NOTE

Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?

I. Introduction

The spread of legalized gambling is one of the most controversial issues in America today. Despite the fact that revenues from gaming on Indian reservations and trust lands comprise only six percent of the national market,[1] Indian gaming has generated a fervent legal controversy that pits supporters of tribal sovereignty against state governments that wish to regulate and control the gaming activities that take place within their borders.

In 1988, Congress provided a statutory framework for Indian gaming when it passed the Indian Gaming Regulatory Act ("IGRA").[2] Shortly before passage of the IGRA, the Supreme Court held that state gaming laws could not be applied to tribal Indians on their reservations without an express provision by Congress.[3] In passing the IGRA, Congress granted the states a limited but significant role in the regulation of Indian gaming. Under the IGRA, an Indian tribe must operate any casino gaming enterprises (referred to as 'Class III' gaming) within the confines of a tribal-state compact entered into by the tribe and the state within which the casino is located. The IGRA imposes upon the states a duty to negotiate in good faith with a tribe wishing to enter a tribal-state compact. In order to enforce this duty to negotiate in good faith, 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. If a tribe brings such an action and the court finds that the state has not negotiated in good faith, the court must order the state and the tribe to conclude a compact within sixty days. If a compact is not concluded within sixty days, the state and tribe must submit to binding mediation. The Secretary of the Interior has the power to disapprove a tribal-state compact.[4] Then, in 1996, the Supreme Court struck down the federal cause of action created by the IGRA, holding that a federal suit by an Indian tribe against a state violates state sovereign immunity under the Eleventh Amendment.[5] The Supreme Court's holding left the tribes with no readily apparent legal remedy should a state refuse to negotiate a gaming compact or refuse to negotiate in good faith.[6]

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1. Senator John McCain, *Forward* to Symposium, *Indian Gaming*, 29 ARIZ. ST. L.J. 1, 1 (1997); Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal- State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 82 (1997).

2. 25 U.S.C. §§ 2701- 2721 (1994).

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

4. *See* 25 U.S.C. § 2710(d) (1994).

5. Seminole Tribe v. Florida, 517 U.S. 44 (1996).

6. Under established jurisdictional law, a tribe could theoretically sue a state in state court in order to enforce its rights under the IGRA. *See* Tafflin v. Levit, 493 U.S. 455, 458-59 (1990); Gulf Offshore Co. v. Mobil Oil Co., 453 U.S. 473, 478 (1981). At least one author has noted that be-

In the wake of the Court's *Seminole* ruling, the Secretary of the Interior has proposed rules for the creation of Class III gaming regulations in the absence of a valid tribal-state compact.[7] Under the Secretary's proposed rules, a tribe may ask the Secretary to approve guidelines for Class III gaming after it has brought suit against a state under the IGRA and after the state has successfully asserted its 11th Amendment defense. At the time that it requests the Secretary to approve Class III gaming, the tribe must submit a proposal containing prospective regulations. If the state submits an alternative proposal, the Secretary's proposed regulations call for a mediation process similar to that described by the IGRA. If the state does not submit an alternative proposal, however, the proposed regulations give the Secretary the power to interpret state gaming laws, determine whether the state has negotiated in good faith, and, ultimately, promulgate Class III gaming regulations despite the fact that no tribal-state compact has been reached.[8]

In this Note, I argue that the Secretary of the Interior's proposed regulations exceed the Secretary's legal authority and upset the delicate balance of interests reached by Congress when it passed the IGRA. In Part II, I examine the IGRA in more detail and explore Congress' intent in creating the federal cause of action authorized in the statute. In Part III, I evaluate the Secretary's proposed regulations and show that they both exceed the Secretary's lawful authority and skew the balance between state and tribal interests created in the IGRA. Finally, in Part IV, I investigate a possible alternative to the rules proposed by the Secretary.

II. IGRA — A Delicate Compromise

A. The Common Law Prior to IGRA: *California v. Cabazon Band of Mission Indians*

The controversy in *California v. Cabazon Band of Mission Indians*[9] arose when the State of California sought to apply its law restricting the playing of bingo[10] to the bingo games conducted on the reservations of the Cabazon and Morongo Bands of Mission Indians. California is a Public Law 280[11] state, which means that its criminal laws are applicable to Indians in Indian country, but that its civil and regulatory laws are not.[12] The issue in *Cabazon* was whether California's bingo restrictions were

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cause the IGRA does not explicitly make federal jurisdiction over tribal claims exclusive, state courts presumptively have concurrent jurisdiction. James E. Pfander, *An Intermediate Solution To State Soveriegn Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 186 & n.108 (1998). Because the tribes do not perceive the states to be particularly friendly to their interests, however, they have been reluctant to resort to state courts. *See* WILLIAM C. CANBY JR., AMERICAN INDIAN LAW 311-12 (3d ed. 1998). As one writer has pointed out, "[i]f the purpose of federal . . . authority over Indian affairs is the perceived inability of states to deal fairly with Indian tribes, it seems perverse to require enforcement of Indian rights in state court." Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 3, 22 (1997).

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

8. *See id.* at 3294-96.

9. 480 U.S. 202 (1987).

10. CAL. PENAL CODE § 326.5 (Deering 1997).

11. Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C.A. §§ 1161-62, 25 U.S.C.A. §§ 1321-22, 28 U.S.C.A. § 1360 (West 1984)).

12. *See generally*, WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 225-29 (3d ed. 1998).

properly classified as criminal/prohibitory or civil/regulatory.[13] The court found that the California law, which permits bingo games under certain circumstances,[14] was regulatory rather than prohibitory in nature, and thus held that the state could not enforce its restrictions against the Indian bingo operations in question.[15]

The *Cabazon* decision, which essentially meant that a state could not regulate Indian gaming unless it prohibited in all instances the type of gaming in question, is commonly credited with contributing to the growth of Indian gaming[16] and spurring Congress to regulate the Indian casino industry.[17] Among the Congressional findings listed at the start of the IGRA is a restatement of the Court's holding in *Cabazon*: "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity."[18]

B. Creating A Role For The States

In the wake of the *Cabazon* decision, Congress responded to ever-increasing pressure from the states[19] and sought a compromise by enacting the IGRA. The IGRA divides all gaming activity into three classes. Class I gaming, consisting of ceremonial and social games with prizes of minimal value,[20] falls under the exclusive jurisdiction of the tribes and is not affected by the IGRA.[21] Class II gaming consists of bingo and similar games, as well as those card games not prohibited by state law and played in accordance with state restrictions.[22] Class II gaming is also within the jurisdiction of the tribes if it is authorized by a tribal ordinance and conducted within a state that "permits such gaming for any purpose by any person, organization or entity."[23] (In this regard, the IGRA clearly reflects the reasoning behind the *Cabazon* decision). IGRA restricts how Class II revenues may be used[24] and requires the chairman of the National Indian Gaming Commission's approval of any tribal ordinance authorizing Class II gaming.[25] Class II gaming specifically excludes banking card games such as baccarat, chemin de fer, or blackjack, as well as electronic or electro-mechanical fac-

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13. *Cabazon*, 480 U.S. at 209.

14. The California statute permits bingo games that are conducted by charitable organizations and have pots of $250 or less. *See* CAL. PENAL CODE § 326.5(a) & (n) (Deering 1997).

15. *Cabazon*, 480 U.S. at 210-12.

16. *See, e.g.*, Joseph M. Kelly, *Indian Gaming Law*, 43 DRAKE L. REV. 501, 502 (1995); Karen S. McFadden, Note, *The Stakes Are Too High To Gamble Away Tribal Self-Government, Self-Sufficiency, And Economic Development When Amending the Indian Gaming Regulatory Act*, 21 J. CORP. L. 807, 810 (1996).

17. *See, e.g.*, Michael D. Cox, *The Indian Gaming Regulatory Act: An Overview*, 7 ST. THOMAS L. REV. 769, 774 (1995); Sean Brewer, Note, *Analysis of the Indian Gaming Regulatory Act in Light of Current Tenth Amendment Jurisprudence*, 26 RUTGERS L. J. 469, 481 (1995).

18. 25 U.S.C. § 2701(5) (1994).

19. *See, e.g.*, CANBY, *supra* note 12, at 287; Stephanie A. Levin, *Betting on the Land: Indian Gambling and Sovereignty*, 8 STAN. L. & POL'Y. REV. 125, 127 (1997).

20. 25 U.S.C. § 2703(6) (1994).

21. *See id.* § 2710(a)(1).

22. *See id.* § 2703(7).

23. *See id.* § 2710(b)(1).

24. *See id.* § 2710(b)(3).

25. *See id.* § 2710(b)(2). The National Indian Gaming Commission is a three member panel created by the IGRA at § 2704.

similes of any game of chance, or slot machines of any kind.[26] Class III gaming is defined as all forms of gaming that are not included in Class I or Class II.[27]

In order to offer Class III gaming, including typical casino games like craps, roulette, blackjack, and slot machines, a tribe must meet three requirements under IGRA. First, the tribe must adopt a resolution authorizing Class III gaming which is approved by the chairman of the National Indian Gaming Commission. Second, the Class III enterprise must be located within a state "that permits such gaming for any purpose by any person, organization, or entity." Third, the enterprise must be operated in accordance with a tribal-state compact entered into by the Indian tribe and the state.[28]

The tribal-state compacting process begins when the Indian tribe requests that the state enter into negotiations for creating a tribal-state compact that will govern the Class III gaming operations planned by the tribe. Upon receiving a tribe's request to negotiate, a state has a duty to negotiate with the tribe in good faith.[29] The Secretary of the Interior may only disapprove of a compact reached by a tribe and a state if the compact violates the IGRA or any other provision of federal law not pertaining to gaming, or if it violates the trust obligation of the United States to the Indians. If the Secretary approves a tribal-state compact, or if he takes no action for 45 days after it is submitted for his approval, the compact takes effect.[30]

If a state refuses to enter into negotiations, or fails to negotiate in good faith, IGRA creates a cause of action for the tribe in federal court. If the tribe introduces evidence that the state: (1) has not entered into a compact with the tribe and (2) has refused to negotiate or has failed to negotiate in good faith, the state will have the burden of proving that it did negotiate in good faith to conclude a Class III gaming compact with the tribe. If the court finds that the state has indeed failed to negotiate in good faith, it must order the state to conclude a compact with the tribe within 60 days.

In making a finding of bad faith, the court may consider the public interest, public safety, criminality, financial integrity, and the economic impact on existing gaming activities. In addition, the IGRA explicitly sets out a demand by the state to tax the Indian tribe as evidence of bad faith. If the tribe and the state fail to conclude a compact within 60 days of the court's order, each party must submit its last best offer to a mediator appointed by the court. The mediator will then select the offer which best comports with the findings of the court and the applicable federal laws and submit his decision to the tribe and the state. If the state consents to the chosen compact within 60 days, it becomes effective. If the state does not consent within 60 days, then the Secretary of the Interior must prescribe Class III gaming procedures which are consistent with the relevant provisions of state law and with the compact selected by the mediator.[31]

The complex set of rules outlined above was the result of a congressional compromise between the demands of state and tribal governments. As Indian gaming grew more prevalent, the states lobbied heavily for federal regulation of gaming on Indian

26. *See id.* § 2703(7)(B).
27. *See id.* § 2703(8).
28. *See* 25 U.S.C.A. § 2710(d)(1).
29. *See id.* § 2710(d)(3).
30. *See id.* § 2710(d)(8).
31. 25 U.S.C. § 2710(d)(7).

lands, fearing that unregulated Indian gaming would lead to unfair competition with state-regulated gaming and an infiltration of organized crime.[32] Indian tribes, on the other hand, saw the *Cabazon* decision as an affirmation of their sovereign rights and protested the need for any congressional legislation.[33] Prior to the passage of the IGRA, numerous regulatory schemes had been introduced in Congress. These earlier bills presented a wide range of alternatives, from reserving nearly all regulatory powers in the Secretary of the Interior and the tribes,[34] to granting the states comprehensive power to regulate Class III gaming on Indian lands.[35] The IGRA represents an amalgamation of ideas presented in these earlier bills,[36] with the tribal-state compacting process as the key provision for addressing and balancing the interests of the tribes and the states with regard to Class III gaming activities.[37]

When it created the IGRA's federal cause of action, Congress expressed concern that states might use the Act's compacting process as a way to exclude tribes from gaming or as a tool for protecting state-licensed gaming from free market competition.[38] In order to ensure that the states dealt with the tribes in good faith, Congress elected, "as the least offensive option," to grant the tribes the right sue the states in federal court.[39] In the view of Congress, the IGRA's provision allowing tribes to seek a judicial finding of bad faith on the part of the states was the best way to "balanc[e] the interests and rights of the tribes to engage in gaming against the interests of States in regulating such gaming."[40]

C. Confusion Erupts—*Seminole Tribe v. Florida*

In 1996, the Supreme Court threw tribal-state compacting law into confusion when it handed down its decision in *Seminole Tribe v. Florida*.[41] In a 5-4 decision, the Court struck down the IGRA's provision authorizing an Indian tribe to bring suit in federal court against a state that had refused to bargain in good faith for a Class III gaming compact. The Court held that Congress lacked the power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity from suit in federal court.[42] The *Seminole* case was a major decision on the meaning of the Eleventh Amendment, with ramifications far beyond the field of Indian gaming law.[43] Its immediate impact, however, was to leave Indian tribes with no clear remedy in the event that a state refused to negotiate a Class III gaming compact in good faith. The

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32. Eric D. Jones, Note, *The Indian Gaming Regulatory Act: A Forum for Conflict Among the Plenary Powers of Congress, Tribal Sovereignty, and the Eleventh Amendment*, 18 VT. L. REV. 127, 133 (1993).

33. Tsosie, *supra* note 1, at 49.

34. *See* H.R. 4566, 98th Cong. (1983).

35. *See* H.R. 1920, 99th Cong. (Senate version dated Sept. 26, 1986); For a systematic overview of Indian gaming bills proposed prior to the passage of the IGRA, *see* Roland J. Santoni, *The Indian Gaming Regulatory Act: How Did We Get Here? Where Are We Going?* 26 CREIGHTON L. REV. 387, 395-403 (1993).

36. Santoni, *supra* note 35, at 404.

37. S. REP. NO. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083.

38. *Id.*

39. *Id.* at 14, *reprinted at* 3084.

40. *Id.*

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

42. *Id.* at 53 — find pg in us reports

43. Martha A. Field, *The* Seminole *Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L.J. 1, 1 (1997).

decision has been attacked on constitutional grounds by numerous authors,[44] and several alternatives have been offered in its aftermath. Among the legal possibilities mentioned in the wake of the *Seminole* decision were a return to the common law under *Cabazon*,[45] pursuit of tribal rights in state court[46], administrative rule-making by the Secretary of the Interior,[47] and a duty of the U.S. Attorney General to litigate the issue of good faith on behalf of the tribes.[48] Although each of these alternatives has its advantages and disadvantages, the need to end the current state of confusion is a pressing one. According to one expert, "[w]hatever the ultimate outcome of the attempts to respond to the *Seminole* decision, no one argues that the present condition of uncertainty is satisfactory."[49]

III. The Secretary of the Interior's Proposed Regulations

Shortly after the *Seminole* decision, the Secretary of the Interior decided to pursue the creation of administrative regulations that would allow for Class III gaming in the event that a state refused to negotiate in good faith with a tribe and asserted its Eleventh Amendment defense to a suit under the IGRA. In May of 1996, the Secretary requested comment on the issue,[50] and in January of 1998, he issued his proposed regulations.[51] By proposing regulations that have the potential to define the law in the aftermath of the *Seminole* decision, the Secretary of the Interior has focused the controversy surrounding the tribal-state compacting process. An examination of his proposed rules is essential in order to address effectively the issue of post-*Seminole* Class III gaming negotiations.

A. The Text of the Proposed Rules

The Secretary's proposed rules begin by asserting that, "the department has concluded that it has the authority to prescribe procedures permitting Class III gaming when a State interposes its immunity from suit by an Indian Tribe."[52] After a concise yet thorough argument in support of the Secretary's authority to issue the regulations,[53] the proposed rules set out a procedure that, with some important differences, roughly tracks a portion of the procedures given by the IGRA. Under the proposed rules, a tribe would be eligible to ask the Secretary to issue Class III gaming proce-

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44. *See, e.g.*, Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996); Shannon Bacon, Note, *The Indian Gaming Regulatory Act: What Congress Giveth, The Court Taketh Away*, 30 CREIGHTON L. REV. 569 (1997); Nancy J. Bride, Note, Seminole Tribe v. Florida: *The Supreme Court's Botched Surgery of the Indian Gaming Regulatory Act*, 24 J. LEGIS. 149 (1998).

45. Colleen F. Walsh, Note, *Congress's Article I Powers May Not Abrogate State Sovereign Immunity Granted By The Eleventh Amendment and Ex Parte Young Is Inapplicable To Suits Brought Under The Indian Gaming Regulatory Act*, 27 SETON HALL L. REV. 806, 835 (1997).

46. Pfander, *supra* note 6, at 186 & n.108.

47. Bacon, *supra* note 45, at 604.

48. Alex Tallchief Skibine, *Gaming on Indian Reservations: Defining the Trustee's Duty in the Wake of Seminole Tribe v. Florida*, 29 ARIZ. ST. L.J. 120, 162 (1997).

49. CANBY, *supra* note 12, at 312.

50. Request for Comments on Establishing Departmental Procedures To Authorize Class III Gaming on Indian Lands When a State Raises an Eleventh Amendment Defense to Suit Under the Indian Gaming Regulatory Act, 61 Fed. Reg. 21394 (1996).

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

52. *Id.* at 3289.

53. *See* discussion in part III(B), *infra*.

dures in the absence of a valid tribal-state compact if five conditions are met: (1) the tribe has requested the state to enter negotiations for a Class III gaming compact, (2) The state and the tribe failed to negotiate a compact within 180 days, (3) the Indian tribe has brought suit against the state in federal court alleging that the state failed to negotiate or failed to negotiate in good faith, (4) the state raised its Eleventh Amendment defense, and (5) the district court dismissed the action because of a lack of jurisdiction due to the state's sovereign immunity.[54]

If these conditions are met, the tribe may submit a proposal to the Secretary that contains, among other things, a description of the planned gaming enterprise and a set of proposed procedures to govern all Class III gaming within the operation. After the Secretary receives the tribe's proposal and determines that the tribe is eligible under the five conditions listed above, the governor and attorney general of the state will have sixty days to comment on whether the state agrees with the tribe's proposal, whether the state believes it negotiated in good faith with the tribe, and whether the tribe's proposed gaming activities are permitted in the state for any purpose by any person, organization, or entity. In addition, the state is allowed to submit an alternative proposal to the tribe's proposed Class III gaming procedures. If the state offers an alternative proposal, the tribe will be given 60 days to offer any objections to the state proposal. If the tribe has no objections, the Secretary may choose to approve or disapprove the state's proposed regulations. If the tribe does have objections to the state's alternative proposal, then the Secretary would appoint a mediator who would select the proposal that best comports with the IGRA and applicable federal law. Upon receiving the mediator's decision, the Secretary would have the power to either accept the mediator's decision or reject it and prescribe appropriate procedures on his own.[55]

In the event that a state does not submit an alternative to the tribe's proposed regulations, the Secretary would have the power to determine, among other things, whether the contemplated Class III gaming activities are permitted in the state for any purposes by any person, whether the proposal is consistent with relevant state law, and whether the state did in fact negotiate in good faith. After making these determinations, the Secretary would then be able to approve or disapprove the tribe's proposed regulations, or call an informal conference between the tribe and the state. Once the Secretary's approval of the proposed regulations is printed in the Federal Register, the tribe would be able to engage in Class III gaming, despite the absence of a valid tribal-state compact.[56]

B. The Secretary's Proposed Regulations Exceed His Lawful Authority

1. The Case Law

Judicial opinions addressing the Secretary of the Interior's authority to issue regulations allowing Class III gaming in the absence of a tribal-state compact are quite rare. In support of his authority to issue these regulations, the Secretary cites the circuit court opinion in *Seminole Tribe v. Florida*.[57] Without analysis or extensive comment, the Eleventh Circuit's opinion in that case briefly endorses the concept of a tribal appeal to the Secretary of the Interior, stating, "[i]f the state pleads an Eleventh

54. Class III Gaming Procedures, 63 Fed. Reg. at 3294-95.
55. *See id.* at 3295-96.
56. *See id.*
57. *See id.* at 3290.

Amendment defense, the suit is dismissed, and the tribe, pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii), then may notify the Secretary of the Interior of the tribe's failure to negotiate a compact with the state. The Secretary then may prescribe regulations governing Class III gaming on the tribe's lands."[58] In considering the *Seminole* case on appeal, the Supreme Court declined to rule on this part of the Eleventh Circuit's opinion, neither endorsing nor denouncing the concept of Secretarial rule making in the absence of a tribal-state compact.[59] According to one prominent jurist, "[i]t is not clear whether the Supreme Court would agree that these substitute procedures are authorized by the [IGRA] Act."[60] The only other Circuit to speak on the issue has taken a contrary view to that of the Eleventh Circuit. In *Spokane Tribe of Indians v. Washington*, the Ninth Circuit sharply and systematically criticized the Eleventh Circuit's endorsement of Secretarial rule-making:

> The Eleventh Circuit was concerned by the regulatory void that it might leave by invalidating the IGRA's provisions for federal judicial enforcement. . . . The Eleventh Circuit reasoned that a void was not necessary because the provisions of the statute authorizing the Secretary of the Interior to impose regulations would come into effect once a state asserted immunity from suit. When that occurred the Secretary of the Interior would, in the Eleventh Circuit's view, remain authorized to impose regulations for Class III gaming. In our view, however, such a result would pervert the congressional plan. This is because the Secretary of the Interior under the statute is to act only as a matter of last resort, 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. The Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation.[61]

Despite the Ninth Circuit's pointed criticism of the idea that the Secretary might prescribe rules for Class III gaming in the absence of a tribal-state compact, the court seemed to hedge a little in the wake of the Supreme Court's *Seminole* ruling. In *United States v. Spokane Tribe of Indians*, the government sought an injunction prohibiting the tribe from engaging in Class III gaming in the absence of a tribal-state compact.[62] Noting that the Supreme Court's *Seminole* ruling left the Spokane Tribe with no apparent legal remedy when negotiations with the State of Washington broke down, the Ninth Circuit held that an injunction blocking the tribe from engaging in Class III gaming without a valid tribal-state compact would not be proper under the circumstances.[63] Commenting on its opposition to Secretarial rule-making in the absence of a tribal-state compact, the court admitted that, "the Eleventh Circuit's suggestion is a lot closer to Congress' intent than mechanically enforcing the IGRA against tribes even

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58. Seminole Tribe v. Florida, 11 F.3d 1016, 1029 (11th Cir. 1994) (*dictum*), *aff'd on other grounds*, 517 U.S. 44 (1996).

59. Although the Court noted the Eleventh Circuit's solution, it specifically declined to address the question of whether Secretarial rule-making would be proper in the absence of a tribal-state compact. *See* Seminole Tribe v. Florida, 517 U.S. 44, 53 n.4, 76 n.18 (1996). In his dissent, Justice Stevens appeared to endorse the solution offered by the Eleventh Circuit. *See Seminole*, 517 U.S. at 99 (Stevens, J., dissenting).

60. CANBY, *supra* note 12, at 310.

61. Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994) (citations omitted).

62. United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998).

63. *Id.* at 1301.

when states refuse to negotiate."[64] Mechanical enforcement of the IGRA's compacting requirement in the absence of any tribal remedy would indeed be inequitable. As the next two sections point out, however, the Ninth Circuit's original criticism of secretarial rule-making remains logically sound and legally compelling.

2. The Statutes

Assuming that the rest of the IGRA survives the *Seminole* court's striking of federal jurisdiction over tribal-state litigation,[65] the text of the statute itself may present serious problems to the Secretary of the Interior's proposed regulations. In supporting his assertion that he is authorized to issue Class III gaming regulations in the absence of a valid tribal-state compact, the Secretary of the Interior argues that section 2710(d)(7)(B)(vii) of the IGRA grants him the appropriate authority.[66] This section of the IGRA, however, contemplates secretarial rule-making under circumstances that are very different from those envisioned in the proposed regulations. Under the IGRA, secretarial rule-making is used only as a last resort in the event that adjudication and mediation fail to produce a tribal-state compact.

Specifically, the IGRA authorizes the Secretary to create Class III gaming procedures only after a *judicial* finding of bad faith on the part of the state[67] *and* a selection from among proposed regulations by a *court appointed* mediator.[68] The Secretary's proposed rules, by contrast, allow for secretarial rule-making without any findings of fact by a court and without any consideration of the issues by a court-appointed mediator. Under the proposed rules, in the event that a state offers alternative Class III gaming regulations to those sought by the tribe, the Secretary would be authorized to prescribe regulations on his own after a mediator appointed by the Secretary himself has considered the issues.[69] Should the state choose not to submit an al-

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64. *Id.* at 1302.

65. There has been some debate over whether the portion of the IGRA stricken by the Court is 'severable' from the rest of the statute. Although the IGRA itself contains a severability clause, 25 U.S.C.A. § 2721 (West Supp. 1998), some scholars have questioned whether and to what extent the rest of the statute has survived the *Seminole* decision. *See, e.g.*, Skibine, *supra* note 48, at 132-42. The Secretary's proposed rules, however, proceed on the implicit assumption that the IGRA is still in effect, and are an attempt to end the stalemate that would occur if a tribe sued a state under the statute and the state asserted its Eleventh Amendment defense. Class III Gaming Procedures, 63 Fed. Reg. at 3290. In hearings held shortly after the *Seminole* decision, Associate Deputy Attorney General Seth Waxman testified that, "our view is quite emphatically that the Supreme Court's decision in *Seminole* does not negate or eliminate most of IGRA, or, indeed, any of IGRA." *Oversight Hearing on the Impact of the U.S. Supreme Court's Recent Decision in Seminole Tribe of Florida v. State of Florida*, 104th Cong. 7 (1996) (statement of Seth Waxman, Associate Deputy Attorney General). Should the rest of the IGRA be found to not survive the *Seminole* decision, then regulation of Indian gaming would presumably return to the common law under *Cabazon Band.*

66. Class III Gaming Procedures, 63 Fed. Reg. 3289, 3290 (1998) (to be codified at 25 C.F.R. pt. 291) (proposed Jan. 22, 1998). Section 2710(d)(7)(B)(vii) of the IGRA reads, "If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures-

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which Class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii) (1994).

67. 25 U.S.C. § 2710(d)(7)(B)(iii).

68. *See id.*, § 2710(d)(7)(B)(iv).

69. Class III Gaming Procedures, 63 Fed. Reg. at 3296.

ternative proposal, the proposed rules would authorize the Secretary to create Class III gaming regulations after the Secretary himself has considered the issue of good faith on the part of the state.[70]

The Secretary supports this innovative adaptation of the powers given him by the IGRA by stating, "[w]hen Congress has not 'directly spoken to the precise question at issue,' courts 'must sustain the Secretary's approach so long as it is based on a reasonable construction of the statute.'"[71] The Secretary's construction of the IGRA appears anything but reasonable, however, when one reads the statute as a whole from beginning to end. Reading the statute makes it clear that the Secretary may only prescribe Class III gaming regulations on his own *after* a judicial finding of bad faith on the part of the state *and after* a selection from among alternative proposals by a court-appointed mediator. The Ninth Circuit has specifically noted that the limited rule-making authority granted to the Secretary by the IGRA should be used only under the conditions set out by the statute.[72] It is a well-known maxim of statutory construction that statutes are to be read and construed as a whole.[73] Read in its entirety, the IGRA does not grant the Secretary of the Interior the authority to promulgate Class III gaming procedures under the circumstances contemplated in his proposed rules.

In addition to the IGRA itself, the Secretary cites two additional parts of the U.S. Code, 25 U.S.C. §§ 2 and 9,[74] to support his assertion of authority to issue Class III gaming regulations in the absence of a tribal-state compact.[75] These sections are generally considered to grant the Secretary wide discretion in his management of Indian affairs,[76] and at least one expert has commented that these sections lend greater support to the Secretary's position than does the IGRA itself.[77]

Despite the Secretary's broad authority in the area of Indian affairs, however, he may not issue a regulation in contravention of federal law. In *Chevron, U.S.A. v. National Resources Defense Council*, the Supreme Court held, "[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[78] Under the standard established in *Chevron*, it appears that the Secretary's proposed regulations are not within his authority. According to the text of the IGRA, "[c]lass III gaming activities shall be lawful on Indian lands only if such activities are — . . . (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ."[79] Given that the Secretary's proposed rules would give him the authority to pro-

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70. *Id.*

71. *Id.* at 3290 (quoting from Auer v. Robbins, 117 S.Ct. 905, 909 (1997)).

72. Spokane Tribe of Indians v. Washington, 28 F.3d 991, 997 (9th Cir. 1994). See discussion in part III(B)(1) of this note.

73. *See, e.g.*, United States v. Morton, 467 U.S. 822, 828 (1984).

74. 25 U.S.C. § 2 (1994) reads as follows: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 9 (1994) reads as follows: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."

75. Class III Gaming Procedures, 63 Fed. Reg. at 3290.

76. *See* Skibine, *supra* note 48, at 142.

77. *Id.* at 150.

78. Chevron, U.S.A. v. National Resources Defense Council, 467 U.S. 837, 842-43 (1984); *accord,* Dole v. United Steelworkers, 494 U.S. 26, 35 (1990).

79. 25 U.S.C. § 2710(d)(1).

mulgate procedures and allow Class III gaming to go forward without a tribal-state compact, they are in direct conflict with the plain meaning of the IGRA. The Supreme Court has stated that, "where . . . a statute's language is plain, the sole function of the courts is to enforce it according to its terms."[80] In addition, the Court has ruled, "[i]n construing a statute, we are obliged to give effect, if possible, to every word Congress used."[81] The plain words of the IGRA make it clear that Class III gaming may only take place under a valid tribal-state compact. Despite the Secretary of the Interior's broad authority in the area of Indian affairs, the clear command of the statute is unavoidable.

The Congressional history of the IGRA lends solid support to the statute's command that no Class III gaming be conducted in the absence of a tribal-state compact. In its report to the full Senate on the IGRA, the Senate Indian Affairs Committee made its intentions perfectly explicit: "S. 555 [the IGRA] does not contemplate and does not provide for the conduct of Class III gaming activities on Indian lands in the absence of a tribal-state compact."[82] After the Supreme Court's *Seminole* ruling, Congress continued to assert its position that no Class III gaming be conducted without a tribal-state compact in place. In an amendment to the Department of the Interior Appropriations Act for fiscal 1998, Congress commanded:

> [T]he Secretary may not expend any funds made available under this Act to review or approve any Tribal-State compact for Class III gaming entered into on or after the day of enactment of this Act. This provision shall not apply to any Tribal-State compact which has been approved by a state in accordance with State law and the Indian gaming regulatory act.[83]

In addition, Congress stated, "[i]t is the sense of the Senate that the United States Department of Justice should vigorously enforce the provisions of the Indian Gaming Regulatory Act requiring an approved Tribal-State gaming compact prior to the initiation of Class III gaming on Indian lands."[84] Although the first of these two provisions is curiously worded, taken together they plainly show that Congress meant exactly what it said when it passed the IGRA: no Class III gaming in the absence of a tribal-state compact.

In the time since the Secretary has proposed his regulations, there have been additional moves in Congress to re-assert the position originally taken in the IGRA. Shortly after the Secretary's proposed rules where published, Senator Richard Bryan introduced a bill to prohibit directly the Secretary from promulgating his proposed regulations.[85] Calling the Secretary's proposed rules a "clear violation of the intent of Congress,"[86] Senator Bryan opined that the Secretary was "overstepping his authority and . . . making a grave mistake."[87] A companion bill was also introduced in the House of Representatives by Congressman Jim Gibbons.[88] Although the measure

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80. United States v. Ron Pair Enters. 489 U.S. 235, 241 (1989).
81. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979).
82. S. REP. NO. 100-446, *supra* note 37, at 6, *reprinted* at 3076.
83. Department of the Interior Appropriations Act, Pub. L. No. 105-83, 111 Stat. 1543, 1569 (1997).
84. *Id.* 111 Stat. at 1570.
85. S. 1572, 105th Cong. (1998)
86. 144 CONG. REC. S50 (daily ed. Jan. 27, 1998) (statement of Sen. Bryan).
87. *Id.* at S49.
88. H.R. 3094, 105th Cong. (1998).

eventually became an amendment[89] to the 1998 Emergency Supplemental Appropriations Act,[90] it was not included in the final version.[91] These latest legislative maneuvers do not bode well for the future of the Secretary's proposed rules, and they provide yet another sign of Congress' antipathy towards the possibility of Class III gaming on Indian lands without a tribal-state compact.

In support of his proposed regulations, the Secretary of the Interior explained that enforcement of the tribal-state compacting requirement for Class III gaming, in combination with the lack of *any* remedy for a tribe should a state assert its Eleventh Amendment immunity from suit, would award a state, "a veto over all Class III gaming within its borders."[92] The Secretary then asserted, quite truthfully, that "[C]ongress did not contemplate or authorize such a state veto in the IGRA."[93] As mentioned earlier, the inequity of mechanically enforcing the IGRA's compacting requirement in the absence of a judicial remedy for the tribes has been noted by the Ninth Circuit.[94] The regulations proposed by the Secretary, however, would vest in the hands of one person both the judicial power to make a finding of bad faith on the part of a state and the legislative power to prescribe Class III gaming regulations in the absence of a tribal-state compact.

Although Congress did not contemplate a state veto over Class III gaming, it also did not intend to vest these powers in the hands of the Secretary of the Interior. The Secretary's proposed regulations, if officially promulgated, would stand in clear violation of the plain language of the IGRA and the abundantly expressed intent of Congress.

C. The Secretary's Proposed Regulations Would Skew the Balance Between Tribal and State Interests Created by the IGRA.

The Secretary's proposed rules, if officially enacted and used to approve Class III gaming over a state's protests, would surely breed litigation that challenges their validity. Even if the proposed rules are eventually upheld in the courts, however, they pose serious problems from a policy perspective. In order to understand the policy implications of the Secretary's proposed rules, it is first necessary to briefly discuss two related issues that have generated a fair amount of controversy under the IGRA. Of the many issues litigated under the IGRA, two of the most contentious have been the proper "scope of gaming" and the proper nature of "good faith."

One of the most hotly debated areas of Indian gaming law is the "scope of gaming" issue. This issue arises from the requirement in the IGRA that a tribe can only engage in Class III gaming if the state within which it is located permits, "such gaming for any purpose by any person, organization, or entity."[95] This provision, apparently inspired by the Supreme Court's holding in *Cabazon*, has been subject to wildly varying interpretations. Tribes have argued that the provision allows them to engage in a wide range of gambling activities not specifically prohibited in all instances by the

89. S.Amdt. 2133, 105th Cong. (1998).
90. H.R. 3579 § 409, 105th Cong. (1998).
91. *See* Pub. L. No. 105-174, 112 Stat. 58 (1998).
92. Class III Gaming Procedures, 63 Fed. Reg. at 3291.
93. *Id.*
94. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1302 (9th Cir. 1998).
95. 25 U.S.C. § 2710(d)(1)(B) (1994).

state, while the National Governor's Association has taken the position that tribal gaming should be subject to all of the restrictions that apply to all other gambling within the state.[96]

Congress has not yet clarified the proper scope of Class III gaming under the IGRA, and the subject has been a matter of interpretation for the courts. The Second Circuit, for example, has held that if a state permits some forms of Class III gaming, then it must negotiate with a tribe for a Class III gaming compact that is not necessarily limited to those specific forms of Class III gaming that are permitted under the state's laws.[97] The Eighth and Ninth Circuits, on the other hand, have held that a state has no duty to negotiate with a tribe over those particular types of Class III gaming that are not permitted in any way by state law.[98]

Closely related to the scope of gaming issue is the question of what constitutes "good faith" under the IGRA. The IGRA itself specifies that a court may consider the public interest, public safety, criminality, financial integrity, and the adverse economic impact on existing gaming activity in determining whether a state has negotiated in good faith.[99] In addition, any demand by the state to tax the Indian tribe or its lands is to be considered evidence of bad faith.[100] In practice, the meaning of good faith under the Act can become closely tied to the court's determination of the proper "scope of gaming." In the Second Circuit's *Mashantucket* decision, for example, the court ruled that because the State of Connecticut refused to negotiate with the tribe on some types of gaming that the court later found to be within the proper scope of gaming, the state had in fact negotiated in bad faith.[101]

Whatever their proper contours, the issues of good faith and scope of gaming presented a crucial legal and fact-finding task for the courts under the IGRA. Under the Secretary of the Interior's proposed rules, in the event that a state asserted its Eleventh Amendment immunity to suit in federal court by a tribe, the Secretary himself would assume the judicial tasks of determining good faith and defining the proper scope of Class III gaming[102]. Section 291.8 of the proposed rules provides for secretarial review of a tribe's Class III gaming proposal. This section gives the Secretary the power to determine, among other things, "whether contemplated gaming activities are permitted in the State for any purposes by any person, organization, or entity,"[103] "whether the proposal is consistent with relevant provisions of the laws of the State,"[104] and "whether the state has negotiated in good faith."[105] After making

96. *See* Levin, *supra* note 19, at 128.

97. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1030-31 (2d Cir. 1990).

98. Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 279 (8th Cir. 1993); Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1258 (9th Cir. 1994).

99. 25 U.S.C. § 2710(d)(7)(A)(iii)(I).

100. *Id.* at § 2710(d)(7)(A)(iii)(II).

101. *Mashantucket*, 913 F.2d at 1032-33. At least one writer has embraced this objective approach to the good faith issue, arguing that a state's erroneous interpretation of the IGRA should not save the state from a judicial finding that the state acted in bad faith when it refused to negotiate on those forms of Class III gaming that it mistakenly believed to be outside of the legal scope of gaming. Nancy McKay, Comment, *The Meaning of Good Faith Under The Indian Gaming Regulatory Act*, 27 GONZAGA L. REV. 471, 485 (1991/1992).

102. Although it is well recognized that Congress may delegate adjudicatory functions to administrative agencies, *see* 1 JACOB C. STEIN ET AL., ADMINISTRATIVE LAW § 3.03[6], at 3-113 (1998), the IGRA makes no such delegation to the Secretary of the Interior and instead provides that a federal court make any finding of bad faith on the part of a state.

103. Class III Gaming Procedures, 63 Fed. Reg.3289, 3295 (1998).

104. *Id.* at 3296.

these determinations, the Secretary is empowered to approve the tribe's proposal and allow Class III gaming to go forward, despite any objection by the state. Senator Richard Bryan, when introducing his bill to specifically block these regulations, attacked this concentration of powers in the hands of the Secretary, saying, "the Department [of the Interior] asserts the States must be acting in bad faith for the Secretary to strip the states of their rights. Of course, the Secretary is judge and jury over whether the States, in fact, are negotiating in bad faith."[106] In response to such concerns, a supporter of the prospect of secretarial rule making has asserted that, "[n]othing indicates that the Secretary could not be trusted . . . to make a fair determination that a state has not negotiated in good faith."[107]

The validity of this assertion is called into serious doubt, however, when one examines the nature of the relationship between the federal government and the Indian tribes. The federal government, and the executive branch in particular, has traditionally had a special relationship with the Indian tribes. Known generally as the 'federal trust relationship,' the bond between the federal government and the tribes is comprised of a mixture of moral obligations and legal duties that is comparable to the duties owed by a trustee to a beneficiary.[108]

The federal trust relationship with the tribes has its foundations in Chief Justice Marshall's *Cherokee Nation v. Georgia* opinion.[109] In defining the relationship between the tribes and the federal government, Marshall wrote, "[t]heir relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and power; appeal to it for relief to their wants."[110] A significant aspect of the trust duty owed by the federal government to the tribes has been to protect tribal interests from the potentially adverse interests of the several states. This aspect of the federal trust duty was explained in *United States v. Kagama*, where the Court wrote, "These Indian tribes are the wards of the nation. . . . They owe no allegiance to the states, and receive from them no protection. . . . [L]argely due to the course of dealing of the federal government with them, and the treaties in which it has been pronounced, there arises the duty of protection."[111] In general, the essence of the federal trust relationship can be summed up as a duty, on the part of the federal government, to serve the best interests of the tribes and their members.[112]

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105. *Id.*

106. 144 CONG. REC. S50 (daily ed. Jan. 27, 1998) (statement of Sen. Bryan). On the specific issue of scope of gaming, the Secretary has chosen, in the preface to his proposed rules, to announce his own interpretation of the issue. Setting aside the Ninth Circuit's holding in the *Rumsey* decision, the Secretary adopted a rationale proposed by the United States' amicus brief in that case. Under the view endorsed by the Secretary, "if a state prohibits an entire class of traditional games, it need not negotiate over particular games in that category." 63 Fed. Reg. at 3293. This rationale, which gives a more diminished effect to state laws than the holding of the court in *Rumsey*, has been attacked by the Western Governor's Association as a "clearly skewed legal interpretation." Letter from Tom Knowles, Chairman, The Western Governors Association, to William Clinton, President of the United States (Dec. 5, 1997) *reprinted in* 144 Cong. Rec. S49 (daily ed. Jan 27, 1998).

107. Skibine, *supra* note 48, at 142.

108. *See generally,* CANBY, *supra* note 12, at 33-34.

109. Cherokee Nation v. Georgia, 30 U.S. 1 (1831).

110. *Id.* at 17.

111. United States v. Kagama, 118 U.S. 375, 383-84 (1886).

112. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm For Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109, 114.

Because responsibility for management of all Indian affairs rests with the Secretary of the Interior,[113] the Secretary is the cabinet-level executive officer that is ultimately responsible for fulfilling the federal government's duty of trust and protection to the tribes. Under the Secretary's proposed regulations, however, he would be called upon in certain circumstances to fulfill the role of impartial judge in the context of a tribal-state dispute over Class III gaming. It is easy to imagine a state that, for reasons ranging from fear of organized crime to fear of competition with state lotteries or state-regulated private casinos, would wish to block certain types of Class III gaming on Indian lands within its borders. In addition, this state could be engaged in a dispute with an Indian tribe whose best interests, in terms of economic development and employment for tribal members, call for an enterprise featuring a full range of Class III gaming activities. Under these circumstances, it is difficult to see how the Secretary could fulfill his trust duty to act in the best interests of the tribe and, at the same time, fulfilling his duties under the proposed regulations to both accurately interpret the proper scope of gaming and serve as a neutral arbiter of good faith on the part of the state.

Logically, it appears difficult, if not impossible, for the Secretary to faithfully pursue the tribe's best interests while fairly adjudicating the conflicting interests of the state. The judicial remedy set out in the IGRA, which calls for a neutral federal court to adjudicate tribal-state disputes and consider the question of good faith, was intended by Congress to "balanc[e] the interests of tribes to engage in gaming against the interests of States in regulating such gaming."[114] By placing the adjudication of tribal-state disputes into the hands of an official with a moral and legal duty to pursue the best interests of the tribes, the Secretary's proposed rules do both parties a disservice and badly skew the balance of interests intended by Congress when it wrote the IGRA.

IV. A Possible Alternative: Federal Duty to Litigate on Behalf of the Indian Tribes — *Chemehuevi Indian Tribe v. Wilson*

Given that states have a valid Eleventh Amendment defense to any suit brought against them by an Indian tribe in federal court, what type of remedy for the tribes would protect tribal interests while continuing to preserve the careful balancing interests achieved in the original IGRA?

In late 1997, the U.S. District Court for the Northern District of California endorsed a solution in *Chemehuevi Indian Tribe v. Wilson*[115] that preserves the IGRA's intention that a federal judge be the arbiter of good faith and avoids the drawbacks of the Secretary of the Interior's proposed rules. In *Chemehuevi*, there were seven plaintiff Indian tribes that had sought to negotiate with California's Governor Wilson in order to enter into Class III gaming compacts. Governor Wilson refused to negotiate, however, until he concluded a separate Class III compact with a tribe not involved in the case. In addition, the Governor insisted that the tribes cease all Class III gaming activities currently conducted on their lands before negotiations could move forward. The tribes, believing that the Governor was not acting in good faith, and noting that the Supreme Court's *Seminole* decision left them with no direct cause of action against the state of California, requested the U.S. Attorney for the Northern District of Califor-

113. 25 U.S.C. § 2 (1994).
114. S. REP. NO. 100-446, *supra* note 37, at 14, *reprinted* at 3084.
115. Chemehuevi Indian Tribe v. Wilson, 987 F.Supp. 804 (N.D. Ca. 1997).

nia and the U.S. Department of Justice to represent them in a suit to compel Governor Wilson to begin good faith negotiations over Class III gaming. When the U.S. Attorney and the Department of Justice refused to take action of behalf of the tribes, the tribes filed suit seeking declaratory relief against the United States.[116]

Relying on the intent behind the IGRA and the nature of the federal government's fiduciary duty to the tribes, Magistrate Judge Zimmerman 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 Class III gaming compact.[117] In analyzing the tribes' claim, the court first noted that agencies such as the Department of Justice generally have complete discretion over whether they will prosecute a claim or enforce a statute.[118] Seeking to avoid the general rule, the tribes pointed to 25 U.S.C. § 175. The section, in its entirety, reads: "In all States and Territories where there are reservations or allotted Indians the United States attorney [United States District Attorney] shall represent them in all suits at law and equity."[119] The only case specifically analyzing the United States Attorney's duty to sue on behalf of the tribes under section 175 is *Shoshone-Bannock Tribes v. Reno.*[120]

In *Shoshone-Bannock,* the court held that neither section 175 nor the federal government's general fiduciary relationship with the tribes could limit the Attorney General's discretion in refusing to assert the tribes' claims to water rights in Idaho's Snake River basin.[121] As the *Chemehuevi* court is quick to point out,[122] however, two of the judges in *Shoshone-Bannock* concurred specially in order to emphasize that the holding of the court in that case was confined to the facts of the case as applied to the substantive law (the Fort Bridger Treaty of 1868) on which the tribes' claims was based.[123] As concurring Judges Rogers and Wald point out, the *Shoshone-Bannock* court, "ha[d] no occasion to decide what the scope of the government's duties would be in a more compelling circumstance."[124] In declaring that the United States had a duty to litigate on behalf of the tribes to enforce their rights under the IGRA, the *Chemehuevi* court argued that the situation of the tribes presented just such a "more compelling circumstance."[125] In the words of the court, "[w]hatever the full extent of the fiduciary relationship, it certainly should include a duty to represent the plaintiffs in a situation where, absent representation, the Tribes will have no legal remedy with which to bring the state to the bargaining table and obtain the benefits of IGRA as Congress intended."[126]

In addition to the government's fiduciary relationship with the tribes, the *Chemehuevi* court drew upon the IGRA itself in order to support its holding. Noting

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116. *See id.* at 807-806. The Eleventh Amendment would *not* prohibit a federal suit by the United States against one of the several states. Arizona v. California, 460 U.S. 605, 614 (1983).

117. *Id.* at 809.

118. *Id.* at 806. *See, e.g.,* Heckler v. Chaney, 470 U.S. 821, 831 (1985); United States v. Batchelder, 442 U.S. 114, 124 (1979).

119. 25 U.S.C. § 175 (1994).

120. Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995).

121. *Id.* at 1482.

122. *Chemehuevi,* 987 F.Supp. at 808.

123. Shoshone-Bannock, 56 F.3d at 1484.

124. *Id.*

125. Chemehuevi, 987 F.Supp. at 808.

126. *Id.* at 809.

the Ninth Circuit's opposition to the concept of Secretarial rule making in the absence of a tribal-state compact[127] and Congress' intent in creating a federal judicial remedy for the tribes,[128] the court extolled the virtues of a government duty to litigate in federal court on behalf of the tribes:

> A duty on behalf of the United States to sue the State to bring it to the bargaining table can certainly be implied from IGRA, since it appears that this is the only legal remedy available to the plaintiff Tribes to seek the benefits Congress intended them to have and to preserve the balance Congress carefully struck between the interests of the states and the tribes.[129]

Whether the holding of the *Chemehuevi* court will be endorsed by higher courts remains to be seen. In *United States v. Spokane Tribe of Indians*, the Ninth Circuit noted the holding in *Chemehuevi*, but declined to address the question of a government duty to litigate on behalf of the tribes.[130]

Overall, the concept endorsed in *Chemehuevi* appears to be the most attractive solution to the predicament facing the tribes in the wake of the Supreme Court's *Seminole* holding. A duty on the part of the U.S. Attorney to litigate for the tribes would protect the tribes' right to negotiate under the IGRA while preventing the troublesome concentration of powers contemplated in the Secretary of the Interior's proposed rules. Also, a government duty to litigate would most closely track the procedure set out in the original IGRA. In the event that a tribe believes that a state has not bargained in good faith, it can, without violating the Eleventh Amendment, compel a state to litigate the matter before neutral and detached federal court.

V. Conclusion

In the midst of the legal battles raging over Indian gaming, it is important to keep an eye on the benefits that have accrued to those tribes and states that have entered into cooperative gaming compacts under the IGRA. There are currently over 150 tribal-state compacts in place,[131] and the Indian gaming business has bloomed into a $6 billion industry.[132] Gaming enterprises have benefitted the tribes in the form of increased employment, decreased dependence of tribal members on welfare payments, and improvements in tribal housing, education, and health care systems.[133] In addition, the states have reaped economic benefits from Indian gaming. In a 1997 study on the impact of Indian gaming in New Mexico, for example, the author found that, "the overall employment and fiscal impact on surrounding communities can be fiscally positive."[134] In Wisconsin, where Class III Indian gaming has been conducted since the passage of the IGRA, average per capita sales in service related businesses have grown 50 percent since 1988.[135] Realizing the possible economic benefits of Indian

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127. *Id.* at n.1.
128. *Id.* at n.4.
129. *Id.* at 808.
130. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1297 n.5 (9th Cir. 1998).
131. CANBY, *supra* note 49, at 312.
132. *Spreading Their Bets*, NEWSWEEK, Aug. 24, 1998, at 6.
133. *See, e.g.*, Tsosie, *supra* note 1, at 95; Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 231 (1997).
134. PATRICK ALLISON, REPLACING THE BUFFALO: THE EFFECTS OF INDIAN GAMING IN NEW MEXICO 16 (1997).
135. *Id.*

gaming, some states have taken affirmative measures designed to end tribal-state standoffs over Class III gaming compacts. Arizona, for example, passed an initiative requiring the governor to enter into a "standard form" Class III gaming compact with any tribe that requests it.[136]

In the absence of such innovative state law measures, however, conflict between the states and the tribes over Class III gaming is bound to continue, especially in those states that perceive the growth of Indian gaming to be a threat to public policy. With the economic future of many Indian tribes and the fate of a $6 billion industry hanging in the balance, the need for an evenhanded solution to the quandary created by the Supreme Court's *Seminole* ruling is particularly pressing. The Secretary of the Interior's proposed regulations, however, would only make matters worse. In addition to violating the text of the IGRA and the clearly expressed intent of Congress, the Secretary's proposed rules would concentrate an inordinate amount of power in the hands of the Secretary and badly skew the balancing of interests achieved in the IGRA. A much better solution is the concept endorsed in the *Chemehuevi* decision—a government duty to litigate the issue of good faith on behalf of the tribes. This solution, which is consistent with the federal government's fiduciary duty to the Indian tribes, would best mirror the process intended by Congress when it passed the IGRA. Under a government duty to litigate, the tribes would have an effective means of enforcing their right to bargain for Class III gaming compacts and the states would be ensured a neutral and detached forum for the arbitration of good faith.

*Joe Laxague**

136. ARIZ. REV. STAT. ANN. § 5-601.01 (West Supp. 1997). The measure was upheld by the Arizona Supreme Court in Salt River Pima-Maricopa Indian Community v. Hull, 945 P.2d 818 (Ariz. 1997).

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