Approved: May 23, 1996.
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 2:30 p.m. on April 29, 1996 in Room 519-S of the Capitol.

All members were present except:
Representative Britt Nichols - Absent

Committee staff present: Mary Galligan, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Natalie Haag, Executive Director Kansas State Gaming Agency
John Campbell, Attorney General's Office

Hearings on **HCR 5057 & 5058** - Tribal Gaming Compacts, were open.

Representative Mike O'Neal gave a history of how the gaming compacts came to be. He explained that the Finney Administration negotiated and signed compacts with the Native American's. The legislature felt that they should have had input when it came to the compacts and the Supreme Court recognized the authority of the legislature to play a role by having input on the compacts and signing off on them. Therefore, the compacts were renegotiated. The legislature created the Joint Committee on Gaming Compacts, because there was a great deal of controversy regarding the interpretation of the Indian Gaming Regulatory Act (IGRA). There were provisions that suggest that states had some discretion in the types of games that the could be offered: Class I, Class II, & Class III (casino type games) and that the states only needed to offer those class of games currently offered by state law. This issue became a key point of debate because a large number of the legislators believed that the gaming compacts should not include Class III gaming since the state prohibited them. The argument on the other side was that if state didn't negotiate the type of games that they wanted, then the state would end up in federal court because it would violate IGRA's good faith agreement and then the state would have to offer more games than what they wanted.

At this time there were several federal cases on appeal that had considered similar issues and some legislators suggested that the compacts be put on hold until those cases were ruled on and there would be a clear understanding on the interpretation of IGRA. However, the legislature moved ahead to get the compacts approved. The Joint Committee on Gaming Compacts included in its guidelines and in the compacts language, so that if the courts found that the state did not need to offer games that they had offered, there would be a way to renegotiate them.

The legislature requested that the Attorney General bring suit against Governor Finney on the issue of whether the lottery amendment authorized casinos in the state. The Kansas Supreme Court held that "lottery" means any games, schemes, gifts or enterprises or similar items where a person agrees to give something of valuable consideration. They proceeded to say that while the state could authorize casinos, they haven't & casinos are still prohibited by state law.

During this same time several state courts ruled that their cases were dismissed because the state had not given its consent to sued under the Eleventh Amendment. The Florida district court has ruled that IGRA abrogated the Eleventh Amendment. On appeal the circuit overturned the district courts finding and found that the Eleventh Amendment immunity applied. (Attachment 1)

Representative O'Neal argues that since Kansas does not permit Class III gaming, under IGRA Kansas does not have to offer it to Indian tribes. The two resolutions are suggestions as how to address this issue. **HCR 5057** would allow the renegotiations of the compacts so that the Native Americans can't offer Class III game which are prohibited by law and **HCR 5058** would direct the Attorney General to seek to enjoin the operations of existing Tribal State Gaming Compacts between the four tribes and the state until the contracts are renegotiated.

Representative Grant was concerned about possible liability that the state might face if the contracts were renegotiated. Representative O'Neal stated that the HCR was not requesting that the state cancel the contracts but to have the Governor renegotiate the compacts. A Kansas Supreme Court case dealing with impairment of contracts has stating that one session of the legislature cannot bind a future legislature with a particular contract with a public or private entity.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Representative O'Neal explained that there were both pro's and con's to the HCR's. The pro's are that some provisions that do not appear to be optimally efficient, such as the assessment and reimbursement schedule could be clarified, the amendment process itself could be clarified in light of *Seminole*. The amendment process could get the state & tribes into court on a substantive issue regarding the "scope of games" allowable. The con's are that the tribes are in the process of establishing the parameters of a working relationship and the creation of an adversarial atmosphere at this time could complicate that process to the detriment of the state's ability to effectively carry out its role; simply requesting an amendment or renegotiation would not halt implementation of the existing compacts and could result in lengthy litigation; and in any negotiation to amend the compacts, the tribes may hold out for concessions by the state on issues the tribes find cumbersome or distasteful now that implementation is underway.

Representative Grant was concerned that with the opening dates for the Indian Casino's being close, they would lose money. Representative O'Neal thought that most of these places don't purchase the equipment rather they lease them from Las Vegas operators. Just like the tracks are on their own, the casino's are on their own.

Natalie Haag, Executive Director Kansas State Gaming Agency, stated that to date one tribe has spent $1.8 million in electronic games, which are set up and ready to operate and $6 million in the facility and payroll. The compact is clear that the body can amend the contract, however, while a compact is being renegotiated the casino can operate under the current contract. Therefore **HCR 5058** which request's the Attorney General to enjoin all actions, violates the contract. She stated that the legislature was not forced or under a court order to sign the compacts last year.

Chairman O'Neal responded that the passage of the compacts was not a voluntary act but was done on the advice of counsel, i.e., the Attorney General's office.

John Campbell, Attorney General's Office, explained that the issue was in litigation for three years. The committee was told that Ninth, Eight & Tenth circuits have ruled that the Eleventh amendment doesn't apply; i.e. tribes can sue you. Requesting amendments to the compacts is o.k. but getting an injunction over the tribes would be hard. He explained that it would take a concurrent resolution in order to renegotiate the compacts.

The committee recessed at 3:30 p.m. and reconvened at 5:15 p.m.

Chairman O'Neal announced his intent not to run **HCR 5058** calling for the Attorney General to seek to enjoin the operation of casinos under the compacts.

HCR 5057 - Tribal Gaming Compacts

Representative Snowbarger made a motion to amend the spelling, in line 30, of "waver" to "waiver" and to report **HCR 5057** favorably for passage, as amended. Representative Merritt seconded the motion. The motion carried.

The committee meeting adjourned at 5:30 p.m.

Seminole Tribe of Florida v. Florida
United States Supreme Court
No. 94-12
Cite 644 U.S. L.W. 4167 (March 27, 1996)

In September 1991, the Seminole Tribe of Florida filed suit in the United States District Court, Southern District of Florida, claiming that the State of Florida and Lawton Chiles, Florida's Governor (defendants), had violated § 2710(d) (3) of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, when they refused to negotiate with the Tribe regarding certain gaming activities that were to be included in a compact between the Tribe and the State. The Tribe filed suit under the judicial enforcement provision of IGRA, § 2710(d) (7) which provides United States district court with jurisdiction over tribal claims concerning a state's failure to enter into or to conduct good faith negotiations when forming Tribal-State compacts.

The defendants took issue with the judicial enforcement provision and filed a motion to dismiss for lack of subject matter jurisdiction. They claimed that the State was immune from suit in federal court under the Eleventh Amendment of the United States Constitution. The district court denied the motion and the defendants appealed. The Eleventh Circuit Court of Appeals (Eleventh Circuit) reversed the district court, finding that Congress did not have the power under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, to abrogate a State's Eleventh Amendment immunity from suit. The Eleventh Circuit therefore concluded that it lacked jurisdiction to hear the Tribe's claim. It also held that **Ex Parte Young**, 209 U.S. 123 (1908), "does not permit an Indian tribe to force good faith negotiations by suing the Governor of the State." The Eleventh Circuit remanded the case to the district court with orders to dismiss the case. The Tribe appealed to the United States Supreme Court (Court).

The issues before the Supreme Court were: (1) whether the Eleventh Amendment prevents Congress from abrogating the States' sovereign immunity, thereby authorizing Indian tribes to file suit against States in federal court to enforce negotiations pursuant to IGRA, which was enacted pursuant to the Indian Commerce Clause; and (2) whether the doctrine of **Ex parte Young** permits an Indian tribe to file suit against a State governor in federal court to enforce the good faith bargaining requirement under IGRA.

The Untied States Supreme Court (Court), in a five to four decision, affirmed the Eleventh Circuit decision. The Court stated that two questions must be answered to determine whether Congress has effectively abrogated the States' sovereign immunity under IGRA. The first question is "whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity?'" **Green v. Mansour**, 474 U.S. 64 68 (1985). The Court quickly concluded that Congress has provided, under §2710(d) (7) of IGRA, an 'unmistakably clear' statement of its intent to abrogate the State's sovereign immunity from suit.

The second, more complicated, question is "whether Congress has acted 'pursuant to a valid exercise of power?'" **Id.** The Court began its analysis by framing the scope of its inquiry: It must be "narrowly focused on one question: Was the Act in question [IGRA] passed pursuant to a constitutional provision granting Congress the power to abrogate?" The Court noted that Congress has had such abrogation power in only two other constitutional provisions: the Fourteenth Amendment (**See Fitzpatrick v. Bitzer**, 427 U.S. 445, 452-456 (1976) and the Interstate Commerce Clause. **See Pennsylvania v. Union Gas Co.**, 491 U.S 1 (1989). In **Union Gas**, the Court held that "the Interstate Commerce Clause, Art. I, § 8, cl. 3, granted Congress the power to abrogate state sovereign

immunity...."

While both parties used the Union Gas opinion to make their respective arguments, the Court decided to overrule Union Gas. The Court noted that the majority in the Union Gas opinion had reached a shared result, but had not reached a shared rationale for that result. Thus, since it was issued, the opinion "has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision." The Court concluded that the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Tribe may not sue the State of Florida in federal court to enforce the negotiation provisions of IGRA. The case was dismissed for lack of subject matter jurisdiction.

Regarding the second issue: should the Eleventh Amendment bar be lifted, as it was in Ex parte Young, thereby allowing the Tribe to sue the governor of the State for failure to enforce the Tribal-State compact negotiations under § 2710(d) (3) of IGRA, the Court found that the Ex parte Young doctrine does not apply in the instant case since the "situation presented here ... is sufficiently different from that giving rise to the traditional Ex parte Young action...." According to Ex parte Young, state officials may be sued in federal court for injunctive relief when violations of federal law are at issue. Since Congress created a remedial scheme for relief within IGRA, however, the Court reasoned that the Ex parte Young doctrine does not apply and state officials may not be brought before the federal court to enforce IGRA negotiations.

The Court also stated that it was not free to rewrite the statutory scheme and that this was the responsibility of Congress, not the federal courts. Thus, the Court held that the doctrine of Ex parte Young does not apply to IGRA and the suit is barred for lack of jurisdiction.

While the Tribe's two claims were dismissed by a majority of five, Justice Stevens dissented in a separate opinion, and Justice Souter also dissented, joined by Justices Ginsburg and Breyer.

Justice Stevens was troubled by the overruling of Union Gas, in which he had been part of the plurality decision. He said the opinion in the instant case has far-reaching implications that do not just prevent Congress from establishing an enforcement scheme under IGRA, but rather "prevents Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy."

Justice Souter in his dissent warned that this was the "first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right." He stated that the majority's use of the Eleventh Amendment as authority for its holding, was misplaced. He noted that he was not objecting to the Court's decision to reexamine Union Gas, since the decision had "produced no majority for a single rationale supporting congressional authority." Rather the Justice was dissenting because he was "convinced" that the majority was "fundamentally mistaken" in its decision.

NOTE: This summary was prepared by the **Native American Law Digest** (NALD). NALD subscribers will receive an in-depth summary of the case as well as the complete text. The NALD is a monthly publication which offers over 300 case summaries annually. For more information, contact The Falmouth Institute, 1-800-992-4489.

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April 3, 1996

From: Mary Galligan, Principal Analyst

Re: *Seminole v. Florida*

The issues addressed by the Supreme Court in *Seminole v. Florida* (644 U.S. L.W. 4167, March 27, 1996) were:

- whether the Eleventh Amendment of the *U.S. Constitution* prevents Congress from abrogating states' sovereign immunity, thereby authorizing Indian nations to file suit against states in federal court to enforce negotiations pursuant to the Indian Gaming Regulatory Act (IGRA); and

- whether the doctrine of *Ex parte Young*[1] permits an Indian nation to file suit against a state government in federal court to enforce negotiations under IGRA.

The Supreme Court in a 5-4 decision found that Congress clearly intended to abrogate state sovereign immunity from suit when it enacted IGRA. However, the Court concluded that the Congress did not have authority under the Indian Commerce Clause of the *Constitution* to implement that intent. The decision was based on the Court's reading of the Eleventh Amendment which prevents Congress from authorizing suits by private parties against unconsenting states. According to the Court, the only authority for such abrogation of states' immunity by Congress is the Fourteenth Amendment. The Court also decided that governors could not be sued for failure to enforce compact negotiations because Congress provided a remedial scheme in IGRA that is in many ways more limited than that available under *Ex parte Young*.

The Court did not venture into a discussion of remedies available to tribes in the absence of those in IGRA saying, ". . . we [are not] free to rewrite the statutory scheme in order to approximate what we think Congress might have wanted had it known that §2710(d)(7) was beyond its authority." Therefore, the court eliminated from IGRA "the elaborate remedial scheme designed to ensure the formation of a Tribal State compact" and left resolution of remedies available to Native American nations in states that refuse to enter into gaming compacts to Congress.

In response to your specific questions I provide the following:

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[1]That doctrine allows a suit against a state official to go forward, notwithstanding the Eleventh Amendment, when the suit seeks prospective injunctive relief in order to end a continuing violation of federal law.

Q1. Was Kansas not part of this Eleventh Amendment litigation?

Kansas raised the Eleventh Amendment defense in the Kickapoo and Potawatomi cases, but was not part of the Florida case. However, the Kansas tribes dropped their lawsuits against the state "in exchange" for approval of the compacts.

Q2. If so, is there any remedy pending given this decision?

Since the state and resident tribes have entered into compacts, I am not sure this decision changes anything in those instances. If those compacts had included expiration dates, the state might be in a better position regarding negotiation of any replacement compacts because in many ways *Seminole* takes the teeth out of IGRA. However, as the compacts stand, they are valid until:

- terminated by mutual agreement of both parties;
- determined to be invalid in a nonappealable decision of a court of competent jurisdiction; or
- the tribe revokes its resolution authorizing the conduct of class III gaming on its reservation.

Q3. What are the options available to Kansas in light of this decision that were not recognized before?

As stated above, in regard to existing compacts, no "options" arising from this decision jump right out. In regard to compacts with other tribes, it looks like the compulsive nature of negotiations may have been eliminated, at least until Congress acts. So, when the Wyandotte, Miami, or any other tribe approaches the state about negotiating compacts, it looks like the state will be in a somewhat better position to insist on provisions it wants included in those compacts. At least the ultimate threat of imposition of gambling procedures without any state involvement appears to have been eliminated. It is not clear to me what would happen if the state would refuse to negotiate at all. Such a position by the state may or may not prevent tribes from conducting gambling in the state.

The *Seminole* decision did not clarify much procedurally regarding compact negotiations. *Cabazon* was not overturned, so presumably tribes continue to have a right to conduct the same games anyone else conducts in the state. But, neither was IGRA totally thrown out, so there remains a statutory requirement for tribes that conduct class III gambling to enter into a state-tribal compact in order to legally conduct that gambling. Absent a mechanism for compelling recalcitrant states to enter into compacts, or for going around those states, tribes can apparently be blocked by states from engaging in legal class III gambling.

If I see any analysis that clarifies that issue, I will forward it to you.

Q4. What is the procedure for amending the existing compacts and what would be some pros and cons of doing so at this time?

Each of the compacts contains the same provision for amendment:

> The Tribe and the State, through the Governor or the Legislature by concurrent resolution, may request negotiations to amend, modify or replace this Compact. In the event either wishes to do so, such party shall notify the other of provisions which it believes require amendment. In the event of such a request, this compact shall remain in effect until amended, modified or replaced. Such notice shall be in writing and shall be sent by certified mail to the Chairpersons of the Tribe, the Director of the State Gaming Agency or any other appropriate governmental official of either. Upon receipt of such notice, the parties shall engage in good faith efforts, to resolve the issues identified in the notice. The parties shall have 180 days to negotiate amendments and all further procedures and remedies available under the IGRA shall apply. The State and the Tribe may agree to extend the 180-day period without prejudice to the rights of either party. (Emphasis added.)

I assume your question is in regard to legislatively initiated action. As you can see from the language of the compacts, the Legislature can request amendment, modification, or replacement of a compact. The procedure involves:

- the Legislature adopting a concurrent resolution requesting negotiation;
- notifying the tribe of the request to amend, modify, or replace the compact and including in the notice an enumeration of provisions that the Legislature wants to amend;
- the state and the tribe negotiating in good faith to resolve those issues identified in the notice; and
- resorting to the procedures and remedies available under IGRA if resolution is not realized within 180 days, unless the period for negotiation is extended by agreement of both parties.

Under Kansas law, the negotiating entity for the state is the Governor. The legislative procedure for approval of the revised compact would be the same as the procedure for initial approval. That is:

- when the Governor completes negotiations he submits the compact to the Joint Committee on Gaming Compacts for its review;
- the Committee could recommend modifications;
- the completed compact would then be forwarded to the Legislature or to the LCC by the Committee with recommendation for approval, rejection, or with no recommendation; and
- the Legislature or the LCC would either approve or reject the compact.

After the state's approval process is completed, the amended compact would also have to be approved and published by the Secretary of Interior.

Rejection of a modified compact would probably not have a serious impact on the tribes' gambling operations because, as noted above, an existing compact remains in effect until a new or modified compact replaces it.

The decision in the *Seminole* case creates a question in my mind regarding what the state and the tribes would do if they were unable to reach a negotiated agreement on compact revisions as contemplated in the compacts. One could read the compact language to mean that the state and the tribe agreed to waive relevant sovereign immunity in order to allow an impasse to be resolved by the federal courts. However, one might also be able to argue that strictly speaking the *Seminole* case removed "the procedures and remedies available under IGRA," so, like the Act, the compacts are currently without any mechanism for resolving stalled amendment negotiations.

The language in the compacts ("the parties shall engage in good faith efforts, to resolve the issues identified in the notice") appears to require one party to participate in negotiation of amendments when requested by the other party. I suppose that if one party was unwilling to negotiate amendments, it might be construed to be dispute regarding the " . . . construction or operation [of the compact] or the respective rights and liabilities of the Tribe and the State thereunder . . . ." While, depending on the circumstances, that might be a stretch, the dispute resolution procedure does clearly provide for involvement of the federal courts and clearly includes a limited waiver of sovereign immunity by both the state and tribe for the purpose of resolving disputes.

Thus, one of the major "cons" of requesting amendment of the compacts at this point is some lack of clarity regarding the appropriate procedure. However, I am confident that one of the Deputy Attorneys General who are familiar with these issues could provide guidance.

Other readily apparent arguments for and against requesting amendment of the compacts at this time include:

Pros	Cons
• Some provisions that do not appear to be optimally efficient, such as the assessment and reimbursement schedule, might be fixed before any significant difficulties arise.	• The state and tribes are in the process of establishing the parameters of a working relationship that is crucial to the success of compact implementation. Creation of an adversarial atmosphere at this time could complicate that process to the detriment of the state's ability to effectively carry out its role.
• The amendment process itself could be clarified in the light of *Seminole*.	• Simply requesting amendment or renegotiation would not halt implementation of the existing compacts and could result in lengthy litigation.
• If the amendment process would get the state and tribes into court on a substantive issue, the legal question regarding the "scope of games" allowable under the tribal state compacts question might be resolved.	• In any negotiation to amend the compacts, the tribes may hold out for concessions by the state on issues the tribes find cumbersome or distasteful now that implementation is underway.

Clearly, this list is not exhaustive, but I hope it provides some food for thought.

If you have further questions, please feel free to call.