IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

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

RESPONSE OF THE QUAPAW TRIBE TO THE STATE OF KANSAS' MOTION TO DISMISS

Plaintiff, the Quapaw Tribe of Indians (the "Quapaw Tribe" or the "Tribe"), hereby responds to the motion of the State of Kansas (the "State" or "Kansas") to dismiss this action under Fed. R. Civ. P. 12(b)(1) pursuant to its Eleventh Amendment sovereign immunity (Dkt. 10-1).

INTRODUCTION & SUMMARY

Following an unsuccessful attempt to engage the State of Kansas in negotiations concerning a tribal-state gaming compact, the Quapaw Tribe filed this action pursuant to 25 U.S.C. § 2710(7)(A). In response the State asserted its immunity from unconsented suits, as recognized under the Eleventh Amendment to the Constitution. Under controlling law, including *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996), the Court appropriately should grant the motion for dismissal.

BACKGROUND

Beginning in 2013, the Quapaw Tribe attempted for almost two years to engage the State, through Governor Sam Brownback, in negotiations over a tribal-state gaming compact in

accordance with the procedures set forth in the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq*. (the "IGRA"). Although the negotiations began on a mutually cooperative basis, Governor Brownback stopped responding to the Tribe's communications, withdrew his previous support, and refused to complete negotiations of a compact.[1] (Dkt. 1 ¶¶ 11-20.) As a result, the Tribe filed this action pursuant to the IGRA to obtain a judicial determination that the State failed to negotiate a gaming compact in good faith. (Dkt. 1.)

Congress adopted the IGRA following hard-fought—and successful—efforts by Indian tribes in the 1970s and 1980s to obtain legal recognition of their rights, as governments, to conduct and regulate the same types of gaming activities permitted by law in the states in which their reservations are located.[2] Revenues from Indian gaming are the equivalent of the tax revenues collected by federal and state governments, and must be used for governmental operations and services and economic development. *See* 25 U.S.C. § 2710(b)(2)(B). Although in IGRA Congress delegated a limited role in certain gaming matters to the states, the oversight and regulation of Indian gaming remains within federal and tribal jurisdiction and authority.[3]

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[1] After initially supporting a compact with the Tribe, Governor Brownback changed positions to protect a proposed state-owned casino from competition. (Dkt. 1 ¶¶ 16-19.)

[2] *See, e.g.*, *California v. Cabazon Band of Mission Indians*, 48 U.S. 202, 213-22, 107 S. Ct. 1083, 1090-95 (1987) (holding states cannot enforce gaming laws in Indian country); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 389-90, S. Ct. 2011-12 (1976) (holding states lack regulatory jurisdiction in Indian country absent express congressional consent). *See generally Cohen's Handbook of Federal Indian Law* § 12.01, at 874 (2012 ed.) (surveying development of Indian gaming law) [hereinafter *Cohen's Handbook*].

[3] *See* 25 U.S.C. § 2702 (defining roles of tribes and the National Indian Gaming Commission in the regulation of Indian gaming); *id.* § 2710(a) (providing for tribal exclusive jurisdiction over class I and II gaming); *id*. § 2710(d)(5) (permitting tribes to regulate class III gaming consistent with tribal-state gaming compacts); *see also Cabazon*, 480 U.S. at 216-18, 107 S. Ct. at 1092-93 (discussing preemption of state law over Indian gaming). *See generally*

Specifically, although Indian tribes retain the exclusive jurisdiction to regulate class II gaming—bingo-based gaming—they may conduct class III gaming—generally card games and so-called Las Vegas style slot machines—only in states that allow such gaming and only pursuant to compact arrangements. *See* 25 U.S.C. § 2710(a) & (d)(1) & (d)(5). The IGRA provides the process under which Indian tribes may obtain class III gaming compacts. *See* 25 U.S.C. § 2710(d)(3). The statute also provides remedies for a state's refusal to engage in good-faith compact negotiations. *See id* § 2710(d)(7). The Secretary of the Interior of the United States may authorize class III gaming procedures where a state that allows such gaming refuses to enter into a compact with a tribe.[4] *See id* § 2710(d)(7).

ARGUMENT & AUTHORITIES

Following the adoption of the IGRA, the United States Supreme Court recognized in *Seminole Tribe of Florida v. State of Florida* that Congress lacks the power to abrogate the governmental immunity states enjoy from unconsented suits, as recognized under the Eleventh Amendment. *See id*. 517 U.S. 44, 47, 54, 72-73, 75-76, 116 S. Ct. 1114, 1119, 1122, 1131-32, 1133 (1996). Specifically, and as the State of Kansas has argued, the Supreme Court has held that a state's sovereign immunity bars suits under the IGRA seeking a determination that a state has failed to engage in good-faith compact negotiations. *See* 517 U.S. at 75-76, 1116 S. Ct. at 1133; *see also Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535, 538 n.2 (1997).

States and other governments have the option not to assert sovereign immunity as a

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Cohen's Handbook, § 12.02 (describing federal and tribal jurisdiction over Indian gaming, and roles delegated by Congress to states).

[4] Under the IGRA and its implementing regulations, a tribe may ask the Secretary to issue class III gaming procedures only after seeking a judicial determination that the state has refused to negotiate a compact in good faith, and only after the state has raised the Eleventh Amendment defense. *See id*.; *see also* 25 C.F.R. Part 291 (2015).

defense. However, as Kansas has elected to assert sovereign immunity to bar the claims in this case, the Court appropriately—and consistent with controlling law—should enter a judgment dismissing this case on the ground of Eleventh Amendment immunity.

CONCLUSION

In view of Kansas' election to assert the bar of sovereign immunity as a defense to this action under controlling law, this action should be dismissed based upon the State's Eleventh Amendment immunity.

Respectfully submitted,

s/ Paul M. Croker

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February 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this the 29th day of February, 2016, I electronically transmitted a full, true, and correct copy of the above and foregoing instrument, the "RESPONSE OF THE QUAPAW TRIBE TO THE STATE OF KANSAS' MOTION TO DISMISS," to the Clerk of Court using the Electronic Case Filing System (the "ECF System") for filing and transmittal of a Notice of Electronic Filing to the filing following ECF registrants (names only):

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A full, true, and correct copy of the above and foregoing was also on the same date deposited in the regular United States mail, with proper postage fully prepaid thereon, addressed to the following:

None.

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