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United States v. Santee Sioux Tribe of Nebraska: The Future of Igra and Indian Gaming in Jeopardy

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UNITED STATES v. SANTEE SIOUX TRIBE OF NEBRASKA:
THE FUTURE OF IGRA AND INDIAN GAMING IN JEOPARDY

I. INTRODUCTION

During the modern history of North America, white European settlers destroyed the self-sufficiency of Native American Indians ("Indians") through war, disease and deceptive treaties. After many years of economic disarray, some Indians attempted to regain self-sufficiency by commercial exploitation of a practice that was traditional in many Indian nations—gambling.1 Recently, casinos located on Indian reservations have become the fastest growing segment of the American gaming industry.2 In 1993 alone, reservation gambling yielded $5.4 billion in revenue.3 Predictably, the federal government passed legislation to regulate the lucrative business of Indian gaming.4

Today, the Indian Gaming Regulatory Act (IGRA)5 dictates that gaming on tribal lands is subject to state laws.6 Although Con-

4. See, e.g., Cox, supra note 2, at 769. In 1979, the Seminole Tribe of Florida opened a high-stakes bingo parlor in violation of Florida gambling laws. See id. In order to continue its operation, the tribe brought suit and prevailed in the District Court for the Southern District of Florida. See id.; see also Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 316 (5th Cir. 1981) (affirming district court's ruling that Florida gambling laws could not be enforced against tribe).
6. See 18 U.S.C. § 1166. Section 1166(a) entitled "Gambling in Indian country," provides, in pertinent part:
   Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.
   Id. Subsection (c) reads as follows:
   For the purpose of this section, the term "gambling" does not include -
   (1) class I gaming or class III gaming regulated by the Indian Gaming Regulatory Act, or (2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under Section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(325)
The purpose of this chapter is –
(1) to provide for a statutory basis for the regulation of gaming by Indian tribes a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the prime beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
(3) to declare that the establishment of independent Federal authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

Id.

8. 135 F.3d 558 (8th Cir. 1998).

9. See id. at 566 (reversing district court’s order and remanding for entry of order enjoining Tribe’s operation of class III gaming and enforcing closure order). For a complete discussion of the facts of Santee, see infra notes 17-29 and accompanying text.

10. See generally United States v. Santee Sioux tribe of Nebraska, 135 F.3d 558 (8th Cir. 1998).


12. For a full discussion of the facts and procedural history of this case, see infra notes 16-28 and accompanying text.
IGRA and the litigation which followed its enactment. Next, this Note explains the Eighth Circuit's rationale for its ruling in *Santee*. Part V analyzes the court's reasoning, providing a critique based on prior holdings and additional authorities. Finally, this Note examines the likely consequences of the Eighth Circuit's holding.

II. FACTS

In March 1993, the Santee Sioux Tribe of Nebraska sought the tribal-state compact necessary under IGRA to conduct class III gaming on its reservation. During negotiations, the Tribe and the State of Nebraska failed to come to terms. The Tribe, nevertheless, opened a gaming facility which offered video slot machines, video poker and video blackjack. On April 25, 1996 the Chairman of the National Indian Gaming Commission (NIGC) issued an order of temporary closure. In compliance, the Tribe closed its gaming facility on May 5. It reopened the facility, however, on
June 28. On July 31, the NIGC upheld the Chairman’s order on appeal, making it a final agency action.

On appeal by the Tribe, the Eighth Circuit addressed the issues of whether IGRA enabled the Attorney General to enforce the NIGC’s closure orders and, if so, whether the Attorney General had the authority to seek injunctive relief to that end. Additionally, the Tribe questioned the government’s power to enjoin illegal activity. Finally, the Tribe argued that the Supreme Court’s ruling in *Seminole Tribe of Florida v. Florida* made IGRA’s provisions relating to compacting unconstitutional. The court held that the Attorney General had the authority to enforce the NIGC’s orders and that the IGRA provided injunctions as enforcement mechanisms of closure orders. Further, the court upheld the government’s use of an injunction to enjoin illegal gambling based on Nebraska case law. Finally, the court declined to address the constitutionality of IGRA’s compacting provisions, stating that Nebraska is not required to negotiate for gambling that is illegal under State law.

### III. Background

This section traces the history of the government regulation of gaming on Indian reservations. Specifically, the section includes a

22. See id. The Tribe decided to continue its operation while they awaited the District Court’s ruling. See id. On July 2, 1996, the United States filed a complaint against the Tribe seeking to enforce the chairman's order and enjoining the continued operation of a class III gaming facility without a valid tribal-state compact. See id. The district court consolidated the Tribe’s and the State’s lawsuits and on July 7, dismissed the Tribe’s case, holding that the chairman’s temporary closure was not a final agency action subject to judicial review. See *Santee*, 135 F.3d at 561. Likewise, the court dismissed the State’s case, holding that United States was not entitled to a civil injunction enforcing the Chairman’s order and that injunctions cannot be used to enjoin illegal activities. See id.

23. See id. Subsequently, the United States sought leave of the district court to file a supplemental pleading based on the NIGC’s final order. See id. The court denied the motion finding that the IGRA only empowered the government to pursue criminal actions and not to seek civil injunctions to enforce the NIGC's orders. See id.


25. See id. at 563-65. The Tribe's argument was in direct opposition to the government's assertion of power pursuant to § 516. See id. at 562.


27. See *Santee*, 135 F.3d at 565. For the Supreme Court's holding in *Seminole*, see infra note 54.

28. See *Santee*, 135 F.3d at 562-63.

29. See id. at 565.

30. See id. at 565.
description of pre-IGRA legislation, an examination of IGRA and subsequent case law, and a discussion of the Attorney General’s role in enforcing IGRA.

A. Public Law 280

In the early 1950s, concern about poor conditions on Indian reservations led Congress to pass legislation that transferred authority from the tribes to the states in which reservations were located. To this end, Congress enacted Public Law 280. The exact scope of the states' jurisdiction over Indian affairs was unclear until the Supreme Court decided *Bryan v. Itasca County*. In *Bryan*, the Court concluded that Public Law 280 granted the states complete criminal jurisdiction over Indian reservations, but did not confer civil regulatory jurisdiction. As a result of the *Bryan* decision, the federal government changed its policy toward the tribes, allowing them to regulate themselves without state interference.

The Supreme Court addressed the issue of a state's right to regulate gambling on Indian lands under Public Law 280 in *California v. Cabazon Band of Mission Indians*. The Court used the reasoning from *Bryan* to determine that, because California allowed some forms of gambling in the state, it could not prohibit Indians from using the same forms of gambling on their reservations. This

31. See H.R. Rep. No. 848, at 5-6 (1950). Specifically, Congress saw “a hiatus in law-enforcement authority that could be best remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility.” Id.


33. 426 U.S. 373 (1976). The case involved an attempt by the State of Minnesota to levy personal property taxes on an Indian mobile home located on trust land. See id. at 373.

34. See id. at 390.


36. 480 U.S. 202 (1987). The case revolved around the tribe's operation of high stakes bingo games on its reservation in violation of California Penal Code § 626.5, which only permits bingo games operated by charitable organizations with prizes not exceeding $250 per game. See id. at 250.

37. See id. at 210. The test is whether the state law generally prohibits certain conduct, thereby falling under Public Law 280's grant of criminal jurisdiction, or whether the state generally allows the conduct, subject to regulation, whereby it is a civil regulatory law and outside the scope of Public Law 280. See id. at 209.
holding ushered in a new era of gambling on Indian reservations, which could be limited only by Congressional legislation.38

B. Indian Gaming Regulatory Act of 1988

The Congressional response to Cabazon came in the form of the Indian Gaming Regulatory Act of 1988.39 States and non-Indian gambling interests lobbied Congress for regulation to prevent organized crime involvement in Indian reservation gaming facilities.40 Some members of Congress, however, questioned the motives of the lobbying parties.41 Nevertheless, both the House and Senate passed IGRA without difficulty.42

1. General Provisions of IGRA

Congress stated that it designed IGRA to protect and promote tribal economic interests.43 To accomplish this goal, IGRA defines three classes of "gaming."44 First, Class III gaming includes the high stakes casino-type games such as roulette, craps and keno.45 Second, IGRA established a National Indian Gaming Commission (NIGC) within the Department of the Interior to help with the administration of tribal gaming.46 The Chairman of the NIGC is responsible for issuing temporary closure orders, approving tribal ordinances regulating class III gaming, and collecting civil fines.47

38. See Bilezarian, supra note 28, at 469 (referring to report filed after 1993 Conference of Western Attorneys General that noted Indian reliance on gambling as major source of revenue).
40. See The Indian Gaming Regulatory Act: Hearing Before the House Committee on Interior and Insular Affairs, 100th Cong. 167 (1987).
41. See id. Senator John McCain of Arizona stated, “the real reason that the non-Indian gaming industry [and the States are] . . . pushing so hard for State jurisdiction over Class III games . . . is fear of economic competition.” Id. at 165. Representative Morris K. Udall of Arizona added, that “the non-Indian gaming industry [is] . . . more insistent on State regulation of Indian gaming” than anyone else. Id. at 109.
43. See 25 U.S.C. § 2702. For the full text of § 2702, see supra note 7.
44. Id. § 2703(6)-(8). For a discussion of the three classes, see supra note 17.
46. See 25 U.S.C. § 2704. The Commission is composed of three full-time members: a Chairman, appointed by the president, and two associate members, appointed by the Secretary of the Interior. See id.
47. See id. § 2705. The Chairman’s decisions are subject to appeal to the Commission. See id. Besides hearing appeals to the Chairman’s rulings, the Commission can make the chairman’s temporary closure order permanent. See id. § 2706. The Commission has the power “by an affirmative vote of not less than two members and after a full hearing, to make permanent a temporary order of the
Third, IGRA established civil penalties that the Chairman may prescribe in the event of violations. Fourth, IGRA describes the process by which a tribe can establish a class III gaming facility. This provision presents the most controversial aspect of IGRA by requiring states to negotiate in good faith with Indian tribes that are interested in opening class III gaming facilities.

2. Case Law Behind IGRA

Soon after IGRA was enacted, tribes challenged the statute on constitutional grounds. In *Red Lake Band of Chippewa Indians v. Swimmer*, the District of Columbia District Court dismissed such a constitutional challenge, based on its holding that Congress merely exercised its plenary power over Indian affairs when in enacted Chairman closing a gaming activity as provided in section 2713(b)(2) of this title."

48. *See id. § 2713.* This section requires the Commission to provide possible tribal violators with a written complaint stating the acts or omissions which may form the basis of a fine or closure order. *See id. § 2713(a)(3).* Additionally, it grants the Chairman the "power to order temporary closure of an Indian game." *Id. § 2713(b)(1).* It also gives the tribe the "right to a hearing before the Commission to determine whether such order should be made permanent or dissolved." *Id. § 2713(b)(2).* Finally, it makes the Commission’s final decision “appealable to the appropriate Federal district court pursuant to chapter 7 of title 5.” *Id. § 2713(c).*

49. *See id. § 2710(d)(1)-(7).* The section dealing with Tribal-State compacts states in pertinent part:

Any Indian tribe having jurisdiction over the Indian lands upon which class III gaming activity is being conducted, or is to be conducted, shall request that State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

*Id. § 2710(d)(3)(A).* "Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe. . . ." *Id. § 2710(d)(3)(B).*

The United States district courts shall have jurisdiction over—Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith (ii) any cause of action initiated by a State or Indian tribe to enjoin class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and (iii) any cause of action initiated by the Secretary to enforce the procedures proscribed under subparagraph (B)(vii).

*Id. § 2710(d)(7)(A).*

50. *See id.*

IGRA.\textsuperscript{52} In addition, the court found no violation of the trust responsibility because Congress acted to "protect tribes and the gambling public from unscrupulous persons."\textsuperscript{53}

States have also challenged the constitutionality of the IGRA on Tenth and Eleventh Amendment grounds.\textsuperscript{54} In \textit{Cheyenne River Sioux Tribe v. South Dakota},\textsuperscript{55} the Eighth Circuit stated that the IGRA does not violate the Tenth Amendment because it does not require states to compact with tribes regarding Indian gaming.\textsuperscript{56} In \textit{Seminole Tribe v. Florida},\textsuperscript{57} the Supreme Court found that the IGRA violated a State's right to immunity from suit under the Eleventh Amendment.\textsuperscript{58}

3. The Aftermath of Seminole

The Court's decision in \textit{Seminole} has left Indian tribes, and IGRA itself, in a precarious situation.\textsuperscript{59} \textit{Seminole} may sever tribal-

\begin{footnotesize}
\begin{enumerate}
\item See id. at 11-12.
\item The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively." U.S. \textit{CONST. amend. X}. States claim that the IGRA violates the amendment by requiring them to negotiate tribal compacts. See Edward P. Sullivan, \textit{Reshuffling the Deck: Proposed Amendments to the Indian Gaming Regulatory Act}, 45 SYRACUSE L. REV. 1107, 1130 (1995).
\item The Eleventh Amendment states, "[t]he 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. \textit{CONST. amend. XI}. States assert the amendment's grant of immunity from suit in cases brought by Tribes against States for failing to negotiate in good faith under IGRA. See Jolly, \textit{supra} note 1, at 311.
\item 3 F.3d 273 (8th Cir. 1993).
\item See id. at 281. The court listed a state's alternatives when a tribe brings suit against the state; they included: 1) continue negotiations until a compact is agreed upon; 2) negotiate, but fail to agree upon a compact, and have a court determine if the state negotiated in good faith; and 3) refuse to negotiate and allow a court to require a compact be concluded in sixty days. See id.
\item In support of its holding, the Supreme Court cited \textit{New York v. United States}, 505 U.S. 144 (1992). In \textit{New York}, the Court held that Congress cannot "commandeer[\textit{r}] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." Id. at 161.
\item 517 U.S. 44 (1996).
\item See id. at 72-73. In \textit{Seminole Tribe of Florida v. Florida}, the Tribe brought suit in the United States District Court for the Southern District of Florida against Florida under the IGRA to compel negotiations of a gaming compact. See id. The Court stated, "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." Id.
\item See Jolly, \textit{supra} note 1, at 318 (expressing concern over cases where States refuse to negotiate with Tribes and in future event of renewal of pre-existing Tribal-State compacts).
\end{enumerate}
\end{footnotesize}
state compacting provisions from the rest of the IGRA.\(^6\) If so, courts could decide to return to the Cabazon "regulatory/prohibitory" test, in cases involving state regulation of class III gaming.\(^6\)

Two courts have subsequently addressed the ambiguities of the Seminole decision. First, the Ninth Circuit, in United States v. The Spokane Tribe of Indians,\(^6\) concluded that, after Seminole, a violation of class III gaming regulations cannot form the basis for an injunction.\(^6\) Second, in Chemehuevi Indian Tribe v. Wilson,\(^6\) a California district court held that the United States government had a "mandatory duty" to prosecute a State on behalf of the Tribe for the State's failure to negotiate in good faith.\(^6\) As these cases reveal, the present condition of the IGRA has been undermined.

4. The Attorney General's Right to Litigate Under IGRA

IGRA grants the Attorney General the exclusive right to prosecute criminal violations of State gaming laws.\(^6\) IGRA also authorizes the Attorney General to investigate activities associated with gaming which may be in violation of Federal law.\(^6\) These provisions deal solely with criminal prosecutions. If the Attorney General can maintain civil actions, that authority must be found outside the provisions of IGRA.

60. See Sullivan, supra note 45, at 1137 (stating that courts may determine that Congress would have enacted IGRA without such provisions, thereby allowing that section be removed).

61. See Sullivan, supra note 45, at 1137. For a further discussion of the Cabazon test, see supra note 355, and accompanying text.

62. 139 F.3d 1297 (9th Cir. 1998).

63. See id. at 1301. The Ninth Circuit expressed its concern with removing a Tribe's right to bring suit against uncooperative States. See id. It viewed that provision of IGRA as an important device in maintaining an equal balance of power between the Tribe and the State. See id. at 1300. The court, however, did not state whether the surviving portion of IGRA was still valid. See id. The court stated, "[w]e deal here only with the narrow question presented by this appeal: Is a preliminary injunction authorized in these circumstances?" Id. at 1301.

64. 987 F. Supp. 804 (N.D. Cal. 1997).

65. See id. at 809. The court concluded that 25 U.S.C. § 175 created a fiduciary relationship between the government and the Tribe. See id. at 807. Section 175 states: "[i]n all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity." Id.

66. See 18 U.S.C. § 1166(d). A valid Tribal-State compact may shift this right to the States. See id.

67. See 25 U.S.C. § 2716 (c). Additionally, IGRA requires the Commission to provide the Attorney General with information violations of Federal law. See id. § 2716(b).
One possibility for such authority is the congressional grant of plenary power in cases where the United States has an interest. 68 Courts have disagreed, however, on the scope of the Attorney General’s authority under this doctrine. 69 Furthermore, courts have held that, under this rule, the Attorney General may seek remedies that are not expressly provided in the statute. 70 Finally, some courts have viewed the statute as a whole to determine if the Attorney General can file suit. 71

IV. NARRATIVE ANALYSIS

In United States v. Santee Sioux Tribe of Nebraska, 72 the Eighth Circuit addressed four issues concerning IGRA. Several of the court’s rulings were unprecedented in IGRA litigation. These issues included the following: (1) whether the United States, acting through the Attorney General, was entitled to maintain a closure order issued by the NIGC; (2) whether IGRA entitled the government to seek criminal prosecution of the Chairman’s orders, or whether civil injunctive relief was also available; (3) whether the court may enjoin the commission of a crime; and (4) whether all of IGRA’s provisions relating to tribal-state compacts were unconstitutional. 73

68. See 28 U.S.C. § 516. Section 516, titled “Conduct of litigation reserved to Department of Justice,” states:

except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the discretion of the Attorney General.

Id.

69. Compare United States v. Solomon, 563 F.2d 1121, 1121 (5th Cir. 1977) (holding Attorney General could not assert Constitutional rights of mentally retarded under Section 516, even though government interest existed, because no explicit or implicit authority) with United States v. Hercules, Inc., 961 F.2d 796, 796 (8th Cir. 1992) (holding Attorney General could enter into consent decrees in absence of statutory right to do so).

70. See United States v. Republic Steel Corp., 362 U.S. 482, 482 (1960) (holding Attorney General may seek injunction although not specifically provided for in statute).


72. 135 F.3d 558 (8th Cir. 1998).

73. See id. at 561-65.
A. Standing of the United States to Litigate

Before considering the merits of the case, the court initially had to decide whether the United States, acting through the Attorney General, was the proper party in the litigation. The court first noted that IGRA authorized the NIGC to issue permanent closure orders. The court further determined that IGRA granted neither the NIGC or the Chairman the "independent authority to litigate the agency's decision," nor "specifically addressed the Attorney General's authority to institute judicial proceeding on behalf of the Chairman or the NIGC to enforce closure orders." Based on IGRA's silence on the issue, the court determined that Congress intended the Attorney General to enforce the agency's orders. The court supported this determination by relying on the Attorney General's grant of plenary power under 28 U.S.C. section 516. In addition, the court cited the Supreme Court's opinion in United States v. Republic Steel Corp. for the proposition that "the Attorney General may file suit on behalf of the United States without specific statutory authority whenever the United States has a justiciable interest." The court, thus, held that the Attorney General can properly seek an injunction on behalf of the United States because of her broad authority to litigate and IGRA's indefinite language concerning the enforcement of closure orders.

74. See id. at 561. The government relied on the Attorney's General broad authority to litigate pursuant to 28 U.S.C. § 516 (1994). See id. The Tribe contended that nothing in the IGRA or Section 516 authorized the Attorney General to enforce closure orders issued by the NIGC. See id. at 562.

75. See id. For the text of the IGRA's provision authorizing the issuance of permanent closure orders, see supra note 39.

76. Santee, 135 F.3d at 562.

77. See id.

78. See id. (referring to Eighth Circuit's ruling in U.S. v. Hercules, Inc.). In Hercules, the court found that 28 U.S.C. § 516 allowed the Attorney General to settle cost recovery actions under CERCLA since the United States was involved and Congress did not specially authorize the EPA to proceed without supervision. See United States v. Hercules, Inc., 961 F.2d 796, 798-800 (8th Cir. 1992); see also Federal Trade Commission v. Guignon, 390 F.2d 323, 323 (8th Cir. 1968).


80. Santee, 135 F.3d at 562. In Republic Steel, the Supreme Court upheld the Attorney General's authority to seek injunctive relief, even though the statute which formed the basis for his suit (The Rivers and Harbors Appropriation Act of 1899) did not give specific authority to do so. See Republic Steel, 362 U.S. at 492. The test to determine if such authority existed "was whether the United States had an interest to protect or defend." Id.

81. See Santee, 135 F.3d at 562 (stating "IGRA's silence on the matter of enforcement of the Chairman's closure order compels our conclusion that the broad authority to litigate granted to the Attorney General under 28 U.S.C. § 516 envisions the action taken here by the United States Attorney to enforce on behalf of..."
B. United States’ Right to Seek an Injunction

After the court determined that the Attorney General could properly initiate the suit against the Tribe, it considered whether the government could seek injunctive relief to enforce the closure order.82 First, the court reversed the district court’s decision to deny civil injunctive relief.83 The court asserted that section 2713(a) of IGRA “authorized [the Chairman] to assess fines for the violation of IGRA itself, not for violations of closure orders entered under the auspices of IGRA.”84 Additionally, the court reviewed regulations passed by the NIGC, noting that closure orders were covered in the section entitled “enforcement,” while civil fines were addressed in their own self-titled section.85 It found that the civil fines section of the regulations did not include non-compliance to closure orders as a grounds for fining a tribe.86 Based on the court’s reading of IGRA and the Commission’s regulations, it concluded that the district court erred in its refusal to grant an injunction to enforce a closure order.87

C. Enjoining a Crime

After the court determined that IGRA allowed the Attorney General to seek an injunction to enforce the NIGC’s closure order, it considered whether an injunction was proper under the facts of

82. See id. at 563.
83. See id. The district court concluded that the Chairman’s imposition of fines under 25 U.S.C. § 2713(a), not civil injunctions, was the only civil remedy available and that IGRA only empowered the government to seek criminal prosecution. See Findings of Fact and Conclusions of Law at 9-10 (July 10, 1996).
84. Santee, 135 F.2d at 563. Section 2713 of IGRA, titled “Civil penalties,” states in pertinent part:
(a) Authority; amount appeal; written complaint
   (1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have the authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or management contractor engaged in gaming for any violation of any provision of this chapter, or any violation of any regulation by the Commission pursuant to this chapter . . . .
(b) Temporary closure; hearing
   (1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, or regulation prescribed by the Commission pursuant to this chapter . . . .
86. See id. (referring to 25 C.F.R. pt. 575.4).
87. See id.
the case. Two sub-issues had to be resolved before it could rule on this main issue: 1) did the Tribe violate Nebraska law; and 2) can the court issue an injunction to prevent a crime?

1. **Does the Operation of Video Gambling Devices Violate Nebraska Law?**

First, the court held that the Tribe operated an illegal gaming facility since Nebraska law prohibits the use of video slot machines, poker and blackjack. The court distinguished Nebraska’s acceptance of the Selective Lottery Output Terminal System (“SLOTS”) to display keno results in a traditional slot machine. The court stated that, “[t]he ‘SLOTS’ device is only a means of allowing keno players to review keno results, and, unlike a slot machine, is not a means of conducting the game itself.”

2. **Can the Court Enjoin the Commission of a Crime?**

Second, the court decided that the lower court erred by not granting an injunction, based on the general rule that a court may not enjoin the commission of a crime. To reach this conclusion, the court initially determined that IGRA incorporated state civil and criminal law. The court relied on the Rules of Decision Act and the Supreme Court’s ruling that judicial decisions are a part of a state’s laws in accordance with the Rules of Decision Act. The court then noted that Nebraska civil case law permitted injunctive

88. See id.
89. See id. at 564; see also, State ex rel. Spire v. Strawberries, Inc., 473 N.W.2d 428 (1991) (finding defendant, who placed video poker, blackjack, and craps machines in his taverns, guilty of possession of “gambling devices” under Nebraska Revised Statutes § 28-1101); Nebraska Revised Statutes § 28-1101 (prohibiting use of “video gaming device which has the capability of awarding something of value”).
90. See Santee, 135 F.3d at 564. The Tribe argued that Nebraska condoned video gambling by approving the use of SLOTS machines. See id.
91. Id. (citing Opinion of Nebraska Attorney General at 11 (Sept. 18, 1995)).
92. See id. at 565. The court acknowledged the maxim that “equity generally will not enjoin the commission of a crime . . . [except]: 1) in cases of national emergency; 2) in cases of widespread public nuisance; and 3) in cases where a statute grants a court the power to enjoin a crime.” Id. (referring to 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2942, at 70-74).
93. See Santee, 135 F.3d at 565. The court viewed the phrase “all State laws pertaining to the licensing, regulation, or prohibition of gambling” contained in 18 U.S.C. § 1166(a) to include State case law as well as State criminal law. See id.; see supra note 4 and accompanying text for further information on §1166(a).
94. 28 U.S.C. § 1652 (1994) (stating “laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply”).
95. See Santee, 135 F.3d at 565 (referring to Commissioner v. Estate of Bosch, 387 U.S. 456, 464 (1967)).
relief to force the closure of gambling facilities determined to be public nuisances.\textsuperscript{96} In making this determination, Nebraska courts viewed "continuing and flagrant" violations as the key factor.\textsuperscript{97} Because the Tribe reopened its gambling facility in spite of the NIGC's closure order, the court determined that the Tribe's actions were "continuing and flagrant," and therefore, subject to injunction.\textsuperscript{98}

D. Constitutionality of IGRA's Tribal-State Compact Provisions

Finally, in light of the Supreme Court's ruling in \textit{Seminole Tribe}, the Tribe challenged the constitutionality of IGRA's provisions concerning tribal-state compacting.\textsuperscript{99} The court declined to address this issue based on its prior holdings.\textsuperscript{100} The court reasoned that, since Class III gaming was illegal in Nebraska, IGRA imposed no duty on Nebraska to negotiate with the Tribe to allow for class III gaming on Tribal land.\textsuperscript{101}

V. CRITICAL ANALYSIS

A. Attorney General's Right to Maintain Closure Order

The \textit{Santee} court failed to adequately justify its holding that the Attorney General possessed the authority to maintain the NIGC closure order. This holding must be examined in light of the following: (1) analysis of the cases cited by the court; (2) critique of the court's statutory basis; and (3) examination of related case law that the court did not include in its opinion.

1. Cited Cases

First, the two cases that the court relied upon, \textit{United States v. Hercules, Inc.}\textsuperscript{102} and \textit{United States v. Republic Steel Corp.},\textsuperscript{103} are distinguishable from the facts in \textit{Santee}. In \textit{Hercules}, the defendants chal-

\textsuperscript{96} See \textit{id.} See generally State ex. rel. Spire v. Strawberries, Inc., 473 N.W.2d 473, 435 (1991) (citing cases in which gambling facilities had been determined to be public nuisances).

\textsuperscript{97} See \textit{Strawberries}, 473 N.W.2d at 436.

\textsuperscript{98} See \textit{Santee}, 135 F.3d at 565.

\textsuperscript{99} See \textit{id.} (noting Tribe's argument that Congress was not able to authorize lawsuits against States for failure to negotiate in "good faith").

\textsuperscript{100} See \textit{id.} The Eighth Circuit relied on its prior ruling in \textit{Cheyenne River Sioux Tribe v. South Dakota}, which stated, "[t]he 'such gaming' language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit." 3 F.3d 273, 279 (8th Cir. 1993).

\textsuperscript{101} See \textit{Santee}, 135 F.3d at 566.

\textsuperscript{102} 961 F.2d 796 (8th Cir. 1992).

\textsuperscript{103} 362 U.S. 482 (1960).
lenged the Attorney General’s right to enter into consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The defendants did not question the Attorney General’s right to initiate the suit because he properly did so under the Resource Conservation and Recovery Act (RCRA), the Clean Water Act, the Refuse Act, the Federal Priority Statute, CERCLA, and Arkansas law.

In Santee, the Attorney General sought to enforce a mandate of the NIGC. The court stated that “IGRA [does not] address specifically the Attorney General’s authority to institute judicial proceedings on behalf of [either] the Chairman or the NIGC to enforce closure orders . . . .” Thus, the court improperly relied on Hercules because the issue in Santee was whether the Attorney General had the authority to initiate a suit, while the issue in Hercules concerned the limitations on the Attorney General’s authority.

In Republic Steel, the Supreme Court considered whether the Attorney General could seek an injunction without the requisite statutory authority. At first blush, this case seems on point with Santee, however, two key differences exist. First, in Republic Steel, the Court found that the Rivers and Harbors Appropriations Act of 1899 specifically granted the Attorney General the right to initiate

104. See Hercules, 961 F.2d at 798 (challenging consent decree entered into by United States and Hercules’ co-defendants on grounds that CERCLA only authorizes head of Environmental Protection Agency to enter into such agreements). The court concluded that “CERCLA § 122 does not clearly and unambiguously limit the Attorney General’s plenary authority over the control and conduct of litigation in which the United States is a party.” Id. Therefore, the court upheld the consent decree under the Attorney General’s plenary power. See id. at 800.
110. See United States v. Hercules, 961 F.2d 796, 798 (8th Cir. 1992). The government filed suit against Hercules under RCRA, the Clean Water Act, the Refuse Act, and Arkansas law. See id. The CERCLA suit, which was the subject of the litigation, involved the liability of Phoenix Capital Enterprises, Inc., InterCapital Industries, Inc., Inter-Ag Corporation, C.P. Bomar, Jr., and J. Randal Tomblin (collectively referred to as the “Phoenix parties”) See id. at 797-98.
111. Santee, 135 F.3d at 562. In fact, no where in the IGRA did Congress address (specifically or impliedly) who may institute judicial proceedings to enforce closure orders. See id.
112. See United States v. Republic Steel Corp., 362 U.S. 482, 492 (1960). Republic Steel operated a steel mill on the banks of the Calumet River and dumped solid waste into the river. See id. at 483. This activity seriously threatened the 21-foot depth necessary to maintain the river’s viability. See id. at 484. In order to restore the river to its proper depth, the United States sought to enjoin Republic Steel from further dumping. See id. at 483.
the suit. In comparison, the IGRA contains no such provision. Second, the Court examined the United States' interest served by the injunction. The Eighth Circuit, in Santee, failed to state any federal interest that an injunction would serve. If the court used legislative intent to determine an interest, as the Supreme Court did in Republic Steel, one could argue that the Tribe's right to economic development and self-sufficiency under the IGRA is as important as the government's right to prevent unauthorized gambling.

2. Statutory Support

In addition to case law, the Eighth Circuit's analysis relied on statutory interpretation. The court's cursory review of IGRA revealed only that the statute did not "specifically" grant the Attorney General, the Commissioner or the NIGC independent authority to litigate the agency's decisions. The court should have considered the statute as a whole. Section 2713 of IGRA, entitled "Civil Penalties," vests authority to levy and collect fines and issue closure orders in the Chairman and the Commission. Nowhere in this section does the language mention the Attorney General, much less indicate that the Attorney General can pursue civil remedies. The only relevant sections which mention the Attorney General are Sec-

113. See id. 485 (1960) (stating "Section 17, 33 U.S.C.A. § 413, directs the Department of Justice to 'conduct the legal proceedings necessary to enforce' the provisions of the Act"). The issue was whether the Rivers and Harbors Act authorized the Attorney General to seek injunctive relief, absent specific statutory language to that effect. See id. at 491-92.

114. For a discussion of the IGRA's lack of statutory authorization, see supra note 88 and accompanying text.

115. See Republic Steel, 362 U.S. at 492 (noting United States' interest in restoring navigability of Calumet River). The Court based its determination on the legislative intent behind the Rivers and Harbors Appropriations Act of 1899. See id.

116. See supra note 7 and accompanying text for discussion of the legislative intent behind the IGRA.

117. See Santee, 135 F.3d 558, 562 (8th Cir. 1998) (determining that Chairman could issue temporary closure orders; NIGC could make closure order permanent; and Tribe could appeal permanent order to district court). See supra notes 39 and 49 and accompanying text for further discussion of these provisions.

118. See United States v. Hercules, Inc., 961 F.2d 796, 799 (8th Cir. 1992) (reviewing CERCLA § 122 as whole to determine whether it limited Attorney General's right to enter into consent agreement).

119. See 25 U.S.C. § 2713 (stating that "the Chairman shall have authority to levy and collect appropriate civil fines" and "the Commission shall . . . decide whether to order a permanent closure of the gaming operation"). For a further discussion of this section, see also supra note 40 and accompanying text.
These sections merely grant the Attorney General the right to prosecute criminal violations. By extending this right to civil actions, without legislative authorization, the court arguably usurped the legislative function.

The court also referred to the Attorney General’s grant of plenary power to litigate under Title 18 of the United States Code Section 516. The court stated that the key question in determining if the Attorney General could bring suit was “whether the United States had an interest to protect or defend.” The court failed, however, to answer this question. Furthermore, the court ignored the Fourth Circuit’s ruling in United States v. Solomon, which stated that Section 516 “is merely a housekeeping provision.” Solomon established that, in the absence of a statutory right to file suit, the government must establish that it has both implicit authority and an interest in the particular case.

Under this reasoning, the case would have to be one in which the United States has implicit authority because IGRA does not expressly grant the Attorney General the right to enforce a permanent closure order. The government could have asserted this

10. 25 U.S.C. § 2716(c) (stating “[t]he Attorney General shall investigate activities associated with gaming authorized by this chapter which may be a violation of Federal law”).

11. 18 U.S.C. § 1166(d) (providing that “[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws . . . .”).

12. See Santee, 135 F.3d at 561-62 (noting that 18 U.S.C. § 516 states, “[c]except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer there is party, or is interested . . . is reserved to officers of the Department of Justice, under the discretion of the Attorney General”).

13. Id. at 562 (citing United States v. Republic Steel, 362 U.S. 482, 492 (1960)).

14. United States v. Solomon, 563 F.2d 1121, 1124 (4th Cir. 1977) (citing United States v. Daniel, Urbahn, Seeyle and Fuller, 357 F. Supp. 853, 857-58 (N.D. Ill. 1973)). In Solomon, the United States attempted to assert the constitutional rights of mentally retarded patients against the administrators of a Maryland mental institution under 28 U.S.C. § 516. See id. at 1123-24. The Attorney General claimed that the United States had an interest in the rights of the mentally retarded as provided by the Developmentally Disabled Assistance and Bill of Rights Act, P.L. 94-103, 89 Stat. 486, 42 U.S.C. §§ 6001-6012 (1977) and other federal statutes. See id. at 1123. The Fourth Circuit considered this a legitimate interest, but concluded that the Attorney General lacked standing because of the absence of explicit and/or implicit statutory authority. See id. at 1129.

15. See id. at 1126. The court noted that the traditional cases in which the United States has authority to file suit are those involving interstate commerce, public nuisance, and national emergency. See Solomon, 563 F.2d at 1129.
interest because *Santee* involved gambling, an activity that affects interstate commerce and may constitute a public nuisance.126

3. *Related Cases*

The Eighth Circuit properly began its analysis with the relevant statutes and examination of *Hercules* and *Republic Steel*. It failed, however, to examine other pertinent cases, including *United States v. Pima County Community College District*127 and *United States v. St. Regis Paper Company*.128 *Pima* is relevant because the district court held that Title VII of the Civil Rights Act of 1964 gave the Equal Employment Opportunity Commission the exclusive authority to file suit in an effort “to eliminate duplication of effort, the overlapping of authority and to standardize procedures.”129

In the present case, IGRA grants the NIGC the right to issue permanent closure orders and to conduct investigations.130 The statute only grants the Attorney General the right to investigate violations of federal laws.131 Since the litigator seeks an injunction based on the closure order, it is logical that the Commission should initiate a suit brought under IGRA.

Consistent with this reasoning, the Second Circuit in *St. Regis* denied the Attorney General the right to enforce a Federal Trade Commission’s (FTC) cease and desist order.132 The court focused

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126. See State ex rel. Spire v. Strawberries, 473 N.W.2d 428, 428 (Neb. 1991) (holding gambling-related activities can constitute public nuisance); City of Omaha v. Danner, 185 N.W.2d 869, 869 (Neb. 1971) (finding establishment which conducted various activities, including gambling, was public nuisance); State ex rel. Johnson v. Hash, 13 N.W.2d 716, 716 (Neb. 1944) (holding facilities that offer continuous gambling are public nuisances).


128. 355 F.2d 688 (2d Cir. 1966).

129. *Pima*, 409 F. Supp. at 1063. The Attorney General attempted to initiate the suit by asserting that Title VII granted him the right to file, pattern and practice suits against public sector employers. See id. The court refused to read such language into the statute. See id.

130. See 25 U.S.C. §§ 2713, 2715. For a further discussion of Commission’s right to issue permanent closure orders, see supra notes 96 and 40 and accompanying texts.

131. See supra note 120 (discussing Attorney General’s right to investigate gambling violations under 25 U.S.C. § 2716(c)).

132. See *St. Regis*, 355 F.2d at 699-700 (holding that “Congress intended section 16 of the FTCA to be jurisdictional, not directory, and that its requirements must be satisfied by the FTC prior to the commencement of a civil penalty suit by the Attorney General”). The Attorney General sought to recover civil penalties under § 5(l) of the Federal Trade Commission Act for St. Regis Paper Co.’s violation of a cease and desist order. See id. at 690. Section 5(l) states in pertinent part: Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty.
on the fact that the case was a civil suit and that the FTC had the primary responsibility of issuing and interpreting cease and desist orders. This fact pattern also existed in Santee. The Attorney General’s enforcement of the NIGC’s permanent closure order, like the Attorney General’s attempt to enforce an FTC cease and desist order, constituted a civil action, seeking a civil remedy. Moreover, IGRA gives the NIGC and its Chairman the right to investigate possible violations of the statute and then to issue closure orders. Accordingly, if the court accepts the Second Circuit’s reasoning in St. Regis, the Commission, rather than the Attorney General, should initiate the suit.

B. Government’s Right to Civil Injunctive Relief

Two flaws exist with respect to the Eighth Circuit’s award of an injunction as a proper enforcement mechanism for closure orders. First, although the court noted that Section 575.4 of the NIGC regulations addresses when civil fines will be assessed, it failed to note that Section 575.3 of the regulations addresses how fines will be assessed. By so doing, the court focused on the timing of fines and ignored that closure orders factor into the assessment of the

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<th>of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. 15 U.S.C. § 45(1).</th>
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<td>133. See id. at 691, 694 (expressing concern over extent of Attorney General’s authority to prosecute violations of FTC orders to cease and desist). The court stated: While it is reasonable to presume that when Congress enacts a criminal statute it intends to authorize the Attorney General to enforce the statute on his own motion, i.e., public policy favors the unencumbered enforcement of criminal laws, but no such presumption of public policy operates here where the authority of the Attorney General to punish violations of FTC cease and desist orders is at issue. Id. at 693. Furthermore, the court stated: [T]he Attorney General has no staff of experts continually checking on compliance with FTC orders. Since he has no authority to enforce the FTCA and has no influence or role to play in the formulation of cease and desist orders issued thereunder, his office is simply not equipped or designed to intelligently police the Commission’s orders or to develop and maintain a broad consistent, policy in this area. [footnote omitted] Id. at 697.</td>
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<td>134. See supra note 22 and accompanying text for a discussion of the Attorney General’s actions.</td>
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<td>135. See supra note 16 and accompanying text for a discussion of the NIGC’s and the Chairman’s powers.</td>
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<td>136. See Santee, 135 F.3d at 563 (stating that “section 575.4 of the NIGC regulations addresses when civil fines will be assessed and does not include the imposition of fines for non-compliance with the Chairman’s closure orders”). Furthermore, Section 575.3 states:</td>
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amount of the fine. Therefore, when considered as a whole, the NIGC's regulations support the district court's ruling that fines are the only available civil remedies.

Second, neither IGRA nor the NIGC regulations mention injunctions as an enforcement mechanism for violations of closure orders. The statute only authorizes fines and closure orders. Since the operative statute does not authorize injunctions, the court should not have granted such relief.

C. Government's Right to Enjoin Crime

The Eighth Circuit's conclusion that the Tribe illegally operated a gaming facility had sufficient statutory and case law support. Even so, the court should have explored the Tribe's argument that Nebraska approved video gaming devices when it approved the use of Selective Lottery Output Terminal System (SLOTS). When confronted with a similar issue, the Tenth Circuit, in Citizen Band Potawatomi Indian Tribe of Oklahoma v. Green, held that video lottery terminals constituted "gambling devices."

The Potawatomi court identified two essential elements in defining "gambling device": "(1) the device must be a machine or mechanical device designed primarily for gambling purposes; and

The Chairman shall review each notice of violation and order of temporary closure in accordance with § 575.4 of this part to determine whether a civil fine will be assessed, the amount of the fine, and, in the case of continuing violations, whether each daily illegal act or omission will be deemed a separate violation for purposes of the total civil fine assessed. 25 C.F.R. § 575.3 (emphasis added).

137. See supra notes 63 and 113 for a further discussion.

138. See Santee, 135 F.3d at 563 (recounting district court's conclusion that any civil remedy, outside of statutory authorized fine, was prohibited under provision of IGRA).

139. See 25 U.S.C. § 2713; supra note 40 and accompanying text.

140. See United States v. Republic Steel Corp., 362 U.S. 482, 507 (1960) (Frankfurter, J., dissenting) (stating, "where, as in this statute, Congress has provided a detailed and limited scheme of remedies, it seems to me the Court is precluded from drawing on any source outside the Act").

141. See supra note 66 for a discussion of Nebraska's prohibition against video gambling.

142. See Santee, 135 F.3d at 564 (concluding that "'SLOTS' device is only a means of allowing keno players to view keno results . . . not a means of conducting the game itself"); see also supra notes 67 and 68 and accompanying text for explanation of "SLOTS" and court's distinction between it and other gambling devices.

143. 995 F.2d 179 (10th Cir. 1993).

144. Id. at 180-81 (concerning Tribe's importation of gambling mechanisms against Oklahoma law). In Potawatomi, the Tribe sought declaratory judgement declaring the importation of video lottery terminal ("VLTs") legal, even though Oklahoma law and the Johnson Act prohibited the dealing of gambling devices. See id. at 180.
(2) the device must operate so that a person may receive or become entitled to receive, as the result of the application of an element of chance, money or property.\textsuperscript{145} Nebraska statutes similarly define "gambling device."\textsuperscript{146}

Applying the Tenth Circuit's test, the SLOTS machines may be classified as gambling devices since they are designed primarily for gambling purposes (i.e., to display keno results) and they are used by keno players to determine if they are entitled to money as a result of their purchasing a keno ticket. Under this approach, the Tribe's operation of video poker, blackjack and slot machines would continue to be illegal under Nebraska law; however, the court would be required to find Nebraska's approach to video gaming regulatory, not prohibitory.\textsuperscript{147} Although this conclusion bears little significance to the present issue, it greatly affects the Eighth Circuit ruling on the constitutionality issue.

D. Constitutionality of IGRA's Tribal-State Compact Provisions

The Eighth Circuit declined to address the constitutionality of the IGRA's tribal-state compact provisions because Nebraska law prohibited video gambling. Under the court's reasoning, IGRA did not require the State to negotiate at all about prohibited activities.\textsuperscript{148} The court could not maintain this position if it accepted the SLOTS hypothesis that Nebraska law did not prohibit video gambling.

\textsuperscript{145} \textit{Id.} at 181 (clarifying definition of gambling device under the Johnson Act, 15 U.S.C. § 1175). The court concluded that Oklahoma's definition did not materially differ and since the state prohibited the use of all gambling devices, including VLTs, the IGRA prohibited the Tribe from importing such devices. \textit{See id.}

\textsuperscript{146} Neb.Rev.St. § 28-1101(5) (stating that "[g]ambling device shall mean any device, machine . . . or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine"); \textit{see also} State v. Two IGT Video Poker Games, 465 N.W.2d 453, 458 (Neb. 1991) (defining "gambling device" as device used or usable to bet something of value on outcome of future event, which outcome is determined by element of chance).

\textsuperscript{147} \textit{See Potawatomi}, 995 F.2d at 181 (concluding importation of "VLTs" violated state law against importation of gambling devices); \textit{United States v. Cabazon Band of Mission Indians}, 480 U.S. 210, 211 (1987) (stating, "[i]n light of the fact that California permits a substantial amount of gambling activity . . . and actually promotes gambling through state lottery, we must conclude that California regulates gambling in general . . ."); \textit{see also} Mashantucket Pequot Tribe v. State of Connecticut, 913 F.2d 1024, 1031 (2nd Cir. 1990) (holding that since Connecticut permitted "Las Vegas Nights" by non-profit organizations, state's approach to class III gaming is regulatory, not prohibitory).

\textsuperscript{148} \textit{See Santee}, 135 F.3d at 565 (citing Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273).
ing, but merely regulated it.\textsuperscript{149} Under this alternative reasoning, the court would have to determine whether the compacting provisions are severable from the rest of IGRA; and if so, what impact severing those provisions would have in the present case.\textsuperscript{150} Most likely, the court would refuse to enforce the injunction.\textsuperscript{151}

VI. IMPACT

Once the Supreme Court removed the right of Indian Tribes to file suit against a state that fails to negotiate in good faith, the scales tipped heavily in favor of the states.\textsuperscript{152} From the legislative history and overall statutory scheme of IGRA, it seems clear that Congress did not intend this result. Thus, Congress should revisit the issues underlying IGRA and make a new attempt to balance state sovereignty with the economic importance of gaming to Indian tribes.\textsuperscript{153}

\textit{Santee} represents one court’s attempt to resolve the crucial issues concerning Indian gaming. Although the Eighth Circuit’s conclusions are reasonable, they are not beyond critique. The economic and sociological importance of Indian gaming issues requires resolution that will be both equitable and definitive. Thus, the courts are not the appropriate forum. Rather, only careful consideration and action by Congress can ensure appropriate resolution of these issues.

\textit{Russell Lannutti}

\textsuperscript{149} For a full discussion of the “SLOTS” hypothesis, see \textit{supra} notes 141-47, and accompanying text.

\textsuperscript{150} For a complete discussion of severability and post \textit{Seminole} decisions, see \textit{supra} note 51-56 and accompanying text.

\textsuperscript{151} \textit{See} United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1297 (9th Cir. 1998) (holding that portions of IGRA still in effect after \textit{Seminole Tribe} cannot form basis for injunction). The Ninth Circuit in \textit{Spokane} stated: It is quite clear from the structure of \textit{[the IGRA]} that the tribe’s right to sue the state is a key part of a carefully-crafted scheme balancing the interests of the tribes and the states. It therefore seems highly unlikely that Congress would have passed one part without the other, leaving the tribes essentially powerless. \textit{Id.} at 1300.

\textsuperscript{152} \textit{See id.} (referring to Supreme Court’s decision in \textit{Seminole Tribe}).

\textsuperscript{153} \textit{See} Sullivan, \textit{supra} note 50, at 1157-66 (chronicling desires and attempts to amend IGRA). The article refers to the discontent expressed by governors, tribes, and members of Congress over the present provisions of the IGRA. \textit{See id.}