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Constitutionality of the Indian Gaming Regulatory Act: State Sovereignty and Compulsory Negotiations - Cheyenne River Sioux Tribe v. South Dakota, The

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The Constitutionality of the Indian Gaming Regulatory Act: State Sovereignty and Compulsory Negotiations

Cheyenne River Sioux Tribe v. South Dakota[1]

I. INTRODUCTION

Indian tribes located within states that permit gambling are allowed to license and operate gaming activities on Indian lands[2] as long as these activities comply with the Indian Gaming Regulatory Act [hereinafter IGRA].[3] Congress enacted the IGRA to balance tribal autonomy and economic self-sufficiency with the state police power seeking to control tribal gaming operations.[4] In *Cheyenne River Sioux Tribe v. South Dakota*, the United States Court of Appeals for the Eighth Circuit addressed the constitutionality of the IGRA and held that the IGRA violated neither the Eleventh nor the Tenth Amendments.[5] This Note examines the split of authority in the federal courts regarding the constitutionality of the IGRA and postulates a Supreme Court determination on the issue.

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1. 3 F.3d 273 (8th Cir. 1993).

2. *Id.* at 275. Since 1989, South Dakota has authorized a state lottery, video lottery, limited card games, slot machines, parimutuel horse and dog racing, and simulcasting. *Id.* at 276. *See also* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221-22 (1987).

3. 25 U.S.C. §§ 2701-2721 (1988). The IGRA attempts "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1).

4. *See* 25 U.S.C. §§ 2701-2721 (1988).

5. *Cheyenne*, 3 F.3d at 280-81.

II. FACTS AND HOLDING

The IGRA divides gaming on Indian lands into three classes, each receiving different levels of state regulation.[6] An Indian tribe has exclusive jurisdiction to regulate Class I gaming.[7] The National Indian Gaming Commission (Commission) oversees Class II gaming,[8] although an Indian tribe may regulate Class II gaming subject to IGRA parameters.[9] Class III gaming on Indian lands is allowed only in states that permit such forms of gaming.[10] In addition, Class III gaming must be authorized by a tribal ordinance, approved by the chairman of the Commission, and conducted in accordance with a tribal-state compact.[11]

The IGRA provides procedural mechanisms for the negotiation and formulation of a tribal-state gaming compact between an Indian tribe and the state.[12] Upon request by a tribe for a tribal-state compact, the state "shall" negotiate with the tribe "in good faith."[13] Federal district courts have jurisdiction to adjudicate disputes arising from a state's failure to enter into negotiations or failure to negotiate in good faith.[14] If the federal court determines that a state failed to negotiate in good faith, it must grant the Indian tribe injunctive relief and require the Indian tribe and the state to conclude a compact within sixty days.[15] If the parties fail to conclude a compact within sixty days, a court-appointed mediator will select the best offer of either the Indian tribe or the state.[16] Thereafter, if the state consents to the mediator's choice within sixty days, the proposed compact becomes effective.[17] However, if the state refuses to consent, the Secretary of the Department of the Interior, in consultation with the tribe, will formulate a compact based upon the mediator's proposal, the IGRA, and state law.[18]

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6. *Id.* at 275.

7. *Id.*; 25 U.S.C. § 2710(a)(1). Class I gaming includes social gaming for minimal prizes and traditional gaming of Indian ceremonies or celebrations. *See* 25 U.S.C. § 2703(6).

8. *Cheyenne*, 3 F.3d at 275; 25 U.S.C. § 2710(b). Class II gaming includes: bingo, lotto, pull-tabs, punch boards, tip jars, non-banking card games, and banking card games operated on or before May 1, 1988. *See* 25 U.S.C. § 2703(7A). The IGRA requires that Class II gaming on Indian lands be permitted by the state, not prohibited by federal law, and be adopted by a tribal ordinance which is approved by the chairman of the Commission. *See* 25 U.S.C. § 2710(b)(1)(A)-(B).

9. *Cheyenne*, 3 F.3d at 275.

10. *Id.*; 25 U.S.C. § 2710(d)(1)(B). Class III gaming includes: casino gambling, parimutuel horse and dog racing, lotteries, and all other activities not defined as Class I or Class II gaming. *See* 25 U.S.C. § 2703(8).

11. *Cheyenne*, 3 F.3d at 275; 25 U.S.C. § 2710 (d)(1)(A)-(C).

12. *Cheyenne*, 3 F.3d at 275.

13. *Id.* (quoting 25 U.S.C. § 2710(d)(3)(A)).

14. *Cheyenne*, 3 F.3d at 276; 25 U.S.C. § 2710(d)(7)(A)(i).

15. *Cheyenne*, 3 F.3d at 276; 25 U.S.C. § 2710(d)(7)(B) (iii).

16. *Cheyenne*, 3 F.3d at 276; 25 U.S.C. § 2710(d)(7)(B)(iv-v).

17. *Cheyenne*, 3 F.3d at 276; 25 U.S.C. § 2710(d)(7)(B)(vi).

18. *Cheyenne*, 3 F.3d at 276; 25 U.S.C. § 2710(d)(7)(B)(vii).

On January 9, 1991, the Cheyenne River Sioux Tribe (Tribe), in accordance with the IGRA, requested that the State of South Dakota (State) negotiate a tribal-state compact which would authorize the Tribe to operate gaming facilities on reservation land.[19] However, by August of 1991, after five "official" negotiations between the Tribe and State officials, and three meetings between the Tribe and the governor of the State, the parties had failed to produce a tribal-state compact.[20] The Tribe filed an action in the United States District Court for the District of South Dakota in April of 1992, alleging that: (1) the State violated the "good faith" negotiation principle mandated by the IGRA; and (2) the State violated tribal civil rights under 42 U.S.C. § 1983.[21] In accordance with the IGRA, the Tribe sought injunctive relief to compel the State to negotiate a compact within sixty days.[22]

The Tribe asserted that the State's routine use of a "Flandreau" style compact constituted a failure to negotiate in good faith.[23] The Tribe contended that it would be unreasonable to impose a "Flandreau" compact on the Tribe.[24] In particular, the Tribe alleged that its economic potential was limited by the State's refusal to negotiate a compact including higher bet limits, gaming sites on tribal trust lands,[25] and traditional keno.[26]

The State asserted Eleventh Amendment immunity from the lawsuit and alleged that the IGRA violated the State's rights under the Tenth Amendment.[27]

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19. *Cheyenne*, 3 F.3d at 275.

20. *Id.* at 276.

21. *Id.* at 277; *see* Cheyenne River Sioux Tribe v. South Dakota, 830 F. Supp. 523 (D.S.D. 1993). The named defendants include: the State of South Dakota, Governor George S. Mickelson, State Attorney General Mark A. Barnett, State Negotiator Grant Gormley, and State Negotiator John Guhin (all collectively referred to as "State").

22. *Cheyenne*, 3 F.3d at 277.

23. *Id.* at 277. The Flandreau Santee Tribe was the first tribe to enter into a Class III gaming compact, pursuant to the IGRA, with the State of South Dakota (approved by the Bureau of Indian Affairs on July 26, 1990). *Id.* at 276. Similar to the case at hand, the Flandreau Santee Tribe also sued the state after five months of unsuccessful negotiations. *Id.* The State and the Tribe settled the suit and executed a "Flandreau compact." *Id.* The "Flandreau compact" became the model compact and has subsequently been executed between the State and five other tribes: the Sisseton-Wahpeton Sioux Tribe, March, 1991; the Yankton Sioux Tribe, June, 1991; the Lower Brule Sioux Tribe, September, 1991; the Crow Creek Sioux Tribe, April, 1992; and the Standing Rock Sioux Tribe, August, 1992. *Id.*

24. *Cheyenne*, 3 F.3d at 277.

25. The Tribe contended that gaming operations should be authorized on two commercially valuable Indian trust lands near Fort Pierce and Pluma, South Dakota. *Id.*

26. *Id.*

27. *Id.* The Eleventh Amendment states: "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." U.S. CONST. amend. XI. The State contended that it did not waive its immunity by engaging in negotiations with the tribe and that only the state legislature can effectively waive this immunity. *Cheyenne*, 3 F.3d at 280. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The State contended that the IGRA unconstitutionally compels negotiation

The district court denied the State's motion for summary judgment, holding that the Eleventh Amendment barred the Section 1983 claim, but not the IGRA claim.[28] The district court concluded that the IGRA did not violate Eleventh Amendment immunity because "no penalties can be assessed against a state for failing to negotiate."[29] Rather, a state only forfeits the opportunity to protect its interests when it enters into a compact negotiation.[30] The district court also held that the IGRA did not violate the Tenth Amendment's reservation of power to the states because the State was not forced to negotiate a compact.[31]

Subsequently, the Tribe appealed to the United States Court of Appeals for the Eighth Circuit, and the State cross-appealed.[32] The Eighth Circuit affirmed the district court's denial of the State's Eleventh Amendment immunity claim by acknowledging the Tribe's right to bring suit against the State.[33] The court reasoned that Congress had the authority to,[34] and unmistakably abrogated, the State's Eleventh Amendment immunity by expressly providing for federal jurisdiction over claims under the IGRA.[35] The Eighth Circuit also affirmed the district court's finding that the IGRA did not violate the State's Tenth Amendment rights. The court construed the IGRA as presenting the State with a choice to either negotiate a compact to protect its interest in overseeing gaming operations within its borders or to ignore the Tribe's request to negotiate.[36]

III. LEGAL BACKGROUND

The process of negotiation enables parties to resolve disputes or plan transactions through discussion or reasoned argument.[37] In negotiation,[38] parties or their representatives enter into a series of exchanges in pursuit of a nonbinding

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by abrogating a power reserved to the states. *Cheyenne*, 3 F.3d at 281.

28. *Cheyenne*, 830 F. Supp. 523. The district court held that the Eleventh Amendment bars actions under 42 U.S.C. § 1983 against the state and state officials acting in their official capacity. *Id.* at 525.

29. *Id.* at 526.

30. *Id.*

31. *Id.*

32. *Cheyenne*, 3 F.3d at 278.

33. *Id.* at 281.

34. U.S. CONST. art. I, § 8, cl. 3. Congress, pursuant to the Indian Commerce Clause, exercises plenary authority over Indian relations. *Cheyenne*, 3 F.3d at 280.

35. *Cheyenne*, 3 F.3d at 281. *See* 25 U.S.C. § 2710(d)(7)(A)(i) (1988). *See also* Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484 (W.D. Mich. 1992).

36. *Cheyenne*, 3 F.3d at 281.

37. LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 4 (abr. ed. 1987).

38. Negotiation is distinguished from mediation, wherein a neutral third party facilitates the discussions. *Id.*

settlement.[39] However, the parties to a settlement may render it legally binding by memorialization in contract.[40]

Generally, the structure of the negotiation process resembles one of two widely-recognized orientations: adversarial or problem solving.[41] In an adversarial orientation, each party attempts to maximize their interest in a limited resource to the other's expense, thereby often resulting in conflicting interests between the parties.[42] In a problem solving orientation, the parties cooperate in order to meet each side's underlying needs by increasing the number of issues for bargaining or expanding the dividable resources.[43]

Many federal statutes and agencies employ alternative dispute resolution mechanisms for adjudicating disputes between the federal government, federal employees, and private parties.[44] Federal courts are divided on whether Congress has the constitutional power to abrogate states' Eleventh Amendment immunity to compel the states to negotiate with an Indian tribe through the procedures mandated in the IGRA.[45]

A. The Eleventh Amendment[46]

The Eleventh Amendment prohibits suits against a state by a private party, including the state's citizens, by a foreign sovereign, or by an Indian tribe.[47] However, states may waive their Eleventh Amendment immunity and consent to suit in federal court.[48] Congress also possesses the power to abrogate the states' sovereign immunity in certain circumstances.[49]

In *Poarch Band of Creek Indians v. Alabama*,[50] an Indian tribe sued to compel Alabama to enter into a tribal-state gaming compact under the IGRA.[51] The Indian tribe alleged that Alabama had not responded "in good faith" to the

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39. *Id.*
40. *Id.* at 64.
41. *Id.*
42. *Id.* at 47.
43. *Id.*
44. AM. JUR. 2D NEW TOPIC SERVICE, *Alternative Dispute Resolution* §§ 17-25 (1985). *See also* 29 U.S.C. §§ 171-173 (1988) (Federal Mediation and Conciliation Service). In the labor management field, it is the declared policy of the federal government to make available government facilities for conciliation, mediation, and voluntary arbitration for the settlement of collective bargaining disputes between employers and employees. *See* 42 U.S.C. §§ 2000e-5, 3610, 6101-6114 (1988). In the case of employment, housing, and age discrimination, the federal government is required to eliminate the alleged unlawful conduct by informal methods of conference, conciliation, and persuasion. *See* 28 U.S.C. § 2672 (1988 & Supp. 1992).
45. *See infra* notes 50 and 65 and accompanying text.
46. For the full text of the Amendment, *see supra* note 27.
47. Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991).
48. Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990).
49. *Id.*
50. 776 F. Supp. 550 (S.D. Ala. 1991).
51. *Id.* at 552.

tribe's request for the negotiation of a compact authorizing Class III gaming within the statutorily required period of 180 days.[52] The *Poarch* court held that the Indian tribe's lawsuit against Alabama was barred by the Eleventh Amendment, thus granting Alabama immunity.[53] The court found that: (1) the Eleventh Amendment applied to the Poarch Indians' action against Alabama; (2) Congress, pursuant to its plenary power granted in the Indian Commerce Clause, did not have the power to abrogate a state's Eleventh Amendment immunity by enacting the IGRA; (3) Alabama did not waive its immunity by entering into negotiations with the Indian tribe; and (4) no exceptions to a state's sovereign immunity applied.[54]

Under facts similar to the *Poarch* case, a federal district court in *Spokane Tribe of Indians v. Washington*[55] upheld Washington's sovereign immunity against a lawsuit brought under the IGRA.[56] The court reasoned that Congress lacked the power to abrogate a state's immunity by enacting legislation pursuant to the Indian Commerce Clause.[57] The *Spokane* court relied on two United States Supreme Court decisions: *Blatchford v. Native Village of Noatak*[58] and *Cotton Petroleum v. New Mexico*.[59] In *Cotton*, the Supreme Court held that it was inappropriate to apply legal theories from the Interstate Commerce Clause to the Indian Commerce Clause.[60] In *Blatchford*, the Supreme Court distinguished between the relationship of sister states under the Interstate Commerce Clause and the relationship of states and Indian tribes under the Indian Commerce Clause.[61] The Supreme Court recognized that under the Interstate Commerce Clause, each state waives its immunity with respect to other states, thus creating a "mutuality of concession."[62] By contrast, the Supreme Court noted that Indian tribes have

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52. *Id.*; *see* 25 U.S.C. § 2710(d)(7)(B)(i) (1993 Supp.).

53. *Poarch*, 776 F. Supp. at 553.

54. *Id.* at 554-63. *See also* Seminole Tribe of Florida v. Florida, 801 F. Supp. 655, 657 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994). Three exceptions to a state's Eleventh Amendment sovereign immunity exist: (1) a state may consent to suit in federal court, or expressly or impliedly waive its immunity from suit (*see, e.g.*, Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 (1991)); (2) Congress may, within its power, abrogate a state's immunity (*see, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-23 (1989)); and (3) under certain circumstances, state officials may be sued in their "individual capacity" for equitable relief (*see* Ex Parte Young, 209 U.S. 123 (1908)).

55. 790 F. Supp. 1057 (E.D. Wash. 1991).

56. *Id.* at 1061. Other federal courts have held that Congress lacked the authority to abrogate the states' Eleventh Amendment immunity. *See, e.g.*, Ponca Tribe of Oklahoma v. Oklahoma, 834 F. Supp. 1341, 1345 (W.D. Okla. 1992); Pueblo of Sandia v. New Mexico, No. 92-0613-JC, 1992 WL 540817 (D.N.M. Nov. 13, 1992); Sault Ste. Marie Tribe of Chippewa Indians v. Michigan, 800 F. Supp. 1484, 1489-90 (W.D. Mich. 1992).

57. *Spokane*, 790 F. Supp. at 1061.

58. 111 S. Ct. 2578, 2583 (1991).

59. 490 U.S. 163 (1989).

60. *Id.* at 192; *see infra* note 117.

61. *Blatchford*, 111 S. Ct. at 2582-83.

62. *Id.* at 2582.

retained immunity from suits brought by the states.[63] Based on principles of mutuality, the Supreme Court reasoned that the states have retained their immunity from suits brought by Indian tribes. In light of *Cotton* and *Blatchford*, the *Spokane* court held that Congress did not have the power to abrogate the states' Eleventh Amendment immunity by enacting the IGRA[64] due to the disparity in Congressional power stemming from the Interstate Commerce Clause and the Indian Commerce Clause.

In contrast, a federal district court in *Seminole Tribe of Florida v. Florida*[65] held that Congress has the power to abrogate the states' Eleventh Amendment immunity by enacting the IGRA under the Indian Commerce Clause.[66] In noting that the Indian Commerce Clause and the Interstate Commerce Clause are derived from the same constitutional source,[67] the court reasoned that the text did not suggest that Congress' power to regulate Indian commerce was any less than its power to regulate interstate commerce.[68] The Eleventh Circuit recently reversed the district court's decision,[69] holding that the IGRA was enacted pursuant to the Indian Commerce Clause, and thus, Congress did not have the power to abrogate the states' sovereign immunity.[70] Another district court in *Kickapoo Tribe of Indians v. Kansas*[71] postulated that Congress' power under the Indian Commerce Clause may be greater than its power under the Interstate Commerce Clause due to the federal government's traditional, plenary power over Indian affairs.[72]

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63. *Id.* at 2583.

64. *Spokane*, 790 F. Supp. at 1061.

65. 801 F. Supp. 655 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994). *See also* Kickapoo Tribe of Indians v. Kansas, 818 F. Supp. 1423 (D. Kan. 1993).

66. *Seminole*, 801 F. Supp. at 660.

67. *Id.* at 662. The Constitution states that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

68. *Seminole*, 801 F. Supp. at 662.

69. Seminole Tribe of Florida v. Florida, 11 F.3d 1016 (11th Cir. 1994).

70. *Id.* at 1026.

71. 818 F. Supp. 1423 (D. Kan. 1993).

72. *Id.* at 1431. *See also* Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (Congress has plenary power "to deal with special problems of Indians" and "to single Indians out as a proper subject for separate legislation"). A similar sentiment is echoed in a treatise on federal law:

> The power over Indian affairs is unusual in our federal system because it includes general federal authority to legislate over health, safety, and morals. . . . [F]ederal power over Indians is 'plenary' in the sense that in Indian matters Congress can exercise broad police power, rather than only the powers of a limited government with specifically enumerated powers.

FELIX S. COHEN'S HANDBOOK OF FEDERAL LAW ch. 3, § C1 at 219-20 (Rennard Strickland et al. eds., 1982).

B. The Tenth Amendment[73]

Congress exercises its conferred powers subject to the restraints of the Tenth Amendment, which reserves certain powers to the states or the people.[74] In *New York v. United States*,[75] the Supreme Court held that Congress can urge a state to enact legislation that conforms to a federal regulatory program, but Congress cannot compel the states to regulate.[76]

A federal court in *Ponca Tribe of Oklahoma v. Oklahoma*[77] held that an Indian tribe's suit under the IGRA was precluded by the Tenth Amendment because the states could possibly be compelled to enact a Class III gaming compact.[78] The *Ponca* court noted that the reviewing court must examine the federal legislation to "determine whether Congress has properly 'encouraged a State to conform to federal policy choices,' or impermissibly compelled state regulation."[79] The *Ponca* court interpreted the IGRA to technically offer a choice of action for a state, but concluded that the choice was meaningless.[80] The *Ponca* court held that a critical alternative was missing because a state "does not have the option of refusing to act" or refusing to regulate Class III gaming.[81] The court concluded that a real possibility of compulsion existed because a state could be ordered by Congress, through the Secretary of the Interior, to enact a gaming compact.[82] A federal court in *Pueblo of Sandia v. New Mexico*[83] adopted verbatim the reasoning and analysis of the *Ponca* court. In essence, the *Sandia* court characterized the issue as "Congress [having] crossed the line distinguishing encouragement from coercion."[84]

A federal district court in California recently considered the constitutionality of the IGRA provisions compelling a state to negotiate a tribal-state compact.[85]

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73. For the full text of the Amendment, *see supra* note 27.

74. New York v. United States, 112 S. Ct. 2408 (1992). In *New York*, the Court held:

> [T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the states. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Id. at 2418.

75. 112 S. Ct. 2408 (1992).

76. *Id.* at 2435.

77. 834 F. Supp. 1341 (W.D. Okla. 1992).

78. *Id.* at 1347.

79. *Id.* at 1346 (quoting New York v. United States, 112 S. Ct. 2408, 2424 (1992)).

80. *Id.* at 1347.

81. *Id.*

82. *Id.*; *see* 25 U.S.C. § 2710(d)(7)(B)(vii). *See also supra* note 18 and accompanying text.

83. No. CIV 92-0613-JC, 1992 WL 540817 (D.N.M. Nov. 13, 1992).

84. *Id.*, slip op. at 3 (citing New York v. United States, 112 S. Ct. 2408, 2428 (1992)).

85. Rumsey Indian Rancheria of Wintun Indians v. Wilson, CIV-S-92-812 GEB, 1993 WL 360652 (E.D. Cal. July 20, 1993); *see also* Yavapai-Prescott Indian Tribes v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz. 1992) (holding that the IGRA does not violate the Tenth Amendment).

In *Rumsey Indian Rancheria of Wintun Indians v. Wilson*,[86] California contended that the IGRA unconstitutionally mandated it to negotiate a compact with an Indian tribe.[87] The court used three levels of analysis in holding that the IGRA did not violate the Tenth Amendment.[88] First, the court reasoned that the IGRA did not require California to assume any regulatory responsibility, which courts have traditionally held to violate the Tenth Amendment.[89] Rather, the IGRA offered California the opportunity to influence federal law and protect state interests through the compact negotiation process.[90] Second, when California and an Indian tribe failed to negotiate a compact, the IGRA did not coerce the state into regulating the gaming.[91] The court noted that "the federal government, and not the state, assumes the full burden of regulating."[92] Finally, the court noted that the legislative history of the IGRA exhibited that "Congress clearly was cognizant of the Tenth Amendment when it acknowledged that a State need not forgo any State governmental rights to engage in or regulate Class III gaming except whatever it may voluntarily cede to a tribe under a compact."[93]

IV. THE INSTANT DECISION

A. The Eleventh Amendment

In *Cheyenne River Sioux Tribe v. South Dakota*, the Eighth Circuit Court of Appeals was faced with the State's allegation that its sovereign immunity under the Eleventh Amendment could not be abrogated by Congress, but only by a State waiver expressly enacted by the South Dakota legislature.[94] Circuit Judge McMillian, writing for the appellate panel, rejected the State's allegation and affirmed the district court's determination that the Tribe's lawsuit, pursuant to the IGRA, was not barred by the State's Eleventh Amendment immunity claim.[95] The Eighth Circuit reasoned that two exceptions to sovereign immunity rendered the State's immunity claim ineffective.[96]

Under the first exception, the *Cheyenne* court, relying on *Seminole Tribe of Florida v. Florida*,[97] held that Congress unmistakably intended to abrogate the states' sovereign immunity by expressly providing for federal jurisdiction over

86. CIV-S-92-812 GEB, 1993 WL 360652.
87. *Id.* at *11.
88. *Id.* at *11-12.
89. *Id.*
90. *Id.*
91. *Id.* at *13; *see* 25 U.S.C. § 2710(d)(7)(vii) (1988).
92. *Rumsey*, 1993 WL 360652 at *13.
93. *Id.* (citing *Yavapai-Prescott Indian Tribes*, 796 F. Supp. at 1297).
94. *Cheyenne*, 3 F.3d at 280.
95. *Id.* at 281.
96. *Id.*; *see supra* note 54 and accompanying text.
97. 801 F. Supp. 655, 657-63 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1994).

disputes under the IGRA.[98] The *Cheyenne* court also noted that when Congress possesses the power, it may abrogate a state's sovereign immunity.[99] The *Cheyenne* court noted that Congress derives its power to abrogate from two sources: (1) the Indian Commerce Clause of the Constitution, which grants Congress plenary authority over Indian relations; and (2) the "uniquely federal issues raised when such authority is exercised."[100] In determining the extent of Congress' power under the Indian Commerce Clause, the *Cheyenne* court adopted the holding in *Seminole Tribe of Florida v. Florida*, which reasoned that Congress' power under the Indian Commerce Clause was equivalent to its power under the Interstate Commerce Clause, which includes the power to abrogate the states' Eleventh Amendment immunity.[101] Due to the IGRA's express grant of federal jurisdiction over disputes arising under the IGRA, and Congress' legitimate power under the Indian Commerce Clause, the court held that the IGRA sufficiently abrogated the State's Eleventh Amendment immunity.[102] Under the second exception to sovereign immunity, the *Cheyenne* court held that the State impliedly consented to suit by actively engaging in tribal-state negotiations which benefitted the state.[103] The court reasoned that a state can not simultaneously receive a benefit from the negotiations while retaining its sovereign immunity.[104] The benefit conferred to the State was "being able to supervise how Indian gaming will be conducted within the state."[105]

B. The Tenth Amendment

The district court held that the IGRA did not violate the Tenth Amendment because under its provisions, a state is not forced to negotiate or regulate a compact.[106] On appeal, the State alleged that the IGRA violated the Tenth Amendment by (1) imposing mandatory negotiation procedures on the states; and (2) coercing the states to execute a tribal-state compact.[107] The *Cheyenne* court affirmed the district court by holding that the IGRA did not compel the State to engage in negotiations and that the State was free to choose its own course of

98. *Cheyenne*, 3 F.3d at 280.

99. *Id.*; *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-23 (1989).

100. *Cheyenne*, 3 F.3d at 280.

101. *Id.*

102. *Id.*

103. *Id.* at 281; *see* Blatchford v. Native Village of Noatak, 111 S. Ct. 2578, 2581 (1991).

104. *Cheyenne*, 3 F.3d at 281.

105. *Id.* It should be noted that other federal courts disagree concerning the level of state participation in negotiations under the IGRA which constitutes an implied consent to suit. "If simply engaging in negotiations is enough to constitute consent, the state was faced with the Hobson's choice of negotiating and consenting to suit or refusing to negotiate and being sued for failure to negotiate." *Poarch*, 776 F. Supp. at 557.

106. *See supra* note 31 and accompanying text.

107. *Cheyenne*, 3 F.3d at 281.

action.[108] In reaching this decision, the court concluded that the IGRA permitted several alternatives for a state that was sued under the IGRA.[109] Under one alternative, a state could continue to negotiate until a compact was formed.[110] Also, if negotiations failed, a state could wait for a judicial determination on whether the state negotiated in good faith. The action would be dismissed upon a finding of good faith or stayed for additional negotiations.[111] Lastly, a state has the right to refuse to negotiate at all, thereby sacrificing the state's opportunity to safeguard its interests through a compact.[112] Based on the different available alternatives for states not complying with the IGRA, the *Cheyenne* court held that the IGRA did not violate the State's rights under the Tenth Amendment.[113]

V. COMMENT

A. The Eleventh Amendment

Federal district and circuit courts are divided as to whether Congress has the authority to abrogate the states' Eleventh Amendment sovereign immunity in order to compel the states to negotiate a Class III gaming compact with Indian tribes, pursuant to the IGRA. The split of authority rests primarily on different interpretations of the Indian Commerce Clause.

The *Cheyenne* court adopted the reasoning of *Seminole Tribe of Florida v. Florida*,[114] which construed the Indian Commerce Clause to vest powers in Congress at least as broad as those granted to Congress under the Interstate Commerce Clause,[115] including the authority to abrogate a state's immunity. In holding that the Indian Commerce Clause grants Congress the power to abrogate the states' Eleventh Amendment immunity, the *Seminole* and *Cheyenne* line of cases bases its reasoning on: (1) the clauses' common derivation from the Constitution: Article I, Section 8, clause 3; and (2) Congress' traditional plenary power over Indian tribes.[116] The first basis of the *Seminole* and *Cheyenne* holdings may be tenuous in light of Supreme Court precedent which distinguishes the different applications between the Indian Commerce Clause and the Interstate Commerce Clause. Despite the fact that the clauses derive from the same constitutional source, the Supreme Court has noted that the function of each clause differs due to the dissimilarity in structural relationship between the entities that

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *See supra* note 65.
115. U.S. CONST. art. I, § 8, cl. 3.
116. *See supra* note 67.

are subject to each clause.[117] The function of the Interstate Commerce Clause is to maintain free trade among the states,[118] whereas the function of the Indian Commerce Clause is to provide Congress with plenary authority to legislate Indian affairs.[119] The structural differences may justify the view that Congress does not have the power to abrogate the states' Eleventh Amendment immunity based solely on a shared constitutional derivation between the Indian Commerce Clause and the Interstate Commerce Clause. If the Indian Commerce Clause includes the power to abrogate, the power must attach from an independent source, not from its textual location.

The *Spokane*[120] line of cases rejected the common derivation basis for equal powers to Congress under both the Indian Commerce Clause and the Interstate Commerce Clause. These federal courts relied on the reasoning of a Supreme Court decision holding that a state's sovereign immunity must be overcome by a source independent of 28 U.S.C. § 1362.[121] *Spokane* and its progeny compared the Supreme Court's "mutuality of concession" reasoning to the IGRA analysis.[122] Sister states surrender their immunity to each other under the Interstate Commerce Clause, thus creating a mutuality of concession. However, Indian tribes retain immunity from suit brought by states under the Indian Commerce Clause, thereby preventing any mutuality of concession. Because Indian tribes retain Eleventh Amendment immunity, the states should not be forced to surrender their immunity. As a result, the *Spokane* line of cases held that Congress did not have the power to abrogate the states' Eleventh Amendment immunity under the Indian Commerce Clause.

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117. *See* Cotton Petroleum v. New Mexico, 490 U.S. 163 (1989).

> In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States . . . [citations omitted], the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs [citations omitted]. The extensive case law that has developed under the Interstate Commerce Clause, moreover, is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause. Most notably . . . [it is] inappropriate to apply Commerce Clause doctrine developed in the context of commerce "among" States with mutually exclusive territorial jurisdiction to trade "with" Indian tribes.

Id. at 192.

118. *Id.*

119. *Id.*

120. *See supra* notes 55-60 and accompanying text.

121. *Blatchford*, 111 S. Ct. at 2583. In *Blatchford*, the issue before the Supreme Court was whether 28 U.S.C. § 1362 established federal jurisdiction over a claim brought by an Indian tribe against a state, thereby abrogating the state's Eleventh Amendment immunity. Section 1362 provides: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." The Supreme Court has interpreted this section as failing in and of itself to "enable tribes to overcome . . . [a state's] sovereign immunity." *Blatchford*, 111 S. Ct. at 2586 n.5.

122. *Blatchford*, 111 S. Ct. at 2582.

In applying the "mutuality of concession" principle to the IGRA analysis, the *Spokane* line of cases may have lost sight of the Indian Commerce Clause's primary function: providing Congress with plenary authority over Indian affairs. Congress also has the sole power to regulate Indian gaming with or without state participation. If the states retain their Eleventh Amendment immunity, Congress may be frustrated in exercising its plenary authority due to contrary or inconsistent regulations of the states. The IGRA necessarily requires the power of abrogation in order to implement federal legislation.

Moreover, the *Spokane* line of cases incorrectly applied the "mutuality of concession" principle to the IGRA analysis, because such a result overstates the effect of a suit brought against a state under the IGRA. Although a state may be sued under the IGRA for failing to negotiate in "good faith," a judicial finding against the state does not penalize or harm the state. The suit is a mere formality. If the state loses the suit, it still has the opportunity to either continue negotiations in good faith or to withdraw from the negotiations. If the state chooses to withdraw, the only cost to the state is the loss of an opportunity to negotiate a tribal-state compact. Therefore, the state loses a right that it would not have even possessed had it not been offered under the IGRA.

Congress' plenary authority over Indian tribes was the second basis of the *Seminole* and *Cheyenne* holdings. This basis provides a more compelling reason for finding that Congress has the authority under the Indian Commerce Clause to abrogate the states' sovereign immunity. From inception in the Articles of Confederation to memorialization in the Indian Commerce Clause, Congress has possessed plenary power to regulate Indian relations.[123] In general, when Congress acts pursuant to a plenary grant of authority derived from the Constitution, its plenary power typically includes a power to abrogate the states' Eleventh Amendment immunity.[124] For example, federal courts have widely recognized that Congress may abrogate the states' immunity pursuant to the following plenary powers: the Interstate Commerce Clause;[125] congressional power over extradition;[126] war powers clauses;[127] Copyright Act

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123. *See Seminole*, 801 F. Supp. at 658-60. *See also* Linda King Kading, Comment, *State Authority to Regulate Gaming within Indian Lands: The Effect of the Indian Gaming Regulatory Act*, 41 DRAKE L. REV. 317 (1992). Prior to the 1950s, the states did not have any authority over Indian tribes, which are traditionally considered sovereign nations. *Id.* at 317-18. The federal government was solely empowered to regulate Indian affairs through treaties with the tribes. *Id.* Since the 1950s, courts have only narrowly allowed states to enforce criminal or prohibitory state laws within Indian lands and have refused to extend enforcement of civil or regulatory state laws. *Id.* Even though the states have an interest in preventing criminal activity in gaming, the regulation of Class III gaming under the IGRA remains a civil/regulatory classification within the province of the federal government. *Id.*; *see also* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

124. *See Seminole*, 801 F. Supp. at 660.

125. *See* Pennsylvania v. Union Gas Co., 491 U.S. at 15.

126. U.S. CONST. art. IV, § 2, cl. 2. *See* County of Monroe v. Florida, 678 F.2d 1124, 1128-35 (2d Cir. 1982), *cert. denied*, 459 U.S. 1104 (1983).

127. U.S. CONST. art. I, § 8, cls. 11-13. *See* Peel v. Florida Dept. of Transp., 600 F.2d 1070, 1074-82 (5th Cir. 1979).

challenges;[128] and any enforcement of the Fourteenth Amendment.[129] Due to its well established plenary power over Indian affairs, the Supreme Court would likely determine that Congress has the authority to abrogate the states' Eleventh Amendment immunity through enactment of the IGRA.

B. The Tenth Amendment

If Congress compels the states to regulate, the Tenth Amendment is violated.[130] In determining whether negotiations are compulsory and constitute state regulation under the IGRA, the core issue focuses on whether the states have a legitimate right to refuse to negotiate without suffering any penalty.

The *Cheyenne* court held that the IGRA did not violate the Tenth Amendment because the IGRA permissively allowed the states to negotiate a gaming compact in order to protect state interests. The *Cheyenne* court construed the IGRA to offer states the right to refuse to negotiate. In contrast, the *Ponca*[131] court held that the IGRA compelled states to negotiate because the states do not have a right of refusal. The *Ponca* court determined that there was a real possibility that Congress could command a state to enact state regulations governing gaming.[132]

If the right of refusal is legitimate, states cannot be penalized for refusing to negotiate. The *Rumsey* court held that the IGRA does not penalize states who refuse to negotiate.[133] Instead, a refusing state merely surrenders "an opportunity to influence federal regulation of Indian gaming which it would not otherwise have . . . ."[134] The *Rumsey* court also held that if a state opts to influence regulations, the IGRA only "requires that the state exercise that influence through the compact negotiating process."[135] The *Rumsey* court draws a fine line between compelling negotiation and encouraging participation in negotiation.

It is most likely that states are not compelled to negotiate under the IGRA because it allows a refusing state to remain absent from the negotiation process. In practice, if a state refuses to negotiate in "good faith," it will be amenable to a harmless lawsuit in federal court. After a determination that the state has failed to negotiate in "good faith," the Secretary of the Department of the Interior formulates a compact.[136] In such a situation, the state is not compelled to enact or enforce the compact, but must remain absent from the regulation of Class III gaming. The state would simply suffer the penalty of being denied the

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128. U.S. CONST. art. I, § 8, cl. 8. *See* Mills Music, Inc. v. Arizona, 591 F.2d 1278, 1285 (9th Cir. 1979).

129. *See* Hutto v. Finney, 437 U.S. 678, 693-94 (1978).

130. *See supra* notes 75, 76 and accompanying text.

131. *See supra* note 77.

132. *Ponca*, 834 F. Supp. at 1346-47.

133. *Rumsey*, 1993 WL 360652 at *12.

134. *Id.*

135. *Id.*

136. *See supra* note 18.

opportunity to take an active role in regulating Class III gaming, an opportunity that the state could only seize by complying with the IGRA. However, if a state chooses to influence the regulation of Indian gaming, the state must follow the alternative dispute resolution procedures mandated in the IGRA.

The immediate effect of the *Cheyenne* holding is that Congress can abrogate the states' Eleventh Amendment immunity. Therefore, any disputes arising under the IGRA between a state and an Indian tribe must be litigated in federal court. The *Cheyenne* holding represents an affirmation of Congress' plenary power in regulating Indian affairs. Congress will continue to hold the states subordinate to congressional policy and regulation of Indian affairs.

The most significant element of the *Cheyenne* holding is that Congress will continue to facilitate the resolution of disputes by imposing mandatory alternative dispute resolution mechanisms in federally dominated areas of law. In general, when the states accept and act on a right or power granted to the states by Congress, the states must comply with the congressional limitations on that granted power. In the context of the case at hand, as a condition subsequent to the states' acceptance of a federally granted right, the states must follow the negotiation and other alternative dispute resolution procedures mandated by Congress. Therefore, Congress will continue to resolve disputes and affect contract negotiations by proliferating and mandating alternative dispute resolution mechanisms in federal statutes.

The IGRA provides a constitutional and efficient set of alternative dispute resolution procedures for the negotiation of a tribal-state gaming compact. By implementing these procedures, states and Indian tribes can negotiate a Class III gaming compact to most effectively meet the Indian tribes' need for economic self-sufficiency and the states' need to oversee gaming within their borders.

VI. CONCLUSION

In the absence of a determination by the Supreme Court, and because litigation under the IGRA has only recently arisen, federal courts will continue to differ on: (1) whether Congress can abrogate the states' Eleventh Amendment Immunity by enacting the IGRA; and (2) whether the IGRA violates the Tenth Amendment by compelling the states to negotiate with Indian tribes. In *Cheyenne*, the Court of Appeals for the Eighth Circuit answered in the affirmative to the first issue and in the negative to the second issue. Furthermore, the well established reasoning of the *Cheyenne* court will likely command a majority of the federal courts presented with the above issues. The IGRA provides a constitutional and efficient set of alternative dispute resolution procedures for a state and an Indian tribe to utilize in negotiating a tribal-state gaming compact.

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