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The Secretary of the Interior as Referee: The States, the Indian Nations, and How Gambling Lead to the Illegality of the Secretary of the Interior's Regulations in 25 C.F.R. Sec. 291

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THE SECRETARY OF THE INTERIOR AS REFEREE: THE STATES, THE INDIAN NATIONS, AND HOW GAMBLING LEAD TO THE ILLEGALITY OF THE SECRETARY OF THE INTERIOR'S REGULATIONS IN 25 C.F.R. § 291

I. INTRODUCTION

Federal Indian law is one of the most complex and dynamic areas of law in the United States.[1] It is a unique area of federal law that exists simultaneously at a time when many are demanding more rights for the states.[2] This combination makes controversy inherent. Indian gaming was the catalyst that finally forced these three entities—the federal government, the states, and the tribes—to work together.[3] Legal battles were inevitable.

Indian gaming has developed over the last ten years to a point where tribes have, for the first time in hundreds of years, become economically independent.[4] Gaming is now the largest revenue-producing activity for Indian tribes,[5] and is also "generally considered the fastest-growing segment of the gaming industry."[6] As these casinos have grown and developed, conflicts among the tribes, states, and the federal government have arisen.[7] One of the primary issues of controversy is

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1. William Bennett Cooper, III, *What's in the Cards for the Future of Indian Gaming Law*, 5 VILL. SPORTS & ENT. L.J. 129, 129 (1998).

2. *See* Rebecca Tsosie, Symposium, *Indian Gaming, Negotiating Economic Survival: The Consent Principle and Tribal State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 26 (1997).

3. *See* Generally Kathryn R. L. Rand & Steven A. Light, Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity, 4 VA. J. SOC. POL'Y & L. 381, 382-83 (1997).

4. *Id* at 382-8.

5. This does not mean every tribe benefits from gaming. Many tribes are not geographically situated to operate a gaming operation and others have declined to engage in gaming for moral or traditional reasons. William Cornelius, Oneida Indian Nation, member.

6. Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 502 (1995). Indian gaming revenues went from "$100 million in 1988 to $8.26 billion" ten years later. Associated Press, *Snake Eyes for Tribes* (Aug. 31, 2000), http://abcnews.go.com/sections/ us/Daily News/casinos000831.html.

7. Anthony J. Marks, *A House of Cards: Has the Federal Government Succeeded in Regulating Indian Gaming?*, 17 LOY. L.A. ENT. L.J. 157, 157-58 (1996).

the compacting process between states and tribes.[8] Recently, this problem has led to new regulations by the Secretary of the Interior (the Secretary).[9] This Comment argues that these regulations are unconstitutional because the Secretary has exceeded the authority of its office.

In order to understand the relationships and parties involved in the compacting process, one must first understand what Indian law is and from where it originated. Part II of this Comment will give a brief historical overview of Indian law leading up to the advent of Indian casinos. This part will cover the case of *Seminole Tribe v. Florida,*[10] which created the necessity for the unconstitutional regulations by the Secretary. Part III will outline the Secretary's regulations in 25 C.F.R. § 291 and explain why the Secretary of the Interior has exceeded the authority given to it by Congress. Part IV offers a variety of possible legal solutions to the situation created by the *Seminole Tribe* decision.

II. THE NATURE AND HISTORY OF INDIAN LAW

A. Historical Overview of Indian Law Leading to the Advent of Gaming

The term "Indian law" means different things to different people. Legally, it is used to refer to the body of law dealing with the status of Indian tribes and their relationship to the federal government.[11] An "Indian tribe" is the fundamental unit of Indian law.[12] A tribe is generally defined by federal law as consisting of a distinct and historically continuous government entity.[13] The federal government recognizes tribes by statute, treaty, or by executive or administrative order.[14] Although a tribe may be recognized in many ways,[15] without

8. *Id.*

9. *See* Class III Gaming Procedures, 25 C.F.R. § 291 (2000).

10. 517 U.S. 44 (1996).

11. *See generally* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 375-77 (1st Cir. 1975).

12. *Id.* at 372.

13. *See* Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 57-59 (2d Cir. 1994).

14. *See generally* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (1986) (providing information regarding what an Indian tribe is and who is an Indian).

15. A group of individuals with a cultural history may consider themselves a tribe, although they lack federal recognition. Lack of federal recognition cannot deprive a group of treaty rights. Today, federal courts review grants of recognition under the Administrative Procedure Act to determine whether the Department of the Interior followed its own regulations and other law in determining the status of a tribe. *See* Cherokee Nation of

federal recognition the tribe is not subject to federal Indian law.[16] If not subject to federal law, a tribe is not entitled to the valuable services and benefits offered by the Department of the Interior.[17]

American Indian tribes and the federal government have a special relationship.[18] The relationship consists of legal duties, moral obligations, treaty obligations, and understandings that have arisen over time.[19] Federal Indian law is codified in Title 25 of the United States Code, entitled "Indians."[20]

Notions of federalism create a unique situation where the reach of state laws over tribes is limited.[21] In the past, Indian tribes have been characterized as a type of "domestic dependent" who rely on the federal government for protection.[22] "[T]oday, Congress exercises plenary power over Indian affairs."[23] This source of Congressional power is said to come from the Indian Commerce Clause[24] and the Supremacy Clause.[25] The federal government's relationship to the tribes is sometimes still classified as that of "trustee" or "guardian" and the federal government carries out certain obligations towards the tribes

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Oklahoma v. Babbitt, 117 F.3d 1489, 1499-1500 (D.C. Cir. 1995).

16. 25 U.S.C.

17. *See* Goldern Hill Paugussett Tribe, 39 F.3d at 57.

18. Sean Brewer, Note, *Analysis of the Indian Gaming Regulatory Act in Light of Current Tenth Amendment Jurisprudence*, 26 RUTGERS L.J. 469, 471-80 (1995).

19. See COHEN, *supra* note 14, at 2-5.

20. *See generally* 25 U.S.C. There are also about 380 treatises, hundreds of opinions of the Solicitor of the Department of the Interior, thousands of cases, and many law review articles. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 1 (West 4th ed. 1998). Further, there is controversy about the constitutionality of allowing a race to have its own special laws. There is a legal fiction which justifies it by claiming that "Indian" is a political term, not a racial one. Morton v. Mancari, 417 U.S. 535, 552-53 n.24. (1974).

21. Bryan v. Itasca County, 426 U.S. 373, 388 (1976).

22. *See* Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919); *see also* Cramer v. United States, 261 U.S. 219, 229 (1923) (stating that failure to protect the tribes rights would be "contrary to the whole spirit of the traditional American policy toward these dependent wards of the nation." The case also claimed that the United States had standing to assert the Indians' interest, because of its position as guardian.) *Id.*

23. *See* Brewer, *supra* note 18, 469.

24. U.S. CONST. art. I, § 8, cl. 3. This clause states that Congress has authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...." *Id.*

25. U.S. CONST. art. VI, § 2, cl. 2, which states "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.*

and their members.[26]

This trust relationship was originally considered the source of Congressional power.[27] In the early 1900s, the Supreme Court began to enforce the federal trust responsibility toward Indians, and has done so ever since.[28] Indian law in some ways still revolves around this relationship, although the limits are constantly changing, creating uncertainty in the boundaries of the legal relationship.[29]

The states have a limited role in tribal relationships. The federal government preempts state power in almost all situations.[30] It would be simplistic, however, to say that state laws have no force in Indian country.[31] Tribal sovereignty is a complicated and fluctuating concept. To sum it up very briefly, state courts have a limited reach in Indian Country. In general, courts have held tribes to have criminal and civil jurisdiction over Indians on Indian land.[32] Tribal sovereignty has been limited when the issue of tribal jurisdiction over non-Indians in Indian territory arises. Civil transactions over non-Indians on tribal land have generally been held to be within tribal authority, while the states generally have criminal jurisdiction of a non-Indian in Indian territory.[33] These distinctions vary on a state-to-state basis.

B. Cabazon *to* Seminole*: States Plead the Eleventh*

The current state of Indian gaming, as discussed above, grew out of

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26. *See generally* Seminole Nation v. United States, 316 U.S. 286 (1942).

27. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903). The case involved a federal statute and the distribution of land. *Id.* Tribal members attacked the statute claiming it was inconsistent with a prior treaty requiring tribal member's consent. *Id.* The court ultimately held that congress has plenary power over tribal relations. *Id.* at 568.

28. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983); United States v. Mitchell, 445 U.S. 535, 542 (1980); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113-114 (1919).

29. *See generally* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

30. *See Lane*, 249 U.S. at 112-113.

31. *See* 18 U.S.C. § 1151 (1994). "Indian county" is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government..., (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments... which have not been extinguished.

Id.

32. *See* 25 U.S.C. § 1301(2) (1994); Duro v. Reina, 495 U.S. 676, 694 (1990).

33. *See Duro*, 495 U.S. at 684.

the conflict of jurisdiction among the federal government, the states, and the tribes.

In the late 1970s and early 1980s, several tribes began operating commercial bingo or poker games on their reservations.[34] Because tribal law is a federal area of law, these games did not conform to state law.[35] In most cases, such operations required the enactment of a tribal ordinance, which under the tribal constitution adopted pursuant the Indian Reorganization Act, required the approval of the Secretary of the Interior.[36] The Secretary approved several such ordinances.[37] Soon after, the states in which these games took place began to try to enforce their laws regulating or prohibiting the tribal bingo operations.[38]

In 1987, one of these conflicts reached the United States Supreme Court. In the landmark decision of *California v. Cabazon Band of Mission Indians,*[39] the Supreme Court affirmed tribal sovereignty over gambling activity on Indian reservations.[40] This holding allowed tribes to develop their reservation economies through gambling free of state regulation.[41] Tribal bingo and card operations began to grow.[42] Some of the tribes began to branch out into other forms of gambling.[43] This created more confusion. State gaming laws could not be applied to the tribe or its members; however, state criminal law could presumably be applied against the non-Indian customer.[44]

The chaos resulting from the *Cabazon* decision prompted Congress to enact the Indian Gaming Regulatory Act (IGRA).[45] The Act divides gaming into three classes with different regulatory results for each class.[46] Class I gaming is within the exclusive jurisdiction of the tribes.[47]

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34. GETCHES, *supra* note 20, at 739.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. 480 U.S. 202 (1987).
40. *Id.* at 221-222.
41. *Id.* at 218-219.
42. *Id.*
43. GETCHES, *supra* note 20, at 749-53.
44. *Id.*
45. 25 U.S.C. §§ 2701-2721 (1994); 18 U.S.C. § 1166 (1994).
46. 25 U.S.C. § 2703 (1994). Class I gaming consists of traditional forms of gaming connected with tribal ceremonies. Class II gaming consists of bingo, pull tabs, certain card games, lotto and other similar games. Class III gaming refers to anything not class I or II, generally the high-stakes gambling games such as blackjack, slot machines, and roulette. *Id.*
47. 25 U.S.C. § 2710(a)(1) (1994).

Class II gaming is within the jurisdiction of the tribes, but is subject to other restrictions of the IGRA and is subject to oversight by the National Indian Gaming Commission (which was established by the IGRA).[48]

To conduct Class III gaming, a tribe must first meet two requirements that are required for Class II gaming: (1) there must be an approved authorizing ordinance, and (2) the gaming must be located in a state that permits such gaming for any purpose by any person, organization, or entity.[49] They must meet a third requirement, which is the focus of this Comment. It requires that Class III gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the state . . . that is in effect."[50] Although the parties are the state and tribe, the compact takes effect only when notice of its approval by the Secretary of the Interior is published in the Federal Register.[51]

The IGRA also imposes upon the states a duty to negotiate in good faith with a tribe wishing to enter a tribal-state compact.[52] In order to enforce this duty, the IGRA creates a federal cause of action that may be initiated by an Indian tribe against a state that refuses to negotiate a compact or that fails to negotiate in good faith.[53]

When a tribe requests to enter into a compact, in the state in which it is located, the alternative dispute resolution provisions of the IGRA are triggered.[54] There is a 180-day period during which the state must negotiate with the tribe.[55] After the 180 days, if the state refuses to negotiate or fails to negotiate in good faith, the tribe can bring the federal cause of action created by the IGRA.[56] At that time, the state has the burden to prove that they negotiated in good faith.[57]

Unfortunately, the statute does not define "good faith."[58] However,

48. 25 U.S.C. § 2710(b) (1994).

49. 25 U.S.C. § 2710(d)(1) (1994).

50. 25 U.S.C. § 2710(d)(1)(c) (1994).

51. 25 U.S.C. § 2710(d)(3)(B) (1994). Signing a compact will not avoid the effect of the Johnson Act, forbidding the use or possession of gambling devices in Indian country, if a state otherwise prohibits gambling devices entirely. *See* Citizen Band of Potawatomi Indian Tribe v. Green, 995 F.2d 179, 181 (10th Cir. 1993).

52. 25 U.S.C. § 2710(d)(3)(A) (1994).

53. 25 U.S.C. § 2710(d)(7)(A)(i) (1994).

54. 25 U.S.C. § 2710(d)(3)(A) (1994).

55. 25 U.S.C. § 2710(d)(7)(B)(i) (1994).

56. 25 U.S.C. § 2710(d)(7)(B)(iii) (1994).

57. 25 U.S.C. § 2710(d)(7)(B)(ii) (1994).

58. 25 U.S.C. § 2703 (1994).

it specifies that a court may consider factors such as the "public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities" when making the determination whether good faith existed.[59]

The IGRA also provides that if a court finds that the state did not negotiate in good faith, the court shall order the state and tribe to conclude a compact within sixty days.[60] If the parties fail to reach an agreement during this time period, they are required to submit their "last best offer" to a compact mediator appointed by the federal court.[61] The mediator is required to accept whichever compact best comports with the provision of applicable federal law and the IGRA.[62] If the state still fails to consent to the compact within the sixty days, then the Secretary of the Interior, in consultation with the Indian tribe, has the authority to prescribe procedures under which the Class III gaming activity may take place.[63] The procedures must be consistent with the compact selected by the mediator and applicable state law.[64] This has led states to complain that this affords too much power to the tribes by mandating state negotiation upon threat of litigation by the federal government.[65]

The state's complaint reached the Supreme Court in *Seminole Tribe v. Florida*.[66] The Supreme Court previously held that the Eleventh Amendment immunity of states from unconsented suit in federal court extended to actions brought by tribal sovereigns.[67] Congress designed IGRA intending, however, to waive the state's Eleventh Amendment immunity.[68] In *Seminole Tribe*, the Supreme Court held that Congress lacked the power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity from unconsented suit in federal court.[69] This decision left tribes without any recourse if a state failed to negotiate in good faith for a gaming compact.

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59. 25 U.S.C. § 2710(d)(7)(B)(iii)(I) (1994).
60. 25 U.S.C. § 2710(d)(7)(B)(iii) (1994).
61. 25 U.S.C. § 2710(d)(7)(B)(iv) (1994).
62. *Id.*
63. 25 U.S.C. § 2710(d)(7)(B)(vii) (1994).
64. *Id.*
65. *See* Tsosie, *supra* note 2, at 55.
66. 517 U.S. 44 (1996).
67. Blatchford v. Native Vill. of Noatak, 501 U.S. 775 (1991).
68. Joe Laxague, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS 77, 81 (1999).
69. *Seminole*, 517 U.S. at 72.

The *Seminole* decision raises questions about the enforceability of federal statutory rights far beyond the field of Indian law.[70] For example, Congress has enacted federal rights of action and has specifically subjected states to suit in federal court in fields such as environmental law, bankruptcy, and intellectual property.[71] The Eleventh Amendment[72] has been read very broadly, at least since 1964.[73] However, the *Seminole* case, narrowly interpreted the Eleventh Amendment.[74]

In the wake of the *Seminole Tribe* ruling, many scholars criticized the Court's holding and proposed solutions to the problem of state non-suability.[75] This Comment will not specifically address the questionability of the *Seminole Tribe* holding. It will instead focus only on the possible solutions after this ruling. Although the Secretary has now offered its own solution, initially there were many proposed solutions. Possible solutions will be discussed in Part IV of this Comment.

III. THE SECRETARY OF THE INTERIOR'S REGULATIONS IN § 291: WHAT THEY ARE AND WHY THEY ARE UNCONSTITUTIONAL

Eventually, however, the Secretary of the Interior proposed and passed rules for the creation of Class III gaming regulations in the

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70. James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State—Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 162 (1998).

71. *Id.*

72. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

73. Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 4 (1997).

74. *Id.*

75. The *Seminole* ruling itself has many critics. *See e.g.*, Pfander, *supra* note 70, at 162 (*citing* Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3 (1997)); S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195 (1996); Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47 (1998); Kit Kinports, *Implied Waiver After Seminole Tribe*, 82 MINN. L. REV. 793 (1998); Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1; Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997); Gordon G. Young, Comment, *Seminole Tribe v. Florida*, 56 MD. L. REV. 1411 (1997).

absence of a valid tribal-state compact.[76] In sum, these regulations allow the Secretary to approve a gaming compact after a suit is brought under IGRA and the state has asserted its Eleventh Amendment right against suit in federal court.[77]

A. The Regulations: What They are and How They Work

The new rules by the Secretary follow a similar negotiation process as the one set out in IGRA.[78] The difference is that they allow for the unavailability of tribal access to federal courts if a state refuses to negotiate in good faith, and then asserts its Eleventh Amendment right to sovereign immunity by giving the Secretary the power to determine bad faith and accept a compact.[79] If the state does not plead the Eleventh, then the provisions in IGRA would be carried out and the suit in federal court will continue.[80]

Once a suit is dismissed from federal court because of the Eleventh Amendment claim, then a tribe must submit a proposal to the Secretary requesting gaming procedures in that state.[81] The Secretary then has thirty days to notify the tribe that it is eligible for the procedures.[82] The Secretary must then notify the involved state of the tribe's proposed procedures, including any comments on the scope of gaming.[83]

The state is allowed to submit an alternative procedure within sixty days.[84] If the state does not submit an alternative proposal, the Secretary can then approve the regulations.[85] If the state does offer an alternative proposal, then a mediation process, similar to that outlined in the IGRA, takes place.[86]

An appointed mediator will review the "last best proposal" from the tribe and state.[87] The mediator then recommends to the Secretary which

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76. 25 U.S.C. §§ 2703-10 (1994).

77. *Id.*

78. Class III Gaming Procedures, 64 Fed. Reg. 17,535-17,536 (April 12, 1999).

79. 25 C.F.R. § 291.3 (2000).

80. *Id.*

81. 25 C.F.R. § 291.4. This proposal includes such things as the scope of the gaming activities, a detailed regulatory plan for the gaming, and a legal analysis addressing state prohibitions and other state policies on different types of gaming. *Id.*

82. 25 C.F.R. § 291.3 (2000).

83. 25 C.F.R. § 291.7 (2000).

84. *Id.*

85. 25 C.F.R. § 291.8 (2000).

86. 25 C.F.R. § 291.9 (2000).

87. 25 C.F.R. § 291.10 (2000).

offer best comports with federal and state law.[88] The Secretary then has sixty days to approve or disapprove the mediator's suggestion.[89] The Secretary can reject the mediator's suggestion and prescribe procedures that he/she thinks best conform to state and federal law.[90]

B. What is Wrong with These Procedures?

In the wake of the proposal of these rules, sixty-seven comments were submitted in response.[91] The states argued that the Secretary lacks the legal authority necessary to create these regulations.[92] It is true that the tribes are left with no legal recourse when the states assert an Eleventh Amendment defense to suit. And it is also clear Congress intended the states to be required to negotiate in good faith.[93] These regulations, however, are not the solution to the problem. The Secretary cites legal support for the authority to create these regulations.[94] When this support is analyzed, the necessity for alternative solutions becomes apparent. Comments sent in by states in regard to the proposed rules voiced several concerns.[95]

The Secretary of the Interior is an administrative organization that gets its power from grants of authority by the federal government.[96] One of these grants of power was the role of the Secretary created in the IGRA. The Secretary cites the IGRA in part for why he/she has the authority to promulgate these regulations.[97] The Secretary relies on § 2710(d)(7)(B)(vii), claiming his/her authority to promulgate these regulations arises from the Congressional grant of power given in the IGRA.[98]

This section does in fact grant the Secretary the authority to promulgate gaming compacts, but only after adjudication and mediation have failed and there has been a judicial finding of bad faith on behalf of the state.[99] The new regulations basically require the Secretary to

88. *Id.*
89. 25 C.F.R. § 291.11 (2000).
90. *Id.*
91. Class III Gaming Procedures, 64 Fed. Reg. 17,537 (April 12, 1999).
92. *Id.*
93. 25 U.S.C. § 2710(d)(7)(B)(iii) (1994).
94. *Id.*
95. *Id.*
96. Class III Gaming Procedures, 64 Fed. Reg. 17,536 (April 12, 1999).
97. *Id.*
98. *Id.*
99. See Laxague, *supra* note 68 at 85 (1999).

determine if there was bad faith on behalf of the state in the negotiation process.[100] The IGRA, on the other hand, contemplated Secretarial rule-making only after the finding by a court of bad faith on the states.[101]

To understand why the Secretary cannot make this finding instead of a court, consider the relationship between the federal government and the tribes discussed in Part II.[102] If you recall, the relationship between these two entities has been characterized as a "federal trust relationship."[103] The federal government is considered to have legal and moral obligations to the tribes.[104] In other words, the tribes look at the federal government as their guardian. The responsibility of the federal government to the tribes is enforced and carried out by the Bureau of Indian Affairs, which is a section of the Department of Interior.[105] In other words, the Secretary of the Interior is responsible for taking care of the federal government's duty to the tribes.[106]

The same Secretary is now responsible for determining whether a state negotiated in good faith with a tribe for a gaming compact.[107] The Secretary is faced with a conflict of interest. There is no possible way it can fulfill both roles: (1) the guardian of a dependent ward, and (2) the neutral factfinder between that ward and a state.

The Secretary also relies on common law for authority to create these rules.[108] The Secretary first cites the circuit court opinion in *Seminole Tribe v. Florida*.[109] In this opinion, the Eleventh Circuit alludes to the idea of the Secretary prescribing regulations in the absence of a tribal-state compact.[110] On appeal, the Supreme Court never addressed this issue.[111]

The Ninth Circuit is the only other court to address this issue.[112] It pointedly criticized the Eleventh Circuit's opinion.[113] The Ninth Circuit

100. Class III Gaming Procedures, 25 C.F.R. § 291 (2000).
101. 25 U.S.C. § 2710(d)(7)(B)(iii) (1994).
102. *See supra* Section II.
103. *Id.*
104. *See supra* Section III.
105. Class III Gaming Procedures, 64 Fed. Reg. 17,535-17,536 (April 12, 1999).
106. *See* Laxague, *supra* note 68, at 87.
107. 25 C.F.R. § 291.11 (2000).
108. *See* Laxague, *supra* note 68, at 83-85.
109. *Id.* at 83-84.
110. *Id.*
111. *Id.* at 84.
112. *Id.*
113. *Id.* at 85.

stated that, "such a result would pervert the congressional plan."[114] The court stated that the Secretary of the Interior under the statute is to act only as a matter of last resort, after a finding of bad faith on the behalf of the state, and then only after consulting with the court appointed mediator who has become familiar with the positions and interests of both the tribes and the states in court directed negotiations.[115]

The Secretary's new regulations defeat the purpose of the IGRA. The clear intent of the IGRA was to bring the states into the process of tribal gaming.[116] When the state asserts an Eleventh Amendment defense, the tribes are left with no recourse. However, in the new regulations, when a state claims it has negotiated in good faith to no avail, the only recourse it is left with is a biased factfinder who can do what it wants without any state input. Obviously, a better solution is needed.

IV. OTHER OPTIONS THAT ARE NOT UNCONSTITUTIONAL

A. Why Do We Not Just Trust the States to Negotiate in Good Faith?

The IGRA compacting provision, as well as the one in the Secretary's recent regulations, attempt to bridge the division that has always existed between tribes and states.[117] It requires alternative dispute resolution, with litigation as a last resort used only if bad faith exists. The hope is that because the process is not constrained by strict legal rules, the parties should be able to reach a "sensible compromise" outside the adversarial context of the courtroom.[118]

What happened to this good-feeling hope? To begin with, the obligation to negotiate in good faith is problematic. The parties have a historically antagonistic relationship, and some states perceive Indian gaming as detrimental to their own interests.[119] Many tribes see the states' main objective as "undermining . . . the tribes' very existence."[120] During the last several years, tribes and states have litigated over such

114. *Id.* at 84. (quoting WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 225, 310 (3d ed. 1998)).

115. *Id.*

116. 25 U.S.C. § 2710(d)(7)(B) (1994).

117. *See* Tsosie, *supra* note 2, at 67.

118. *Id.* at 66.

119. *Id.* at 72.

120. *Id.* (quoting Frank R. Pommersheim, *Tribal—State Relations: Hope for the Future?* 36 S.D. L. REV. 239, 269 (1991)).

things as taxes, cigarettes, and land.[121] Both parties expect the worst from the other.

The tribes are used to being uniquely federal entities, subject only to federal law. States do not always look at the tribe's enterprises as a benefit to the state. They are both here to stay, however, and they need to work together.

The IGRA standards "embod[y] a model of negotiated agreement between tribes and states in which each is given some opportunity to promote its interests, while neither is given an opportunity to... disregard the other's interests."[122]

The states' interests in negotiating a compact are the safety of the "state['s] citizens from immoral or illegal activit[ies]."[123] They are also concerned with preserving "state economies from unfair competition from tribal gaming enterprises."[124] The tribe's interests are the need to preserve tribal sovereignty and at the same time build tribal economies. The IGRA attempts to make these two adversarial parties work together.[125] It is an attempt to "facilitate an intercultural dialogue between sovereign governments that replicates, in some ways, negotiations among international sovereigns."[126]

Unfortunately, the historical antagonism between the states and tribes did not cause the foresight for the problems that happened with the IGRA.

B. Some Constitutional Solutions

Before the Secretary approved these regulations, many other solutions were offered. The most simple and obvious would be for the states to waive their Eleventh Amendment immunity defense. This would allow a judicial factfinder to determine if there is bad faith on the part of the state.

This is not likely to happen. In lieu of this, Professor Kit Kinports has suggested "a revival of the doctrine of implied waiver, which would regard the states as having impliedly waived their immunity from suit in federal court by agreeing to participate in certain kinds of federal

121. *Id.*
122. *Id.* at 91.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

programs."[127] This is one possible solution, but has not ever really been considered by any court.

Another option put forth has been the forum-allocation principle.[128] This solution seems more problematic. This concept expresses the idea that "the current Eleventh Amendment doctrine may operate primarily to control the power of the federal trial courts to hear state-party claims as an original matter."[129] There are two parts to his proposed legislation. First, create legislation that would "empower the state courts to hear all federal claims against the states that the Eleventh Amendment places beyond the reach of the federal district courts."[130] Second, his proposed legislation would "empower litigants to appeal final state-court decisions to the intermediate federal appellate courts."[131] The major problem with this solution is that tribes, are reluctant to resort to this because they do not feel they will get a fair judgment fighting a state in that same state's court.

Several scholars have suggested reliance upon the "abrogation authority of the Fourteenth Amendment" to make provision for the enforcement of rights created under grants of power, "such as the Commerce and Intellectual Property Clause," and in this case, the Indian Commerce Clause.[132]

A last possible solution would be to recognize a federal duty to litigate on behalf to the Indian tribes. Relying on *Chemehuevi Indian Tribe v. Wilson*, Joe Laxague argues that this is the only solution.[133] In *Chemehuevi Indian Tribe*, the Governor of California refused to negotiate a gaming compact.[134] The tribe, claiming bad faith on the state's part, "requested [that] the U.S. Attorney for the Northern District of California and the U.S. Department of Justice to represent them in a suit to compel [the state] to begin good faith negotiations over Class III gaming" procedures.[135] "Relying on the intent behind the

127. Pfander, *supra* note 70, at 164-165.

128. *Id.* at 165.

129. *Id.*

130. *Id* at 161.

131. *Id.*

132. *Id.* at 164.

133. *See* Laxague, *supra* note 68, at 91-94. See this article for an in-depth discussion of the *Chemehuevi* case and Laxague's solution to the states asserting an Eleventh Amendment immunity defense. *Id.*

134. *See* Chemehuevi Indian Tribe v. Wilson, 987 F. Supp. 804, 805 (N.D. Cal. 1997); see also, Laxague, *supra* note 68, at 91.

135. *See Chemehuevi Indian Tribe*, 987 F. Supp. at 806; see also, Laxague, *supra* note 68, at 91-92.

IGRA and the nature of the federal government's fiduciary duty to the tribes, [the Judge] declared that the United States had a mandatory duty to prosecute an action against the State of California on behalf of the tribes in order to enforce their rights under the IGRA to negotiate for a gaming compact."[136] This appears to be one of the most legally sound and fair of all possible solutions.

V. CONCLUSION

States and tribes have an adversarial history, which is longer than almost any two parties that exist today. In the confusion resulting from the *Seminole* decision and the Secretary's new regulations, it is easy to overlook the fact that hundreds of tribal state contracts have been negotiated successfully. The federal government, in creating IGRA, tried to force the parties to consider the needs of the other. When this is not allowed to happen, the intent of the IGRA is invalidated. The new regulations give the Secretary of the Interior even more power, further skewing the balance intended by the creation of the IGRA. It is important that we preserve the intent of the IGRA through a legal and Constitutional solution.

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136. *See Chemehuevi Indian Tribe*, 987 F. Supp. at 809; see also, Laxague, *supra* note 68, at 92.

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