



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 28, 2007

The Honorable Dirk Kempthorne
Secretary of the Interior
Department of the Interior
1849 C Street NW
Washington, DC 20240

C/O Mr. Lane McFadden
United States Department of Justice
Environmental & Natural Resources Division
P.O. Box 23795
L'Enfant Station
Washington, D.C. 20026

Re: *State of Texas v. United States of America, et al.*
No. 05-50754 in the Fifth Circuit Court of Appeals; appeal from CA No. A04CA143-LY,
U.S. District Court, Western District of Texas, Austin Division

Dear Secretary Kempthorne:

I write to express my concern with the Acting Principal Deputy Assistant Secretary for Indian Affairs' May 24, 2007 preliminary determination, which concludes that the Kickapoo Traditional Tribe of Texas ("Kickapoo Tribe") is authorized to conduct casino gambling in the State of Texas.¹ In addition, I am troubled by the manner in which the preliminary determination was brought to our attention. Despite the United States Court of Appeals for the Fifth Circuit's pending decision on legal questions directly related to this issue, your preliminary determination was issued without formal notice to the State or the courts. Rather, we learned about its issuance from the news media. With that in mind, and for the reasons stated in this letter, I ask that you and your staff postpone further proceedings involving the Kickapoo Tribe until the courts have an opportunity to rule on this matter.

For your convenience, this letter contains a brief procedural history detailing the Office of

¹I write this pursuant to Texas Disciplinary Rule of Professional Conduct 4.02(a), which permits communication with a client, provided opposing counsel consents. *See* Tex. Disciplinary R. Prof'l Conduct 4.02(a), reprinted in Tex. Gov't Code Ann., tit. 2, sub. G, app. A (Vernon Supp. 1997) (Tex. State Bar R. art. X, § 9). Per electronic communications between Assistant Attorney General Bill Deane and Lane McFadden with the Environmental & Natural Resources Division of the U.S. Department of Justice, your legal counsel in this matter (who received an advance copy of this letter), has consented to this communication.

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the Attorney General's ongoing efforts to prevent the federal government from imposing casino gambling upon the State of Texas. As you may know, the Texas Legislature has repeatedly refused to allow the expansion of gambling in our State. Unfortunately, the U.S. Department of Interior ("Department") is proceeding on a course that usurps the State's power to prohibit casino gambling within its boundaries. If finalized, your preliminary determination could allow casino gambling in Texas despite formal objections from state elected officials, and without regard for our statutory gambling prohibitions.

The disagreement that prompted this letter is not the first legal dispute between Texas and the Kickapoo Tribe, which tried to bring casino gambling to our State in the 1990's. After failing to negotiate a compact that would have legalized Class III (casino-style) gambling in 1995, the Kickapoo Tribe filed a lawsuit in federal district court alleging that the State failed to negotiate in good faith. Before the lawsuit was concluded, the United States Supreme Court decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114 (1996), which held that Indian Gaming Regulatory Act ("IGRA") did not waive the State's Eleventh Amendment immunity. *Seminole*, 116 S.Ct. at 1131-32. As a result, the State's motion to dismiss the Kickapoo Tribe's lawsuit was granted on April 2, 1996. Before the lawsuit's dismissal, Governor George W. Bush wrote to your predecessor disapproving of procedures that unconstitutionally usurped Texas' ability to prohibit casino gambling. For your convenience, a copy of that letter is enclosed. *See Exhibit "A", April 16, 1998 letter from Governor Bush. See IGRA § 2710(d)(7)(B)(I).*

As you may know, the Department and the Kickapoo Tribe have been litigating a second matter (the subject of this letter) since March 2004. At issue is the constitutionality of the Department's Secretarial Procedures governing the Indian gambling approval process. Until this important constitutional question is resolved, the Department should not further proceed with this matter. Thus, we sought a preliminary injunction and a stay of administrative proceedings to prevent further action by the Department until the courts rule on the legality of your procedures.

Despite the pendency of our application for preliminary injunction and petition for declaratory relief, on December 2, 2004, the Department invited the parties to participate in an informal conference. The preliminary determination indicates that both the Kickapoo Tribe and the State were invited to attend, but notes: "The State did not respond" without further explanation. In fact, the State of Texas did not participate in the conference because we had already filed a lawsuit against the Department (March 11, 2004), participated in a preliminary injunction hearing (April 20, 2004), and argued cross motions for summary judgment (October 26, 2004). Our application for preliminary injunction sought to prevent the Department from conducting further proceedings, including the aforementioned informal conference. Thus, as we have clearly stated in briefs filed with federal courts, because the Secretarial Procedures are unconstitutional, any proceedings thereunder are similarly inappropriate. It is illogical to presume that we would participate in a meeting under such counterproductive circumstances.

In fact, the State of Texas concludes that the Secretarial Procedures, which minimize all states' ability to impact the process, exceed the scope of the Secretary's authority under the IGRA.

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As a result, it is imperative that there be a legal resolution to pending constitutional issues before the Secretarial Procedures are used to impose casino gambling on the citizens of Texas. As such, we oppose implementation of procedures promulgated by the Department because we conclude your process is unconstitutional. Thus, a court should render its decision as to legality of the Secretarial Procedures before they are implemented by the Department.

As of this writing, Texas' action to protect its casino gambling prohibition is pending before the Fifth Circuit. At issue during the February 7, 2006 oral argument was the State of Texas' constitutional challenge to the legality of the Secretarial Procedures, as well as questions on ripeness and standing. The Fifth Circuit has not yet issued its decision.

On July 18, 2005, the Office of the Attorney General asked that the Department notify us about any developments involving the Kickapoo Tribe's application. We also asked to be informed of any further meetings or conferences conducted under 25 CFR Part 291.8 during the pendency of the appeal. The Department, however, failed to provide status reports or further notifications. Thus, as you might imagine, we were very surprised to learn of the Department's May 24, 2007 preliminary determination. It appears that the Department is proceeding with the Kickapoo Tribe's application despite Texas' very serious legal challenges to the Secretarial Procedures.

Accordingly, I ask that you postpone all further proceedings under Part 291 Secretarial Procedures, including the informal conference under § 291.8(b)(2), until the Fifth Circuit Court of Appeals has an opportunity to rule on the pending appeal.

Sincerely,



Greg Abbott
Attorney General of Texas

Enclosure

cc: Ms. Jennifer P. Hughes
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Mr. William T. Deane
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