IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

QUAPAW TRIBE OF INDIANS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 16-2037**
	)	
STATE OF KANSAS,	)	
	)	
Defendant.	)	
	)	

DEFENDANT STATE OF KANSAS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

In accordance with D. Kan. 7.1(a) and D. Kan. 7.6, Defendant State of Kansas, by and through counsel, Stephen Phillips, Assistant Attorney General for the State of Kansas, and Bryan C. Clark, Assistant Solicitor General for the State of Kansas, submits this Memorandum in Support of the State's Motion to Dismiss Plaintiff Quapaw Tribe of Indians' Complaint against it.

NATURE OF THE MATTER BEFORE THE COURT

This is an action by the Quapaw Tribe of Indians (Quapaw Tribe) against the State of Kansas (State) under the Indian Gaming Regulatory Act of 1988 (IGRA). The Quapaw Tribe seeks a determination that the State has violated 25 U.S.C. § 2710(d)(7) by failing to negotiate in good faith with the Quapaw Tribe a compact governing Class III gaming on the Quapaw Tribe's Indian lands in Cherokee County, KS, and an order requiring the State to negotiate such a compact. *See, e.g.*, Compl. (Dkt. 1) at 1 (¶ 1), 11 (¶¶ 35, 36); *see also* 25 U.S.C. § 2710(d)(7). The Quapaw Tribe's Complaint flies directly in the face of well-established U.S. Supreme Court precedent that the State's Eleventh Amendment immunity precludes such suit and that 25 U.S.C.

§ 2710(d)(7), which purports to provide federal district courts jurisdiction to compel non-consenting states to negotiate gaming compacts with Indian tribes, exceeded congressional authority. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47, 54, 72, 75-76 (1996).

BACKGROUND

Plaintiff Quapaw Tribe, a federally recognized Indian tribe, seeks to develop a casino on a parcel of land in Kansas held in trust for it by the federal government. While not necessary for a decision in this case, a detailed factual background of the events leading up to this case is set forth in the State's Amended Complaint (Dkt. 13) at 7-13, in *State of Kansas v. National Indian Gaming Commission*, No. 15-CV-4857-DDC-KGS.[1]

IGRA, 25 U.S.C. §§ 2701 *et seq.*, regulates gambling on tribal lands. It divides games into three classes. Relevant here are Class III games (true slot machines and generally games played against the house) which only may be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State." 25 U.S.C. § 2710(d)(1)(c).

IGRA requires states to negotiate such compacts in "good faith." *Id.* § 2710(d)(3). If such a negotiation ultimately fails, IGRA purports to authorize the tribe to bring suit against the state in federal district court. *Id.* § 2710(d)(7). If the court finds the state acted in bad faith, IGRA purports to authorize the court to order the state to negotiate a compact and eventually to submit to mediation. *See id.* § 2710(d)(7)(B)(iv). Ultimately, if mediation fails, IGRA purports to allow the Secretary of Interior to allow Class III gaming without a compact. *Id.* § 2710(d)(7)(B)(vii).

This suit by the Quapaw Tribe is brought pursuant to 25 U.S.C. § 2710(d)(7). The Quapaw Tribe seeks a declaration that the State has failed to negotiate in good faith and seeks an

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[1] District Judge Daniel D. Crabtree recently granted the defendants' motions to dismiss in that case. *See State v. Nat'l Indian Gaming Comm'n*, No. 15-CV-4857-DDC-KGS, 2015 WL 9272847 (D. Kan. Dec. 18, 2015). The State's appeal is pending. *See* State v. Nat'l Indian Gaming Comm'n, No. 16-3015 (10th Cir.).

order requiring the State to comply with the procedural requirements of 25 U.S.C. § 2710(d)(7) *Seminole Tribe*, however, requires the Court to dismiss this suit. *See* 517 U.S. at 72.

MOTION TO DISMISS STANDARD

The State's sovereign immunity, "embodied in the Eleventh Amendment," bars the Quapaw Tribe from maintaining this suit against the State. *See Seminole Tribe*, 517 U.S. at 47, 72, 76. Because "§ 2710(d)(7) cannot grant jurisdiction over a State that does not consent to be sued," *id.* at 47, this suit "must be dismissed for lack of jurisdiction," *id.* at 73. *See id.* at 64 ("[S]tate sovereign immunity limit[s] federal courts' jurisdiction under Article III.").

Because the State has raised subject matter jurisdiction, Plaintiff Quapaw Tribe, as "the party asserting jurisdiction[,] has the burden of overcoming a sovereign immunity defense." *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 (10th Cir. 2010) (citing *Sydnes v. United States*, 523 F.3d 1179, 1183 (10th Cir. 2008)). Federal courts have limited jurisdiction, and they presume they lack jurisdiction. *Marcus v. Kan. Dep't of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999) (citing *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991); *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974)). Plaintiffs must allege sufficient facts to overcome this presumption. *Id.* Conclusory allegations are not enough. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Jensen v. Johnson Cnty. Youth Baseball League*, 838 F. Supp. 1437, 1439-40 (D. Kan. 1993).

ARGUMENT

In *Seminole Tribe*, the Supreme Court held that states have Eleventh Amendment immunity from IGRA suits seeking to compel states to negotiate a compact under IGRA or seeking a declaration that states failed to negotiate in good faith. 517 U.S. at 72-73. The Court held that "Congress does not have authority under the Constitution to make the State suable in

federal court under § 2710(d)(7)." *Id.* at 75. Congress exceeded "constitutional limitation" in purporting to grant such power. *Id.* The Court even went on to disallow under *Ex Parte Young*, 209 U.S. 123 (1908), suits against state officials to require compact negotiation. *Id.* at 73-76.

The Tenth Circuit has recognized and applied *Seminole Tribe*, saying: "[U]nder *Seminole Tribe* . . . , the Eleventh Amendment shields the state from an action seeking to compel the state to negotiate with the Tribe in good faith." *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535, 538 (1997). The Circuit added by way of a footnote: "The Supreme Court in *Seminole* held that Congress lacked the authority to abrogate the states' Eleventh Amendment immunity in IGRA, which was enacted pursuant to the Indian Commerce Clause. Thus, the provision in IGRA authorizing tribes to sue states for failing to negotiate gaming compacts in good faith did not [abrogate] the states' Eleventh Amendment immunity." *Id.* at 538 n.2.

Because § 2710(d)(7) cannot grant this Court jurisdiction to compel a non-consenting state to negotiate an IGRA gaming compact, and because the State has not consented to this suit or otherwise waived its sovereign immunity, this suit must be dismissed. *See Seminole Tribe*, 517 U.S. at 75-76; *Muscogee (Creek) Nation*, 611 F.3d at 1227.

CONCLUSION

The Quapaw Tribe's suit against the State of Kansas is precluded by Eleventh Amendment immunity and must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this24th day of February, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent electronic notification of such filing to all counsel of record.

s/Stephen Phillips
Stephen Phillips