to the disputed issue, which was the Secretary's creation of the procedures to fill the gap left by *Seminole Tribe*.[59] The court did not give any analysis for its outcome, and only stated, "[I]n this case, there is no dispute that Congress has not addressed this issue."[60]

The district court then used the second step of the *Chevron* test to determine if the Secretary's interpretation was reasonable; if so, deference would be given to the interpretation.[61] The district court first determined the Secretary had authority to promulgate regulations regarding Indian affairs under 25 U.S.C. §§ 2 and 9.[62] Section 9 gives the President the authority to regulate Indian affairs.[63] The Commissioner of Indian Affairs is delegated, through § 2, the authority to manage all Indian affairs and "all matters arising out of Indian relations."[64] Next, the court found the Secretarial Procedures reasonable because the Secretary had authority and the Procedures follow the "compacting and remedy provisions" of IGRA.[65]

B. Issue

The issue this note will focus on is the authority of the Secretary to authorize the Secretarial Procedures and the reasonableness of the Procedures.[66] The State of Texas claimed the Secretarial Procedures were unconstitutional and unauthorized by IGRA.[67] The Fifth Circuit used the *Chevron* test to determine whether IGRA authorized the Secretarial Procedures, which allowed the court to avoid the constitutional issues.[68]

---

58. Texas v. United States, 362 F. Supp. 2d 765, 770 (W.D. Tex. 2004), *rev'd*, 497 F.3d 491 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. 25 U.S.C. § 9 (2006).

64. *Id.* § 2.

65. *Texas*, 362 F. Supp. 2d at 771.

66. Also at issue was Texas's standing to bring the case and the ripeness of the cause of action. Texas v. United States, 497 F.3d 491, 495 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).

67. *Id.* at 499.

68. *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2009

C. Fifth Circuit Holding

The Fifth Circuit stated that "[t]he Secretarial Procedures violate the unambiguous language of IGRA and congressional intent by bypassing the neutral judicial process that centrally protects the state's role in authorizing tribal Class III gaming."[69] The court held that "[t]he Secretarial Procedures [were] invalid and constitute[d] an unreasonable interpretation of IGRA."[70] This holding by the Fifth Circuit was contrary to the district court's finding that the Secretary had the authority to enact the new procedures and that the new procedures were reasonable.[71]

IV. Fifth Circuit Rationale

The court avoided the constitutionality issue, and instead, turned to the *Chevron* test to determine if the Secretarial Procedures were authorized by IGRA.[72] The *Chevron* test consists of two steps to examine the validity of challenged administrative regulations.[73] The first step determines if a statute is ambiguous or silent concerning the scope of secretarial authority.[74] Step two examines whether the regulations reasonably flow from the statute when viewed in context of the overall legislative framework and the policies that animated Congress's design.[75]

The court quoted the inquiry under *Chevron* step one as "whether Congress has directly spoken to the precise question at issue."[76] The court began by looking at the plain language of IGRA and noted how 25 U.S.C. § 2710(d)(7)(B)(I)-(vi) only gives the Secretary authority to intervene as a final step after mediation.[77] The court determined that the statute was clear and unambiguous, but went on to address the appellees' claim that because Congress did not address the Eleventh Amendment issue, the Secretary's actions were justified.[78]

---

69. *Id.* at 511.
70. *Id.*
71. *See* Texas v. United States, 362 F. Supp. 2d 765 (W.D. Tex. 2004), *rev'd*, 497 F.3d 491 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).
72. *Texas*, 497 F.3d at 499.
73. *Id.* at 501.
74. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).
75. *Id.*
76. *Texas*, 497 F.3d at 501.
77. *Id.*
78. *Id.* at 502.

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

The court addressed the appellees' claim by explaining why an agency or court cannot assume Congress's intent through unspoken situations.[79] The court stated that "[a]gency authority may not be lightly presumed," because agency power would be too broad and limitless.[80] The court closed its analysis by saying that Congress clearly left the Secretary little remedial authority and the Secretary was inferring too much from what little authority was granted to him.[81]

The "[a]ppellees further contend[ed] that a judicial decision can, *ex post facto*, create a *Chevron*-type 'gap' that introduces ambiguity into the operation of a statutory scheme and thereby authorizes an administrative agency to step in and remedy the ambiguity."[82] The court stated that *Chevron* requires that the gap be left open by Congress and not made by the court.[83] The court stated that "Congress has the power to confer expansive interpretive authority on agencies to accommodate changing or unpredictable circumstances."[84] The court reasoned that if Congress wanted to confer that type of authority to the Secretary, it knows how to write the statute to permit a flexible interpretation.[85]

The court then moved to step two of the *Chevron* test, stating that even if the Secretary was able to ignore Congress's explicit limitations because of the decision in *Seminole Tribe*, the Secretarial Procedures would not pass step two.[86] Step two requires that the Secretarial Procedures "reasonably effectuate Congress's intent for IGRA."[87] If the Secretary's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," a court will not disturb that choice "unless it appears from the statute or legislative history that the accommodation is not one that Congress would have sanctioned."[88]

The court points out Congress balanced the interests of the states and Indian tribes when it created IGRA.[89] The court further states that Congress put in place protection for the states in the case that the negotiations were

79. *Id.*
80. *Id.* at 502-03.
81. *Id.* at 503.
82. *Id.*
83. *Id.*
84. *Id.* at 504.
85. *Id.*
86. *Id.* at 506.
87. *Id.*
88. *Id.* (citing Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845 (1984)).
89. *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2009

unsuccessful; an impartial judicial intermediary would resolve the issue.[90] The court contends that "[t]he role the Secretary plays and the power he wields under the [Secretarial] Procedures bear no resemblance to the secretarial power expressly delegated by Congress under IGRA."[91] The court gave four reasons for why the Secretarial Procedures did not bear resemblance to the delegated powers in IGRA.[92] Consequently, the court rendered the Procedures invalid under step two of the *Chevron* test.[93]

The final claim raised by the appellees was that Secretarial authority is derived from general Indian trust statutes when read with § 2710(d)(7)(B)(vii).[94] "[C]ourts may consider 'generally conferred authority[.]'"[95] The court found that the sections the appellees referred to did not grant the Secretary "a general power to make rules governing Indian conduct. Instead, the authority Congress there delegated to the Secretary only allows prescription of regulations that implement 'specific laws,' and that are consistent with other relevant federal legislation."[96]

In summary, the court used the *Chevron* test to determine if the intent of Congress was ambiguous, which could give the Secretary the authority to make these Procedures. The court's analysis of steps one and two of the *Chevron* test made it clear to the court that Congress gave the Secretary limited authority, and the intent of Congress to do so was clear in the statutes.

---

90. *Id.* at 507.

91. *Id.* at 508.

92. *Id.*

> First, IGRA interposes, before any secretarial involvement, the requirement that an impartial factfinder determine whether the state has negotiated in good faith. Under the Secretarial Procedures, however, it matters not that a state undertook good-faith negotiations with the tribe: The Secretary may prescribe Class III gaming irrespective of a state's good faith.... Second, under IGRA, if mediation is ordered, it is undertaken by a neutral, judicially-appointed mediator. . . . Under the Procedures, however, the Secretary selects the mediator.... Third, whereas under IGRA's remedial scheme the court-appointed mediator essentially defines the regulations that the Secretary may promulgate, the Procedures enable the Secretary to disregard not only the mediator's proposal, but also the proposals of the state and tribe. . . . Fourth, the Secretarial Procedures contemplate Class III gaming in the absence of a tribal-state compact—directly in derogation of Congress's repeated and emphatic insistence.

Id. (citations omitted).

93. *Id.* at 509.

94. *Id.*

95. *Id.* (citing United States v. Mead Corp., 533 U.S. 218, 229 (2001)).

96. *Id.* at 509-10 (citations omitted).

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

V. Analysis

A. *The Accuracy of the Rationale and Holding in* Texas v. United States

The court in *Texas* had to determine the validity of the Secretarial Procedures, which were proposed in the wake of *Seminole Tribe*.[97] The *Chevron* test was the correct test for the court to use to determine if the Secretary had congressionally granted authority to propose the new Class III gaming procedures. "[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[98] Like the *Chevron* court, the court in *Texas* was "review[ing] an agency's construction of the statute which it administers."[99] The matter to be determined was whether the Secretarial Procedures should get *Chevron* deference.

The beginning point of analysis starts with the first step in the *Chevron* test. Here, the court must determine if Congress specifically addressed the precise issue at hand.[100] If Congress did not specifically address the issue, then the court must move to step two and determine if the agency's statutory interpretation is reasonable.[101] To move to step two, the *Chevron* test implicitly requires the agency to have congressional authority to act.[102]

The Fifth Circuit found in *Texas* that "Congress did not explicitly authorize the Secretarial Procedures."[103] The reasoning used by the Fifth Circuit was that Congress gave the Secretary a limited role in the Class III gaming procedures only after judicial remedies and mediation had not produced a tribal-state compact. The court therefore reasoned the Secretary did not have congressional authority to make these Procedures after *Seminole Tribe* created a gap in IGRA procedures.[104]

---

97. *See id.*

98. United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

99. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984); *see Texas*, 497 F.3d at 501.

100. *Chevron*, 467 U.S. at 842.

101. *Id.* at 843.

102. *See id.* at 842-44.

103. *Texas*, 497 F.3d at 501.

104. *Id.* at 502.

Published by University of Oklahoma College of Law Digital Commons, 2009

The Fifth Circuit, in its opinion, strictly confined its analysis of the Secretary's authority to the provisions of IGRA.[105] The court did not address the general authority of the Secretary derived from 25 U.S.C. §§ 2 and 9 until after it conducted step two of the *Chevron* test.[106] The court recognized through *United States v. Mead Corp.* that courts can consider "generally conferred authority" in determining the authority of the Secretary, but the Fifth Circuit found 25 U.S.C. §§ 2 and 9 did not give the Secretary general rule-making power over Indian conduct.[107] Rather, the court said the Secretary only has the power to prescribe "regulations that implement 'specific laws,' and that are consistent with other relevant federal legislation."[108]

The court cited to several cases to illustrate that the Secretary was only relying on the general authority statutes and not prescribing regulations that implemented preexisting rights and laws.[109] The court used the cases to prove the Secretary cannot create regulations that give Indians rights that were not previously statutorily granted.[110] The court found that IGRA does not guarantee tribes the right to conduct Class III gaming; therefore, the Secretary could not use the general authority statutes to fill in the gap left by *Seminole Tribe*.[111]

While the court separates its analysis of the *Chevron* test and the Secretary's generally conferred authority, the general authority of the Secretary should be considered during the analysis of step one of the *Chevron* test. The Secretary's general authority is enough to prove the Secretary has been delegated power to promulgate regulations for IGRA, after *Seminole Tribe* created the gap in the Class III gaming procedures.

The Honorable James L. Dennis, in his dissent, also found the Secretary had the power to proscribe the new procedures.[112] Circuit Judge Dennis said, based upon *Mead*, IGRA does not have to specifically delegate to the Secretary the authority to provide the new procedures.[113] *Mead* reiterates that the Supreme

---

105. *See generally id.*
106. *See id.* at 506-09.
107. *Id.* at 509 (citation omitted).
108. *Id.* at 510.
109. *See id.*
110. *See id.* at 510-11.
111. *Id.* at 511.
112. *See id.* at 517 (dissent).
113. *Id.* *United States v. Mead Corp.* states:

> Congress . . . may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

Court looks to generally conferred authority to determine what Congress would expect an agency to do when a gap needs to be filled, instead of looking only to the statutory language.[114]

Mead proves that in a situation where a gap or ambiguity comes up—even if Congress did not intend the result—Congress may expect a certain agency to step in and fill the gap or ambiguity even without expressed authority.[115] The Fifth Circuit's opinion in *Texas* did not dismiss the fact that the Secretary does have general authority, however, the court found that the Secretary's general authority did not include the power to implement the Class III gaming procedures.[116] The Supreme Court in *Morton v. Ruiz* set out the powers of the Secretary by stating:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, and the power has been given explicitly to the Secretary and his delegates at the BIA.[117]

From this quote, it is apparent the Secretary is expected and has the power to make rules and policies dealing with Indian affairs. IGRA regulates gaming on tribal lands, an area of Indian affairs.

The main reasoning the court used to find that the general authority statutes did not permit the Secretary to create these Procedures was that IGRA did not guarantee tribes the right to Class III gaming, and therefore, the Secretary did not have a statutory right that is required under *Mead*.[118] Relying on *Morton*,

---

> circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.

533 U.S. 218, 229 (2001) (citations omitted).

114. *See generally Mead*, 533 U.S. 218.

115. *See id.*

116. *See Texas*, 497 F.3d at 509-11.

117. Morton v. Ruiz, 415 U.S. 199, 231 (1974) (citations omitted).

118. *See Texas*, 497 F.3d at 511.

Published by University of Oklahoma College of Law Digital Commons, 2009

Circuit Judge Dennis, in his dissent, said the Chief Judge's opinion incorrectly used the phrase "statutory antecedent."[119] The courts have only required a statute or law relating to Indian affairs be enacted before the Secretary promulgates rules or regulations to carry it into effect.[120]

In addition to the dissent's reasons for rejecting the court's finding that the Secretary did not have general authority to prescribe the Secretarial Procedures, the cases the court relied on to prove the Secretary's lack of authority actually help show the opposite. In *Organized Village of Kake v. Egan*, the Secretary prescribed regulations allowing the Kake to operate fishing traps, which violated Alaska fish trapping laws.[121] The Supreme Court found that these regulations were in excess of the Secretary's general authority because there was not a statutory right allowing the Kake to trap in Alaska.[122]

The court used *Village of Kake* to show its similarity to *Texas*.[123] The court focused on the issue of the Secretary's lack of authority to promulgate regulations without statutorily defined rights.[124] *Village of Kake*, however, actually helps prove the Secretary did have authority to prescribe the Secretarial Procedures. IGRA gives Indian tribes the right to conduct Class III gaming operations on tribal land as long as the tribe goes through the procedures set out in IGRA.[125] Unlike *Village of Kake*, *Texas* includes IGRA, which grants tribes the right to Class III gaming operations, and therefore it is not the Secretary who is guaranteeing tribes the right to conduct Class III gaming, as the court in *Texas* held.[126] Rather, the Secretary is just prescribing new procedures for a tribe to go through for the opportunity to conduct Class III gaming.[127] The Secretarial Procedures only give tribes an opportunity to conduct Class III gaming.[128] The Procedures did not turn IGRA into a guaranteed right to Class III gaming.[129]

119. *Id.* at 520 (Dennis, J., dissenting).

120. *Id.* (Dennis, J., dissenting).

121. *See* Organized Village of Kake v. Egan, 369 U.S. 60 (1962).

122. *See id.*

123. *See Texas*, 497 F.3d at 509-11.

124. *See id.*

125. *See* 25 U.S.C. § 2710 (2006).

126. *See Texas*, 497 F.3d at 511.

127. *See* Class III Gaming Procedures, 63 Fed. Reg. 3289 (proposed Jan. 22, 1998) (codified at 25 C.F.R. pt. 291).

128. *See id.*

129. *See id.*

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

The other case the court used as an illustration of the Secretary's lack of authority was *United States v. Eberhardt*.[130] In *Eberhardt*, the Ninth Circuit found fishing regulations imposed by the Secretary valid because there were preexisting fishing rights granted by Congress.[131] *Eberhardt*, like *Village of Kake*, again shows the Secretary is authorized to create regulations regarding Indian affairs when there is a preexisting statutory right. For the reasons just discussed, the Secretary has the authority to promulgate the Secretarial Procedures governing Class III gaming, and therefore passes step one of the *Chevron* test because Congress did not expressly speak to the issue in IGRA.

Now the court's analysis of step two of the *Chevron* test must be examined. Step two of the *Chevron* test requires the court to determine if the agency's regulations reasonably represent the intent of the statute and legislative history.[132] The *Texas* court found the Secretarial Procedures unreasonable because they "clearly violate[d] IGRA's intent."[133] The court gave four main reasons for why the Secretarial Procedures did not conform to Congress's intent behind IGRA. These reasons were that under the Secretary's Procedures: (1) there is not a determination of whether or not the state negotiated in good faith; (2) the Secretary, instead of the court, appoints a mediator; (3) the Secretary can disregard proposals of the mediator, tribe, and state and promulgate her own; and (4) there does not have to be a tribal-state compact.[134]

Chevron gives deference to an agency's interpretation of a statute, and a court, basing its decision on the statue and legislative history, should not overrule an agency's decision unless Congress would not have sanctioned the agency's decision.[135] The court must focus on the reasonableness of the agency's resolution and whether Congress would have sanctioned the resolution; consequently, a court should not reject an agency's decision because it seems unwise.[136]

First, the court claims that under the Secretarial Procedures there is not a determination of whether the State actually negotiated in good faith, which does exist in the original provisions of the IGRA.[137] Under the Secretarial

---

130. 789 F.2d 1354 (9th Cir. 1986).

131. *See id.*

132. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

133. Texas v. United States, 497 F.3d 491, 506 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).

134. *See id.* at 508-09.

135. *Chevron*, 467 U.S. at 845.

136. *See* United States v. Mead Corp., 533 U.S. 218, 229 (2001).

137. *See Texas*, 497 F.3d at 508; 25 U.S.C. § 2710(d)(7)(A)(I) (2006).

Published by University of Oklahoma College of Law Digital Commons, 2009

Procedures a tribe can request that the Secretary issue Class III gaming procedures when: (a) the tribe has requested that the state enter negotiations to create a tribal-state compact; (b) a compact has not been negotiated after 180 days, from the tribe's request; (c) the tribe brought suit against the state claiming the state would not negotiate or negotiated in bad faith; (d) the state claimed its sovereign immunity defense; and (e) the court dismissed the actions because of the state's sovereign immunity.[138] If all of the conditions have been met then the state has the opportunity to comment on the tribe's proposal and affirm whether the proposal violates state laws or if the state even allows the proposed gaming activities by others in the state, and the state may also submit an alternative proposal.[139]

The Secretarial Procedures do not provide for a judgment of the state's actions in negotiations with the tribe, but the Secretarial Procedures do provide safeguards to prevent a tribe from bringing frivolous, bad-faith allegations against the state.[140] The state also has the opportunity to tell the Secretary why the tribe's proposal is not in accord with state law or give other reasons why the tribe's proposal should not be accepted.[141] The state then has the ability to submit an alternative proposal.[142]

The Secretarial Procedures still give states protection against frivolous claims from tribes. A tribe still has to file a lawsuit in federal court, and the state must claim sovereign immunity before a tribe can call on the Secretary to provide Class III gaming procedures.[143] If a state has negotiated in good faith and the tribe is bringing a frivolous claim against the state, then the state may waive its sovereign immunity and allow the court to make a ruling on the matter. If a state chooses to claim sovereign immunity and forego trial, the state still has the ability under the Secretarial Procedures to provide reasons proving the tribe's proposal cannot work in the state or the state can submit an alternative proposal to the Secretary.[144] Given the similar nature of the Secretarial Procedures and the provisions of IGRA regarding a good faith determination, Congress would likely sanction this part of the Secretarial Procedures.

---

138. 25 C.F.R. § 291.3 (2008).
139. *Id.* § 291.7.
140. *See id.* § 291.3.
141. *Id.* § 291.7(b).
142. *Id.* § 291.7(c).
143. *Id.* § 291.3.
144. *Id.* § 291.7.

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

Second, the court finds the Secretarial Procedures to be unreasonable because the Secretary, rather than the court, appoints the mediator.[145] When a state submits an alternative proposal to the Secretary, the Secretary then appoints a mediator to "resolve differences between the two proposals."[146] The mediator selected must not have any "official, financial, or personal conflict of interest with respect to the issues in controversy."[147] The court claims that because the Secretary has an obligation to "protect the interests of Indian tribes," the mediation process is biased.[148] The court then stated that "the Secretary cannot play the role of tribal trustee and objective arbiter of both parties' interest simultaneously."[149]

The Secretary should not be an "objective arbiter," and she is not; "the person appointed as a mediator is the fair and impartial decider."[150] The Secretary is only selecting the mediator who will preside over the dispute. The mediator is the person who needs to be impartial and is ultimately deciding what proposal best fits the terms of IGRA.[151] The Secretarial Procedures seek to prevent biased decision makers by requiring that the selected mediator not have any conflicts of interest with the issue in controversy. While the Secretary does select the mediator, the process is not as biased as the Fifth Circuit believes. Whether it is a court or the Secretary selecting the mediator, the mediator will be a neutral party.

Third, the court holds that another material difference in the Secretarial Procedures is that the Secretary can disregard the decision of the mediator, as well as the proposals of the state and tribe.[152] Under the Secretarial Procedures, the Secretary either approves or disapproves the proposal chosen by the mediator.[153] The Secretary can only disapprove the mediator's decision for one of seven reasons.[154] The reasons are generally based on the proposal's adherence to federal and state law, including IGRA.[155] The Secretarial Procedures further provide that if the Secretary rejects the mediator's proposal

---

145. Texas v. United States, 497 F.3d 491, 508 (5th Cir. 2007), *cert. denied*, Kickapoo Traditional Tribe of Tex. v. Texas, 129 S. Ct. 32 (2008).

146. 25 C.F.R. § 291.9 (2008).

147. *Id.*

148. *Texas*, 497 F.3d at 508.

149. *Id.*

150. *Id.* at 524 (Dennis, J., dissenting).

151. 25 C.F.R. § 291.10 (2008).

152. *Texas*, 497 F.3d at 508.

153. 25 C.F.R. § 291.11 (2008).

154. *Id.*

155. *Id.*

Published by University of Oklahoma College of Law Digital Commons, 2009

and prescribes her own the Secretary's proposal must reflect the mediator's proposal "as much as possible," while following IGRA and other federal and state law.[156]

The court's main concern is the Secretary has too much power to create her own Class III gaming procedures if she is able to unilaterally reject the proposal chosen by the mediator.[157] The court did not elaborate on the reasons why it thinks the Secretary has "unbridled power" in prescribing gaming procedures, but it is likely the court is referring to the language of 25 C.F.R. § 291.11(c).[158] Under 25 C.F.R. § 291.11, the Secretary's procedures must "comport with the mediator's selected proposal as much as possible."[159] The language used is different from that of IGRA, but it does not necessarily give the Secretary any more power. IGRA allows the Secretary to prescribe procedures for Class III gaming if the state does not accept the mediator's chosen proposal, and the Secretary's procedures should be consistent with the proposal the mediator chose and in accordance with IGRA, federal, and state law.[160]

The provisions in IGRA are not that different from the Secretarial Procedures. Under the Procedures, "as much as possible" seems to mean the Secretary will have to change parts of the proposal that do not comport with IGRA, state law, federal law, or a select few other reasons, but otherwise the Secretary's procedures should reflect the proposal chosen by the mediator. The Secretary can only disapprove the mediator's chosen proposal for seven reasons, and the Secretary must still follow the mediator's proposal to the extent possible.

Fourth, the court's final unreasonable difference is the Secretarial Procedures do not require a tribal-state compact.[161] The court said the only exception to a tribal-state compact under IGRA is if a court finds the state negotiated in bad faith and the parties went through a court-appointed mediator.[162] The Secretarial Procedures are meant to fill the gap left by *Seminole Tribe*, which prevents a tribe from suing a state claiming sovereign immunity. If the state and tribe have been unable to agree on a tribal-state compact at this point, the Secretary takes over where the court usually would

156. *Id.*
157. *See Texas*, 497 F.3d at 508.
158. *See id.*
159. 25 C.F.R. § 291.11 (2008).
160. 25 U.S.C. § 2710(d)(7)(B)(vii) (2006).
161. *Texas*, 497 F.3d at 508-09.
162. *Id.*

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

under IGRA. The Secretarial Procedures are now the one exception to a tribal-state compact, since the avenue prescribed by Congress was found to be unconstitutional by *Seminole Tribe*.[163] For all the reasons discussed previously with the first three differences listed by the court, the Secretarial Procedures are about as similar to the provisions of IGRA as possible, without being unconstitutional. After *Seminole Tribe* there was not an exception to a tribal-state compact. The Secretary, through her agency authority, created a new, yet similar, exception to re-balance the power of tribes and states, after the states were left with a veto power through the availability of a sovereign immunity defense.

In summation, under step two of the *Chevron* test, the court should have focused on the reasonableness of the Secretarial Procedures and not just the small differences between the Procedures and IGRA. The Secretarial Procedures are not perfect, but they are reasonable and reflect the intent Congress had in enacting IGRA, which is to balance the states' and the tribes' negotiating power so they can work out an agreement.

B. The Need for Congressional Action

The Supreme Court denied certiorari to the parties attempting to appeal this case. As it stands in the Fifth Circuit, tribes do not have any remedy against a state that will not negotiate or negotiates in bad faith and then claims sovereign immunity. Congress's intent was not to give states a vehicle to disallow tribal Class III gaming.[164] Rather, the intent was to give states limited authority, which they did not have after *Cabazon*, so they could negotiate with tribes to come to agreements regarding tribal Class III gaming that retained the interests of both parties.[165] Congress did contemplate creating a federal agency to regulate tribal gaming, but Justice Department officials argued that state agencies had "the expertise to regulate gaming activities and to enforce laws related to gaming . . . and thus that there was no need to duplicate those mechanisms on a Federal level."[166] In accordance with Congress's wish to uphold tribal sovereignty, Congress used the tribal-state compacts as a mechanism for allowing the tribe to relinquish aspects of its sovereignty to state jurisdiction.[167]

---

163. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

164. *See* S. REP. NO. 100-446 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071.

165. *See id.*

166. *Id.* at 5, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

167. *Id.* at 5-6, *as reprinted in* 1988 U.S.C.C.A.N. at 3075-76.

Published by University of Oklahoma College of Law Digital Commons, 2009

The solutions Congress could use to repair the imbalance of IGRA after *Seminole Tribe* and *Texas* could vary widely, but since the Supreme Court has not taken the issue, Congress needs to fill the gap. This note will focus on three possible solutions and discuss whether each one would be in line with Congress's intent for IGRA and the effect each would have on the states and tribes.

First, Congress could adopt the Secretarial Procedures.[168] This would give tribes another approach toward a tribal-state compact. If a state claimed sovereign immunity when a tribe sued, and the court dismissed the action due to the state's sovereign immunity, then the tribe could ask the Secretary to issue Class III gaming procedures.[169] The Secretary has been willing to take on the task and the Secretarial Procedures reasonably reflect the intent of IGRA, so this would be a good solution. The main problem with this solution is that the Secretary is the trustee for Indian tribes and whether or not there is an actual bias favoring the tribes, there is a perceived bias.

The Secretarial Procedures do differ from the original provisions of IGRA, which were discussed in the analysis of the Fifth Circuit in *Texas*, and in Subpart A of Part V of this note. The differences will not be re-analyzed, but as covered in the previous subpart, the Secretarial Procedures do reasonably reflect the intent of Congress in IGRA and are similar to the provisions of IGRA with only minor differences.

The adoption of the Secretarial Procedures by Congress would have the most benefit for Indian tribes. The tribes would be the beneficiaries of this option because as it stands now they do not have any course of action to take when a state claims sovereign immunity from an Indian tribe's lawsuit. While the tribes would be the primary beneficiaries, the states would not necessarily lose any rights. The states would have to negotiate with tribes, but this was already a requirement under IGRA. The states originally did not have any right to be involved or regulate gaming on a tribe's reservation under *Cabazon*.[170] This option still provides states with the privilege to regulate tribal gaming, which did not exist prior to the enactment of IGRA. Overall, the adoption of the Secretarial Procedures would restore states' and tribes' equal bargaining power, thus upholding Congress's original intent behind IGRA.[171]

168. *See* 25 C.F.R. §§ 291.1 - 291.11 (2008).
169. *Id.* § 291.3.
170. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
171. *See* S. REP. NO. 100-446 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071.

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

Second, Congress could adopt the Secretarial Procedures with some modifications, if they agreed with the Fifth Circuit or found other problems within the Procedures. The Secretarial Procedures gave the Secretary more of a role than she had under IGRA. Congress could make modifications regarding the two main differences between the Secretarial Procedures and IGRA to take some of the Secretary's involvement away, while still allowing the Secretary to take the place of the court.

The following modifications that will be discussed take the view of the Fifth Circuit in *Texas* and do not reflect the analysis of this note. As a threshold matter, Congress would have to require the Secretary to determine if the state negotiated in bad faith before going any further. Next, the selection of the mediator would have to be modified. Congress could either allow the tribe and state to agree on a mediator, possibly leading to unnecessary conflict, or Congress could create a list of acceptable mediators from which the Secretary could choose. Finally, the Secretary would need to have limited discretion when prescribing Class III gaming provisions after the mediator has chosen a proposal. To effectuate this, Congress would need to amend the provision within IGRA forcing the Secretary to base her Class III gaming procedures on the proposal selected by the mediator.

This solution would be in line with the concerns and the decision in *Texas*, as well as the intent of Congress in IGRA. The Secretary would have an increased role in the process afforded to the tribe when a state does not negotiate or negotiates in bad faith. Although her role would be increased, her power would be limited through the modifications.

Under this solution, there would not be an obvious benefit to either party. The tribes would still have to prove the state negotiated in bad faith, and the mediation process would be neutral. An argument can still be made that the Secretary's increased role in the process would favor the tribes, but with the appropriate safeguards in place, it would be difficult for the Secretary to assert a bias.

Third, another path Congress could take would be to repeal IGRA and revise 18 U.S.C. § 1166(c)(2) to allow Class III gaming without a tribal-state compact.[172] If Congress repealed IGRA and made Class III gaming legal without a tribal-state compact, then states would not have any control over tribal gaming under *Cabazon*.[173] If Congress considers this solution it should

172. *See* 18 U.S.C. § 1166 (2006).
173. *See Cabazon*, 480 U.S. 202.

Published by University of Oklahoma College of Law Digital Commons, 2009

keep the National Indian Gaming Commission to oversee Class II and III gaming.[174]

Congress would not likely take this approach since it does not follow the intent it had in enacting IGRA. The intent behind IGRA, in particular the sections governing Class III gaming, was to balance the interests of state and tribal governments.[175] The states' interests include the interaction of tribal gaming with the states' public policies and laws, as well as the effect on states' revenue raising instruments, such as lotteries.[176] Similarly, the tribes have interests in raising revenues to support the tribal community, become economically self-sufficient, and "regulating activities of persons within its jurisdictional borders."[177]

The tribes would greatly benefit from this solution. The tribes would not have to rely on a state's willingness to negotiate in order to conduct Class III gaming on a reservation. Although a tribe would not have to negotiate with a state, it is likely that it would have to get its gaming proposals approved by the Department of the Interior, which was the process before the enactment of IGRA.[178] The Department of the Interior does not have interests like the states, so the tribes still benefit from this solution by having the ability to fulfill their interests.

The interests of the states would not be served by this solution, since the states would not have any authority over tribal gaming. State interests in tribal gaming should not outweigh or even be balanced with the tribes' interests, considering that tribes are only subordinate to the federal government and states only have jurisdiction over tribes if Congress expressly delegates that authority to the states.[179] Although the states' interests do not have to be considered, Congress has found the need to include the states in tribal Class III gaming, and part of that need was to prevent the duplication of gaming regulatory agencies on the federal level since states already have sufficient agencies.[180] Bearing in mind Congress's concerns and intent, it is unlikely

174. The Commission was established under IGRA as an independent agency within the Department of the Interior. 25 U.S.C. § 2704 (2006).

175. *See* S. REP. NO. 100-446, *as reprinted in* 1988 U.S.C.C.A.N. 3071.

176. *Id.* at 13, *as reprinted in* 1988 U.S.C.C.A.N. at 3083.

177. *Id.*

178. *See id.* at 3, *as reprinted in* 1988 U.S.C.C.A.N. at 3072.

179. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); *see* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980).

180. *See* S. REP. NO. 100-446, at 5, *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3075.

https://digitalcommons.law.ou.edu/ailr/vol33/iss2/5

Congress would implement a solution eliminating states from the Class III gaming process.

VI. Conclusion

The *Texas* court erred in parts of its *Chevron* test analysis. The Secretary has general conferred authority to fill the gap in IGRA left after the decision in *Seminole Tribe*. The Secretarial Procedures allowing tribes an opportunity to get Class III gaming procedures, even if a state claims sovereign immunity, are reasonable under step two of the *Chevron* test. The Fifth Circuit's holding has now rendered the Secretarial Procedures invalid, at least in the Fifth Circuit. Unless Congress takes action and adopts the Secretarial Procedures or creates a new avenue for tribes to take if a state claims sovereign immunity, then states will continue to have a veto power over tribes in negotiating Class III gaming procedures, which is not what Congress intended.

Published by University of Oklahoma College of Law Digital Commons, 2009