Federal Indian Law

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FEDERAL INDIAN LAW

INTRODUCTION

The United States Court of Appeals for the Tenth Circuit decided several issues dealing with Native Americans between August 31, 1997 and September 1, 1998. The decisions reinforced and delineated Native American dependence on the states and the federal government.1 This survey will address and analyze Tenth Circuit decisions that reinforced precedents in the areas of gaming, tribal membership, and Indian trust lands. Each topic focuses on one central issue: the delicate, and sometimes arbitrary, negotiation of power between the federal and state governments and the imperfect sovereignty of the respective Indian nations.

Historically, American Indian law has not incorporated Native American culture or custom into its precedents.2 Indeed, this trend extends deep into the nineteenth century. As de Tocqueville noted in his journals during his travels through the United States during the early part of the century, "the conduct of the United States Americans toward the natives was inspired by the most chaste affection for legal formalities."3 The United States Supreme Court analyzed this trend in its opinion in Worcester v. Georgia4 by discussing the persistent eagerness of the United States to enter into treaties with Native American tribes and to impose Anglo-American mores on them.5 Between the American Revolution and the late nineteenth century, Congress used treaties and statutes, often engineered from the white perspective,6 to define the relationship of the United States with American Indian tribes.7

During the initial grafting of Anglo-American law onto Native American cultures, tribes existed as sovereign entities, separate from the states.8 The Court in Worcester illustrated this fact by affirming the sov-
s overignty of the Cherokee Nation and emphasizing that the state of Georgia had no jurisdiction over the Nation itself nor the individual members of the Tribe. The Court had previously held that Native American sovereignty was not absolute, as with a foreign nation. Justice Marshall compared the relationship between the United States and Native American tribes as a trust relationship similar to that of ward and guardian, with the federal government acting as a benevolent tutor.

American policy toward Native Americans grew more invasive as the nineteenth century progressed. Initially, Congress intended to act as a tutor to Native American tribes until the American government believed that the Indians had adapted well enough to white culture to operate their own judicial and political institutions. Congress, however, changed its role in the 1830s with the initiation of the removal policies that began with the implementation of the campaign promises of President Andrew Jackson. The Great Removal forcibly removed 60,000 Indians from their ancestral homelands to the western, undeveloped part of the continent. To survive, Native Americans would now have to assimilate and to learn the ways of their American tutor. This policy of gradual assimilation into mainstream culture guided American policy toward Native Americans throughout the nineteenth century. The expectation was that the “Indians would become small republics protected by the United States and at some distant future date might be represented in the halls of Congress.”

The United States intensified this policy until the late nineteenth century, when Congress enhanced its policy of assimilation. In 1887,
Congress enacted the Indian General Allotment Act, which created a specific policy to force Native Americans to assimilate into white society. The statute was intended to turn the Indians into "true Americans" by splitting native lands into individual plots for farming. The Supreme Court affirmed this policy in *Lone Wolf v. Hitchcock,* endorsing Congress's right to unilaterally abrogate treaties with Native Americans. Through the Allotment Acts, Native Americans lost eighty-six million acres of land between 1887 and 1934. This devastating effect left the Indians destitute and defeated.

American policy toward Native Americans shifted again in the early part of the twentieth century with the passage of the Indian Reorganization Act of 1934. Indian identity and culture had almost disappeared because the federal government had controlled all aspects of Native American life for the previous fifty years. This statute, an acknowledgment by Congress that the policy focus of allotment had failed, allowed for some degree of tribal autonomy. The statute stopped the allotment of tribal lands, allowed for Native American ceremonies, and attempted to resuscitate Native American culture. This new congressional policy, which emphasized decreasing Native American dependency on the federal government, escalated with the Termination Era of the 1950s. During this period, Congress enacted its legislation affecting Native Americans with the sole intent of ending the dependency of Indians on the federal government. As a reincarnation of the assimilation policies of the nineteenth century, the Termination Era legislation attempted to homogenize Indian culture with general American culture "by breaking

23. 187 U.S. 553 (1903).
26. *See id.*
28. *See generally Tom Holm, Indian Concepts of Authority and the Crisis in Tribal Government,* SOC. SCI. J., July 1982, 59, 59-71, reprinted in Tom Holm, *The Crisis in Tribal Government,* in *AMERICAN INDIAN POLICY,* supra note 1, at 135, 135-54 (arguing that Indian culture faces oblivion because internal political strife is largely caused by dissatisfaction with the operation of tribal governments). Holm emphasizes that "Indian lands had been confiscated or dismembered; tribal governments had been dissolved; American Indian arts had been all but lost; and tribal religious ceremonies banned or destroyed." *Id.* at 140.
29. *See id.*
30. *See id.*
32. *See id.*
down cultural and tribal bonds. Ultimately, through this policy, Congress terminated the relationship between itself and 109 Indian tribes.

The 1970s and the Nixon Administration brought the current government policy of self-determination. Despite the sweeping tone of this policy, it applied only to federally recognized Indian tribes, excluding almost one-third of the native peoples in the United States. Unrecognized tribes still must apply for and receive federal recognition to participate in many federal programs designed for Native Americans. The relationship between the federal government and the Native American tribes has come full circle and has evolved from one of a guardianship back to a trust relationship, where American Indian tribes have some degree of internal autonomy.

I. INTERPRETATION OF THE INDIAN GAMING REGULATORY ACT:
GUIDED SELF-DETERMINATION

A. Background

In the past decade federal courts have decided numerous cases involving the rapid growth of the gaming industry, especially high-stakes gambling, on Native American reservations. Before 1988, Native American tribes chose to develop gambling facilities on their respective reservations as a lucrative, fast path toward economic growth and self-sufficiency. Federal statutes did not regulate reservation gambling, and the states had no jurisdiction over the Indian casinos within their respective jurisdictions. Gaming on reservations has tempered some of the harsher effects of poverty some Native Americans have endured for generations and has enhanced the political power of a few tribes.

Controversy arose over tribal casinos in the 1970s and 1980s when state governments began to dispute tribal authority to operate the casinos without any state regulation. Congress addressed state concerns with the

33. Id.
34. See id.
35. Cf. id. President Nixon noted that it was time for "a new era in which the Indian future is determined by Indian acts and Indian decisions." Id. (citing MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS FOR INDIAN POLICY, H.R. DOC. NO. 91-363, at 1 (1970)).
36. See id.
37. See id. at 45.
38. Cf. id. at 46.
40. See id. at 129.
42. See id. at 528–29.
enactment of the Indian Gaming and Regulatory Act of 1988 (IGRA). Intending to temper the escalating tension between states and Native American reservations, the Congress enacted the IGRA to provide a legal framework for Native Americans to use gaming "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." Specifically, Congress attempted to create a balance between tribal and state interests with the creation and the empowerment of the National Indian Gaming Commission (NIGC). The NIGC, a body composed of three members, two of whom must be Native Americans, oversees casino activities, supervises the parties, and evaluates casino financial practices. The NIGC also has the authority to create tribal gaming regulations, to contract with tribal and state entities, and to conduct investigations of premises, records, and the bookkeeping of tribal casinos.

The structure of the statute divided gaming into three categories: Class I, Class II, and Class III. The statute permits completely unregulated Class I gaming and limited regulation of Class II gaming. Class III gaming requires state assent. Receiving state assent requires that tribes comply with certain specific procedures, including asking the respective state to negotiate a Class III gaming compact. The state must negotiate in good faith. Should a state refuse to negotiate a gaming compact with a tribe, the statute confers standing on the tribe to bring an action against the state in federal court. If the tribe can meet its burden

44. Cf. Thompson supra note 41, at 522, 530. Congressional concern stemmed from the possibility of the influence of organized crime and the lack of federal regulatory authority on reservations. See id. at 530. Once again, with the construction of the statute, Congress assumed a guardian-type role over Native Americans.
45. Id. at 530–31.
46. See 25 U.S.C. § 2704 (setting forth the composition of the National Indian Gaming Commission and stating that at least two members of the Commission must be from an Indian tribe, and no more than two members can be from the same political party).
47. See id. § 2704(b)(3).
48. See id. § 2706(b).
49. See id. § 2706(b)(10).
50. See id. § 2706(b)(7).
51. See id. § 2706(b)(2)–(4).
52. See id. § 2703(6). Class I gaming is for small prizes or gaming that includes traditional Indian games used during traditional tribal ceremonies and festivals. Id. Neither the states nor the federal government has the authority to regulate this type of gaming. Id. § 2710.
53. See id. § 2703(7). Class II gaming includes games such as lotto, bingo, and card games, with the exclusion of banking card games such as blackjack and baccarat. Id. § 2703(7)(A)–(B).
54. See id. § 2703(8). Class III games include all games not listed under Class I or Class II, such as banking card games, slots, keno, animal racing, and jai-alai.
55. See id. § 2703(6).
56. See id. § 2710(b).
57. See id. § 2710(d)(1)(C).
58. See id. § 2710(d)(3)(A).
59. See id.
60. See id. § 2710(d)(7)(A) & (B).
and prove that the state failed to negotiate in good faith, the district court
can order the state to conclude a compact with the tribe within a sixty-
day period. Should the state fail to negotiate a compact within this time
period, the tribe can resort to a federal mediator, who has the authority to
select one of the compacts proposed by either the state or the tribe. Should the state reject federal mediation, the Secretary of the Interior can
determine procedures to facilitate the conclusion of the compact.

The decision of the United States Supreme Court in *Seminole Tribe of Florida v. Florida* significantly altered the operation of the IGRA. In September 1991, the Seminole Tribe sued the state of Florida and Governor Lawton Chiles for refusing to negotiate a Class III gaming compact with the Tribe and for violating the “requirement of good faith negotiation” mandated by section 2710(d)(3) of the IGRA. Florida moved to dismiss the Tribe’s complaint claiming that the suit violated the state’s sovereign immunity that protected it from suit in federal court. The district court denied the motion, and the Eleventh Circuit reversed, concluding that the Indian Commerce Clause did not give Congress the power to abridge the Eleventh Amendment immunity granted to the states. In addition, the Court also found that its precedent in *Ex parte Young* did not allow a tribe to sue a state for good faith negotiation and force a state’s governor to negotiate with a tribe.

The Supreme Court affirmed the Eleventh Circuit’s decision, holding that the Eleventh Amendment prevented Congress from enacting legislation to allow Indian tribes to sue a state under the Indian Commerce Clause. The Indian Commerce Clause did not give Congress the power to abrogate the sovereign immunity of the states and violate their Eleventh Amendment rights under the Constitution. Thus, section 2710(d)(7) of the Indian Gaming Regulatory Act could not confer federal

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61. See id. § 2710(d)(7)(B)(ii) & (iii). A court must balance state interests against tribal interests. See id.
62. See id. § 2710(d)(7)(B)(iv).
63. See id. § 2710(d)(7)(B)(vii).
64. 517 U.S. 44 (1996).
67. See id. at 52.
68. See id. at 52–53.
69. 209 U.S. 123 (1908). In *Ex parte Young*, the Court decided an appeal based on a suit brought by the stockholders of various railroad companies against, among others, members of several regulatory bodies of the state of Minnesota and the Attorney General of Minnesota. Cf. id. at 127–30. The plaintiffs sought injunctive relief against the promulgation and enforcement of price controls fixing the tariff rates of railroads in Minnesota. See id. at 127–31. The Court decided that the Eleventh Amendment prohibits a suit brought by citizens of a state or nation against another state. See id. at 149.
70. See Seminole Tribe, 517 U.S. at 52.
71. See id. at 52–53.
72. See id. at 47.
jurisdiction over a state that has not consented to be sued. Finally, the Court held that Ex parte Young could not be used to enforce the good faith requirements of section 2710(d)(3) against an official of the state.

In analyzing the context of the statute, the Court determined that Class III gaming was only legal if it was authorized by the Tribe's governing body, satisfied the requirements of the statute, was approved by the NIGC, was located in a state permitting such gaming "for any purpose by any person, organization, or entity," and conformed with the tribal-state compact. In its analysis of the statute and the constitutional questions governing it, the Court addressed two issues: whether the Eleventh Amendment prevented Congress from authorizing suits by Indian tribes against the states as injunctive relief to enforce legislation enacted by the Indian Commerce Clause, and whether the doctrine of Ex parte Young permitted actions against a state's governor for injunctive relief. The Court answered the first question in the affirmative and the second in the negative.

The Supreme Court addressed the Eleventh Amendment argument and noted that the text indicated that the judicial power of the federal government could not be extended to any action in "law or equity" against a state by citizens of another state or a foreign nation. The Court held that the scope of the statute extended beyond Article III courts and stood "not so much for what it says, but for the presupposition . . . to which it confirms." This presupposition has two parts: each state is a sovereign entity in the federal system, and a state cannot retain its sovereignty if it cannot consent to potential suits brought against it. Thus, the federal courts do not have jurisdiction over a suit against a state that does not consent to be sued. Here, Florida did not consent to be sued.

The Tribe claimed that the IGRA abrogated state immunity and that Congress explicitly expressed its intent to do so in the statute. Analyzing this claim, the Court noted that Congress can only abrogate state sovereignty "by making its intention unmistakably clear in the language of the statute." The Court examined the text of the statute, and the language that specifically referred to the state as a defendant and
concluded that Congress intended to abrogate state sovereign immunity.\footnote{See id.} The Court then addressed whether, in abrogating the immunity, Congress had overstepped its constitutional boundaries.\footnote{See id. at 59.} The Court began by its assessment by analyzing whether the Indian Commerce Clause conferred on the federal government the authority to abrogate states' rights.\footnote{See id. at 62.} Since neither the language in article three, section two, clause one of the United States Constitution, nor the absence of a prohibition in the text of the Eleventh Amendment allowed a state to be sued without its consent,\footnote{See id. at 59.} the Seminole's claim was dismissed for lack of jurisdiction.\footnote{See id. at 66.}

Finally, the Supreme Court considered whether the Tribe might exercise jurisdiction over its own suit to enforce the good faith requirements of section 2710(d)(3) against Governor Chiles, regardless of the jurisdictional bar of the Eleventh Amendment.\footnote{See Seminole Tribe, 517 U.S. at 73; cf Ex parte Young, 209 U.S. 123 (1908).} The Court, however, did not see the Seminole's situation as one similar to that in \textit{Ex parte Young}.\footnote{See id.; see also Green v. Mansour, 474 U.S. 64, 68 (1985); cf. 25 U.S.C. § 2710 (d)(3) (1994 & Supp. II 1996).} In distinguishing the instant case from \textit{Ex parte Young}, the Court noted that the IGRA statute contained a provision for enforcement in section 2710(d)(7).\footnote{See Seminole Tribe, 517 U.S. at 73; cf Ex parte Young, 209 U.S. 123 (1908).} The opinion emphasized that section 2710(d)(3) provided a sixty-day requirement that the state and the tribe complete a compact, should the state not negotiate in good faith.\footnote{See id. at 67.} In addition, if the tribe and state did not satisfy the requirement within the sixty-day time period, the statute required that both parties submit proposals to a federal mediator, who then would select the best proposal.\footnote{See id. at 67.} Finally, if the state did choose not to accept the compact selected by the mediator, the mediator must notify the Secretary of the Interior, who then would prescribe regulations for gaming on the reservation in question.\footnote{See id. at 74–75.} Ultimately, the
Seminole Tribe could not use the *Ex parte Young* precedent because Congress included a remedial provision in the statute that required the submission of the state and tribal plans to a federal mediator, who selected the plan that best comported with the statute and a provision that allowed for the Secretary of the Interior to implement Class III gaming procedures should a state fail to accept the federal mediator's choice.  

The *Seminole Tribe* decision undermined the IGRA. The Supreme Court's interpretation of the Eleventh Amendment recognizes a state's right not to negotiate with Indian tribes over Class III gaming. Public opinion, which historically has been opposed to Native American gaming, no doubt, may encourage states not to negotiate with Native American tribes—especially now that the Supreme Court's decision in *Seminole Tribe* has nullified the enforcement provision of the IGRA. The *Seminole Tribe* decision has directly affected the outcome of the decisions in the Tenth Circuit and other circuits that have addressed the issue of Class III gaming on Native American reservations.

**B. Tenth Circuit Cases**

1. *Jicarilla Apache Tribe v. Kelly*

   a. **Facts**

   In *Jicarilla Apache Tribe v. Kelly*, the Tenth Circuit addressed the legality of Class III gaming on tribal casinos within New Mexico. The Jicarilla Apaches negotiated a tribal-state, Class III gaming compact with the governor of the state of New Mexico under the auspices of the IGRA. On May 20, 1996, the Tribe opened a casino on its reservation. After the opening of the casino the United States Attorney for New Mexico, John Kelly, warned the Tribe that the government would take action against it for the illegal operation of a Class III gaming facility. In response, the Tribe filed a lawsuit against John Kelly, United States Attorney for the District of New Mexico; Janet Reno, Attorney

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98. *See id.* at 76.
100. *See id.* at 872. Because states now have immunity from litigation via the Eleventh Amendment, the statutory safeguard that the states negotiate in good faith no longer exists, giving the states "veto" power over Class III gambling. *Id.*
101. *See id.* at 874.
102. 129 F.3d 535 (10th Cir. 1997).
103. *See Jicarilla Apache Tribe*, 129 F.3d at 536.
104. *See id.*
105. *See id.*
General of the United States; and Bruce Babbit, Secretary of the Interior, alleging four claims.  

First, in seeking declaratory relief, the Tribe argued that the compact allowed it the right to continue its Class III gaming activities. Second, the Tribe claimed that its casino was legal and that its threatened closure by the federal government violated the Tribe's Fifth Amendment rights. Third, the Tribe claimed that Class III gaming was legal and authorized by federal law and the compact. Fourth, the Jicarilla Apaches claimed that the defendants had a fiduciary duty to protect the Tribe's gaming activities from interference by others "purporting to act under color of state or federal law." The defendants counterclaimed and sought an order declaring the Class III gambling activities by the Tribe to be illegal, violating both New Mexico and federal law. The district court issued an order invalidating the compact and dismissing the Tribe's claim for declaratory relief.

b. Decision

In affirming the decision of the district court, the Tenth Circuit based its decision on Pueblo of Santa Ana v. Kelly, where it held that a compact nearly identical to the one in this case was invalid because it violated the IGRA and New Mexico state law. In Pueblo, the Tenth Circuit made several central determinations regarding the IGRA statute. First, the court decided that the parties to a compact, the state and the tribe, must have agreed to form a gaming compact and that the compact must govern both of the parties before the Secretary of the Interior can approve Class III gaming on the reservation in question. Second, the court held that state law dictated the process by which a state legally can

107. See Jicarilla Apache Tribe, 129 F.3d at 536.
108. See id.
109. See id.
110. See id.
111. Id. The Jicarilla Apaches also argued that New Mexico waived its Eleventh Amendment Immunity by filing a pleading in reply to the Tribe's claims. See id. a 537. Additionally, the Tribe challenged the district court's dismissal of its case, which prevented it from filing a cross claim against New Mexico for failure to negotiate in good faith. See id. a 537–38.
112. See id.
113. See id. at 536–37.
114. 104 F.3d 1546 (10th Cir.), cert. denied, 118 S. Ct. 45 (1997).
115. See Pueblo of Santa Ana, 104 F.3d at 1559. The Tenth Circuit affirmed a district court decision upon which the district court relied in dismissing the action of the Jicarilla Apaches. See id. The court found that the Governor of New Mexico did not have the authority to negotiate a compact with the Tribe under New Mexico law. See id. The court also rejected the Jicarilla Apache's attempt to distinguish its claim from the facts in Pueblo of Santa Ana by recognizing that New Mexico law estopped the state from arguing the illegality of the agreement and also that New Mexico did not negotiate in good faith. See Jicarilla Apache Tribe, 129 F.3d at 537.
116. See Jicarilla Apache Tribe, 129 F.3d at 537 (quoting Pueblo of Santa Ana, 104 F.3d at 1553).
enter into a compact with a tribe.\textsuperscript{117} Third, the Tenth Circuit agreed with the New Mexico Supreme Court in \textit{State ex rel. Clark v. Johnson} on the issue of whether New Mexico and a Native American tribe had established a legal compact under New Mexico law.\textsuperscript{118} It held that the New Mexico Supreme Court was correct in its conclusion that the governor's lack of authority undermined the legality of any compact negotiated under the IGRA.\textsuperscript{119} Based on \textit{Pueblo of Santa Ana} and the decision of the New Mexico Supreme Court, the court concluded that that the compact in the instant case between the Jicarilla Apache Tribe and governor failed under both state law and the IGRA.

The Tenth Circuit also rejected the Tribe's request to remand the case to the district court so that it could file its cross-claim against New Mexico for failure to negotiate in good faith.\textsuperscript{120} The court concluded that the lower court's dismissal of the claim was neither premature nor incorrect.\textsuperscript{121} It supported its decision by referring to \textit{Seminole Tribe},\textsuperscript{122} which held that the Eleventh Amendment shields states from litigation.\textsuperscript{123} Despite the limitations created by the Eleventh Amendment, the Tenth Circuit noted that immunity can be waived.\textsuperscript{124} In applying this standard, the Tenth Circuit rejected the Jicarilla Apache's claim that the state of New Mexico waived its sovereign immunity, noting that New Mexico never filed a motion to dismiss; it merely entered an appearance.\textsuperscript{125} The court emphasized that an appearance in court is not, in itself, a definitive waiver of sovereign immunity.\textsuperscript{126}

2. \textit{Mescalero Apache Tribe v. New Mexico}\textsuperscript{127}

a. Facts

The Tenth Circuit addressed the issue of whether the Apache Tribe of the Mescalero Reservation could sue the state of New Mexico to compel the state to negotiate a Class III gaming compact.\textsuperscript{128} The Mescalero Apache Tribe began negotiating with the state to conclude a tribal Class

\textsuperscript{117}. \textit{Id.} in \textit{State ex rel. Clark v. Johnson}, 904 P.2d 11 (N.M. 1995), the New Mexico Supreme Court considered both the state constitution and state law in holding that neither authorized the governor of New Mexico to negotiate and sign a gaming compact. See \textit{Johnson}, 904 P.2d at 22–26.

\textsuperscript{118}. See \textit{Jicarilla Apache Tribe}, 129 F.3d at 537.

\textsuperscript{119}. See id. The court noted that the Supreme Court of the United States denied certiorari in \textit{Pueblo of Santa Ana} and that the decision by the Tenth Circuit is the law of the circuit. See id.

\textsuperscript{120}. See id.

\textsuperscript{121}. See id. at 538.

\textsuperscript{122}. For a discussion of \textit{Seminole Tribe}, see supra notes 64–101 and accompanying text.

\textsuperscript{123}. \textit{Jicarilla Apache Tribe}, 129 F.3d at 538.

\textsuperscript{124}. See id. The court noted, however, that waiver is difficult to prove and must be "unequivocal...[since constructive consent is insufficient." \textit{Id.} (quoting Johns v. Stewart, 57 F.3d 1544, 1553 (10th Cir. 1995)).

\textsuperscript{125}. See id.

\textsuperscript{126}. See id.

\textsuperscript{127}. 131 F.3d 1379 (10th Cir. 1997).

\textsuperscript{128}. See \textit{Mescalero Apache Tribe}, 131 F.3d at 1380.
III gaming compact in the late 1980s. In the early 1990s, a task force established by then Governor Bruce King and the Tribe arrived at a tentative agreement to allow limited gaming on the reservation. Later, however, the governor refused to sign the agreement. In 1992, the Tribe filed an action to compel New Mexico to negotiate a Class III gaming compact, alleging bad faith negotiation by the governor and the state of New Mexico under section 2710(d)(7).

New Mexico filed a motion to dismiss the Tribe’s case, arguing that its Eleventh Amendment immunity barred the Tribe’s claim. The district court agreed with New Mexico and dismissed the case. In Ponca Tribe v. Oklahoma, the Tenth Circuit Court of Appeals reversed, holding that states cannot assert either the Tenth or the Eleventh Amendments as defenses to an IGRA action to compel good faith negotiation. On remand, New Mexico filed an answer and a counterclaim requesting an order that the compact was invalid, again arguing that a state cannot be sued by a tribe because of the immunity protections of the Tenth and Eleventh Amendments.

In turn, the Mescalero Apaches filed a motion to strike the state’s constitutional defenses and counterclaim for constitutional immunity. New Mexico moved for summary judgment on its counterclaim that the tribal compact was invalid. While on remand, the United States Supreme Court decided Seminole Tribe, invalidating the IGRA provision abridging Eleventh Amendment immunity protection for the states. In light of its decision in Seminole Tribe, the Supreme Court vacated the Tenth Circuit’s decision in Ponca Tribe v. Oklahoma and remanded the case to the Tenth Circuit for further consideration.
After the Supreme Court's decision in *Seminole Tribe* and its subsequent decision to vacate the Tenth Circuit's decision in *Ponca Tribe*, the district court held a hearing on the outstanding motions of both parties.\(^{144}\) The district court denied the Mescalero Apache's motion to strike New Mexico's Eleventh Amendment immunity defense.\(^{145}\) It granted the Tribe's motion to strike New Mexico's Tenth Amendment immunity defenses and denied the Tribe's motion to dismiss New Mexico's counterclaim.\(^{146}\) It granted the State's motion for summary judgment on the compact's legality, finding that the compact was invalid, and the Tribe appealed.\(^{147}\)

During the pendency of Tribe's appeal, the Tenth Circuit decided the case of *Pueblo of Santa Ana v. Kelly*\(^{148}\) and found that the compacts entered into by the tribes, which were very similar to the Mescalero Apache compact, were invalid and not "in effect" under the IGRA.\(^{149}\) The court held that New Mexico law did not grant the governor the authority to negotiate a compact with the tribe.\(^{150}\)

The Tenth Circuit sought to clarify the issues on appeal by ordering the parties to brief the following issues: the effect of the decision in *Pueblo of Santa Ana* on this appeal,\(^{151}\) and the effect that recent changes in New Mexico state law might have on any of the issues raised by the appeal.\(^{152}\)

The Mescalero Apaches argued that *Pueblo of Santa Ana* was not controlling because the issues presented in this appeal were not raised in that case.\(^{153}\) First, the Tribe sought to distinguish its appeal from *Pueblo of Santa Ana* because the United States was not a party to the suit, as it had been in *Pueblo of Santa Ana*, and the court did not have to consider whether the federal government was an indispensable party.\(^{154}\) The court decided that the state's counterclaim would stand even if the United States were a necessary party because the federal government cannot be sued without its consent. The court concluded that it could only grant the Tribe's request for the dismissal of the state's counterclaim if it found

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144. See id.
145. See id.
146. See id.
147. See id.
148. 104 F.3d 1546 (10th Cir.), cert. denied, 118 S. Ct. 45 (1997).
149. *Pueblo of Santa Ana*, 104 F.3d at 1559.
150. See id.
151. See *Mescalero Apache Tribe*, 131 F.3d at 1381.
152. See id.
153. See id. at 1381–82.
154. See id. at 1382. The Tenth Circuit noted that deciding whether or not a party is indispensable includes a determination under FED. R. Civ. P. 19(a) that the party is necessary and can be joined if possible. See id. at 1383. The elements that determine whether a party is necessary include whether complete relief is available to the individuals and entities already party to the suit, whether the unnamed party has an interest in the claims and would be hampered by its absence, and whether a party in the suit would be at a substantial risk of "multiple or inconsistent obligations." Id.
155. See id.
that the federal government was also an indispensable party. Second, the Tribe argued that the absence of the federal government in this dispute compelled the court to decide whether Congress abrogated the Tribe's sovereign immunity. Third, the Tribe claimed that the court did not address the political question doctrine in Pueblo of Santa Ana, an issue for consideration in the instant case, because the court did not have the jurisdiction to entertain the claim under the doctrine. Fourth, the Tribe argued that New Mexico's form of sovereign immunity differed from that of Florida in the application of Seminole Tribe. Last, the Tribe argued that New Mexico had substantially changed its law as related to this decision, requiring the court to revisit its decision in Pueblo of Santa Ana.

New Mexico countered the Tribe's arguments by contending that the holding in Pueblo of Santa Ana was binding in this appeal because the Tenth Circuit found that the compacts in Pueblo of Santa Ana, which were identical to the compacts in this case, were invalid. The state also argued that recent changes in New Mexico law now allowed the governor to enter into gaming negotiations with tribes. New Mexico reported that the state and the Apaches had entered into a new Class III gaming compact, and that the recent state law changes and the new compact between New Mexico required the Tenth Circuit to certify three state law questions to the New Mexico Supreme Court before deciding the merits of the appeal.

156. See id. The court sets out the rules of an indispensable party as enumerated in FED. R. CIV. P. 19(b), which include the degree that a judgment made in the individual's absence would be prejudicial to the individual or already named parties, the degree by which the prejudice can be lessened by the judgment through relief and other considerations, if the judgment will be "adequate" despite the absence of the individual, and if the plaintiff will retain a sufficient remedy even if the case is dismissed for nonjoinder. See id. The court also noted that the Supreme Court of the United States has required that any court reviewing an appeal from an appellate perspective for the first time analyze the successful plaintiff's interest in maintaining the judgment, the defendant's unsuccessful attempts to litigate his claim, the interest of the individual not named in the suit, and the interests of judicial time and efficiency. See id. (citing Enterprise Management Consultants, Inc. v. United States, 883 F.2d 890, 894 (10th Cir. 1989) (citing Provident Tradesmen's Bank & Trust Co. v. Patterson, 390 U.S. 103, 109–11 (1969))).

157. See id. at 1382.

158. See id.

159. See id.

160. See id.

161. See id.

162. See id. The state claimed that New Mexico had recently enacted legislation giving the governor the authority to make compacts with tribes. See id.

163. See id.

164. See id. New Mexico, pursuant to the Federal Rules of Appellate Procedure, requested that the court certify the following questions: (1) Whether the New Mexico legislature acted within its constitutional authority when enacting the state statute, (2) Whether the tribal resolution authorized the governor to negotiate and to enter into a treaty with the tribe, and (3) If the statute was unconstitutional, whether the defective portions of the statute could be excised from the valid sections of the statute. Id.
b. *Decision*

The Tenth Circuit addressed the issues raised, including whether the United States was an indispensable party, the applicability of the precedent in *Seminole*, tribal sovereign immunity, the political question doctrine, the court's jurisdiction over the counterclaim, and the changes in New Mexico law. The court concluded that the Tribe was correct in asserting that the issues of indispensability could be raised at any time, despite the fact that the Tribe only raised the issue after an initial unfavorable ruling. The court concluded that the United States was not an indispensable party to the action. Citing its precedent in *Pueblo of Santa Ana*, it found that the approval of the Secretary of the Interior could not and did not predicate the intrinsic legality of the compact. The court also concluded that the absence of the government did not prejudice any party to the action and that the United States could not challenge the ruling in a later claim. Finally, the court determined that judicial efficiency weighed against the inclusion of the federal government as an indispensable party. The court held the state's counterclaim valid, despite the absence of the federal government.

Next, the Tenth Circuit considered the applicability of *Seminole Tribe* to the Tribe's claims. The court rejected the Tribe's argument drawing distinctions between their situation and *Seminole Tribe*, and held that the Tribe's argument confused general state sovereignty and Eleventh Amendment immunity. Citing *Seminole Tribe*, the court explained that a state could waive its general sovereign immunity in state court and subject itself to a civil action. However, a waiver, however, is not enough to abrogate its Eleventh Amendment immunity. The court emphasized that immunity encompassed not only whether the state could be sued but also

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165. The Tenth Circuit began its analysis by discussing the district court's holdings. *See id.* at 1383. The district court concluded that the *Ponca Tribe* decision, which held that the IGRA did not violate the Tenth Amendment, was binding in the instant case. *See id.* The court also found that New Mexico had Eleventh Amendment immunity from suit for failure to negotiate in good faith. *See id.* In addition, the district court held that New Mexico did not waive this claim by filing a counterclaim. *See id.* The court also held that it had the jurisdiction to determine the state's counterclaim and that the Tribe's sovereign immunity action did not bar it from hearing this claim. *Id.* at 1382–83. It also concluded that the state's counterclaim was not barred by the political question doctrine. *See id.* at 1383. Finally, the court ruled that the compact negotiated by the New Mexico governor and the Tribe was invalid because the governor lacked the requisite constitutional authority to negotiate with the Tribe on New Mexico's behalf. *See id.*

166. *See id.* at 1383.

167. *See id.* at 1384.

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*
when it could be sued. Therefore, the court concluded that New Mexico must explicitly specify its intention to waive its immunity in federal court and emphasized that New Mexico's actions did not alter its Eleventh Amendment immunity from actions in federal court. Thus, the Tenth Circuit affirmed the district court's denial of the Tribe's motion to strike New Mexico's Eleventh Amendment immunity defense.

The Tenth Circuit then addressed the tribal sovereign immunity issue and whether Congress abrogated this protection. Citing Santa Clara Pueblo, the court reasoned that common law immunity protects Native American tribes from litigation. The court did not consider this immunity to be absolute and noted that it could be waived in an affirmative act. However, it noted that the exception to the rule is narrow and any act must be express and unmistakable. The court also noted that the IGRA gave the district court authority over any claim to prevent Class III gaming activity on Indian reservations. The Tenth Circuit concluded that the IGRA waived tribal sovereign immunity not only in instances involving compliance with IGRA provisions, but also in situations where one party requested injunctive relief in its initial claims.

The court summarily addressed the fourth, fifth, and sixth issues. The court, relying on its opinion in Pueblo of Santa Ana, determined that the claim was justiciable. In assessing whether or not it has jurisdiction

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177. See id.
178. See id. at 1385. The court of appeals also addressed whether New Mexico waived its Eleventh Amendment immunity by filing a counterclaim against the Tribe. See id. at n.4. Agreeing with the district court's sua sponte resolution of this matter, the Tenth Circuit concluded that even though a state can waive its Eleventh Amendment immunity and consent to be sued, a "stringent test" must be used to determine the validity of such waiver. See id. (citing Johns v. Stewart, 57 F.3d 1544, 1553 (10th Cir. 1995)). This test is satisfied only upon a showing that the language is so express in its intent or in its statutory or constitutional mandate "as [will] leave no room for any other reasonable construction." Id. (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239–40 (1985)) (quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974))). The Tenth Circuit concluded that New Mexico had not waived its sovereign immunity by filing a counterclaim or responding to a claim against it. See id. (citing Santee Sioux Tribe of Neb. v. Nebraska, 121 F.3d 427 (8th Cir. 1997); American Fed'n. of State, County, and Mun. Employees v. Corrections Dept't., 783 F. Supp. 1320, 1327 (D.N.M. 1992); National R.R. Passenger Corp. v. Roundtree Transp. & Rigging, Inc., 896 F. Supp. 1204, 1206–07 (M.D. Fla. 1995)).
179. See id. at 1385.
181. See Mescalero Apache Tribe, 131 F.3d at 1385.
182. See id.
183. See id. (citing United States v. Testan, 424 U.S. 392, 399 (1976)).
184. See id.
185. See id.
186. See id. at 1386. The Tenth Circuit concluded that the state's counterclaim was not a non-justiciable political question and that the claim was not made in Pueblo of Santa Ana, which showed why the argument did not succeed. See id. The court explained that a political question involves a "textually demonstrable constitutional commitment of the issue to a coordinate political development; or a lack of judicially discoverable and manageable standards for resolving it." See id. (quot-
over the claim, the court concluded that it did, in fact, have jurisdiction, again referring to its decision in *Pueblo of Santa Ana.* 187 Finally, the court refused to decide whether the recent legislation passed by the New Mexico had any bearing on the outcome of the instant case, noting that the new statute was not at issue. 188

C. *Other Circuits*

Other circuits also wrestled with gaming issues during the survey period. The Sixth Circuit, in reversing a district court decision, concluded that the IGRA applied to gaming in *Keweenaw Bay Indian Community v. United States.* 189 In this case, the Tribe acquired a plot of land that was later taken into trust by the federal government for the benefit of the Keweenaw Tribe. 190 The Tribe and the state of Michigan agreed to negotiate a tribal-state compact for Class III gaming on tribal lands if the Tribe met four conditions. 191 The Tribe met each of the stated conditions and applied for approval from the Bureau of Indian Affairs (BIA). 192 The BIA indicated that the Tribe must conform to the requirements enumerated in section 2719 of IGRA. 193 The Tribe refused and sued the state in federal district court for declaratory and injunctive relief. 194 The Sixth Circuit rejected the Tribe’s argument that the existence of the compact removed gaming from the jurisdiction of IGRA 195 and found that the validity of its compact did not exclude it from conforming with section 2719 of the IGRA. 196

The Eighth Circuit also addressed the issue of Class III gaming in *United States v. Santee Sioux Tribe of Nebraska.* 197 When negotiations between the state of Nebraska and the Sioux Tribe to open a Class III
gaming facility failed in the early 1990s, the Tribe opened the facility anyway. Concurrently, the Tribe sued Nebraska for failure to negotiate in good faith. After a NIGC decision, the Tribe was forced to close its facility. The district court did not enjoin the Tribe from its gaming activity. In reversing and remanding the lower court’s decision, the Sixth Circuit determined that the Attorney General had the authority to enforce the closure order, that the Tribe’s operation of the video poker, blackjack, and slot machines was illegal, that Nebraska law provided for injunctive relief, and that the Tribe’s operation of the casino was a violation of IGRA.

The Ninth Circuit decided two cases regarding the IGRA during the same time period. In United States v. Spokane Tribe of Indians, the court addressed whether the portions of the IGRA not struck down by Seminole Tribe remained valid. The dispute revolved around compact negotiations that went sour between the state of Washington and the Spokane Tribe. The district court dismissed the Tribe’s claim against Washington based on Eleventh Amendment immunity. During the pendency of its initial claim, the Tribe increased its gaming activity, despite the lack of a valid compact. The district court issued an order injoining the Tribe from most of its gaming activities. The Ninth Circuit found that those portions of the IGRA that had not been overruled by the Supreme Court’s decision in Seminole Tribe remained valid but could not serve as the foundation for an injunction invalidating tribal gaming. Thus, the court vacated the injunction and remanded the case back to the district court, noting that other agencies within the executive branch, such as the Department of the Interior, might also serve as appropriate forums for the resolution of the differences between the Tribe and the state.

Finally, the Ninth Circuit also addressed the IGRA in Confederated Tribes of Siletz Indians of Oregon v. State of Oregon, which arose out of compact negotiations between the Tribe and the state of Oregon for a

198. See Santee Sioux, 135 F.3d at 560.
199. See id.
200. See id. at 561.
201. See id.
202. See id. at 562.
203. See id. at 564.
204. See id. at 564–65.
205. See id. at 563–65.
206. 139 F.3d 1297 (9th Cir. 1998).
207. See Spokane Tribe, 139 F.3d at 1301.
208. See id.
209. See id.
210. See id.
211. See id.
212. See id. at 1298.
213. See id. at 1302.
214. 143 F.3d 481 (9th Cir. 1998).
casino on their reservation. The parties agreed that the state could monitor gaming activity in the casino. After the routine inspection of the casino, the state announced to the Tribe that it intended to release its report as required by the Oregon Public Records statute. The Tribe sued to prevent the release of this report. The district court granted the Tribe's motion for summary judgment, and the state of Oregon appealed. The Ninth Circuit held that the compact did not prevent the state of Oregon from releasing its report under the public records statute. The court also found that the IGRA did not prevent the application of Oregon's public records laws.

D. Analysis

The recent decisions in the circuit courts reflect the tension and the inconsistencies of the Supreme Court's analysis in Seminole Tribe. Seminole Tribe has gutted the effective functioning of the IGRA and the ability of Native American tribes to establish and to implement a reliable form of income. The decision in Seminole Tribe has removed the parity between the states and Native American tribes. States now have the power to squelch Class III gaming without any serious discussion or negotiation with the tribe. The Court effectively has placed Class III gaming under the jurisdiction of the states, weakening the ability of Native Americans to implement Class III gaming activities on their reservations.

Consequently, the Supreme Court and the Tenth Circuit have broken with recent precedent in fostering and maintaining Native American tribal sovereignty. The Tenth Circuit and other federal courts now no longer have the power to mediate disputes between Native American tribes and the states. The Supreme Court has limited the power of federal courts to

215. See Siletz Indians, 143 F.3d at 483.
216. See id.
217. See id. at 484 (citing OR. REV. STAT. §§ 192.410–192.505 (1996)).
218. See id.
219. See id.
220. See id. at 484–85.
221. See id.
assert jurisdiction over such disputes, and as a result, has departed from decades of judicial deference not only to the tribes but also to congressional leadership. The result has limited the statute’s intent to retain parity between the parties. Without recourse in the federal courts, Native American tribes no longer have an effective remedy to compel a recalcitrant state to negotiate in good faith. Although the remaining sections of the IGRA remain in effect in some circuits, these sections are unenforceable without the judicial remedies designed to enforce them. While the Court’s Eleventh Amendment analysis presents compelling arguments, interestingly, the Court does not address the other side of the issue: Congress’s authority under the Commerce Clause and its power to regulate interstate commerce under its express power conferred by Article I of the Constitution. Clearly, both Congress and tribal sovereignty must subjugate themselves to state sovereignty and their power to regulate Class III reservation gaming.

II. TRIBAL MEMBERSHIP

A. Background

The federal government classifies Native Americans as members of political organizations, or tribes, not as members of a particular ethnic group. Congress often relies on tribal membership in identifying whether a person can be treated as a Native American for federal legislation and government programs. Because the government has negotiated treaties with separate Indian tribes and not with the Native Americans themselves, its primary responsibility lies in its obligations to the tribe, not to the individuals. The judiciary consistently has upheld a tribe’s right to determine its own basis for membership. A tribe can create membership "by usage, by written law, by treaty with the United States, or even by intertribal agreement." Native American tribes register their members on tribal rolls, but requirements for such registration vary. The criteria can range from one-quarter to as much as one-half Indian ancestry; other tribes do not have such stringent, or any, requirements. Some tribes even allow for

225. See id. at 84.
226. See id. (noting that “in a number of statutory provisions, and regulations promulgated under such provisions, being an Indian and being a tribal member are synonymous, or tribal membership alone is one possible ground for an individual being considered an ‘Indian’”).
227. Cf. COHEN, supra note 6, at 20 (noting that the tribe has the power “to grant, deny, revoke, and qualify membership”).
228. Id.
229. See id. at 22–23.
230. See id. at 23.
the enrollment of all tribal relatives, regardless of blood content. Congress has the authority to determine tribal membership in a different fashion if it chooses to facilitate the administration of Native American affairs.

B. Tenth Circuit Case—United States v. Von Murdock

1. Facts

United States v. Von Murdock must be viewed within the context of the Ute Termination Act (UTA). Congress intended the UTA to divide and distribute the assets of the Ute Tribe of the Uintah and Ouray Reservation between full-blooded and mixed-blooded members of the Tribe. The goals of the statute include “the termination of Federal supervision over the trust, and restricted property, of the mixed-blood members . . .; and for a development program for the full-blood members . . ., to assist them in preparing for termination of Federal supervision over their property.” The statute defines “full-blooded” Utes as individuals with one-half Ute ancestry and “mixed-blooded” as individuals with less than one-half Ute ancestry. The Utes created rolls consisting of mixed-blood and full-blood Utes, which were published in the Federal Register and became final after a review and protest period. The statute stipulates that the Tribe can only determine new membership according to the laws and regulations promulgated by the Tribe. It also divides tribal assets of the mixed-ancestry Utes evenly. Finally, it calls for the establishment of a tribal committee to manage assets that cannot be equitably divided.

The defendant’s parents were listed on the final rolls as mixed-blood Utes according to the terms of the statute and thus received their share of the Tribe’s property. According to the property distribution of the UTA, the defendant’s parents lost their respective memberships and all rights in tribal property after the final asset distribution.

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231. See id.
232. See id. Congress can create different distinctions for Native Americans for the purpose of determining “eligibility for social programs, jurisdiction in criminal matters, preference in governmental hiring, and administration of tribal property.” Id.
236. Id.
237. Id. § 677a(b)–(c).
238. See id. § 677g. The statute indicates that that the Tribe will only be made up of full-blooded members and that mixed-blooded Utes cannot have an interest in the Tribe unless the statute indicates otherwise. See id. § 677d.
239. See id. § 677d.
240. See id. § 677i.
241. See id.
243. See Von Murdock, 132 F.3d at 536.
dant, Von Murdock, applied with the Ute Tribe for permission to hunt on tribal lands. The Tribe denied the application, noting that he was not a member of the Tribe and had no ancestral rights to the land. Von Murdock hunted on the Ute lands anyway. The authorities arrested him and charged him with hunting on Indian tribal land in violation of 18 U.S.C. § 1165.

The defendant claimed that since he was a member of the Tribe, he had a right to the use of the tribal land, and that the UTA was unconstitutional. The district court rejected defendant's argument, and defendant entered a plea of nolo contendere. The defendant appealed his conviction to the United States Court of Appeals for the Tenth Circuit.

2. Decision

The Tenth Circuit affirmed the decision of the district court. In addition, the court denied defendant's rehearing petition and revised its published opinion of October 20, 1997. Citing both the tribal constitution and the UTA, the court determined that because defendant's parents had already received their share of the tribal property, they were no longer members of the Tribe. Therefore, Von Murdock was not a member of the Tribe and not eligible for tribal membership. The court noted that defendant based his argument on the Kalamath Termination Act (KTA) discussion in the Kimball cases. Using both Kimball cases, the defendant reasoned that because the KTA did not terminate the user rights of terminated descendants, the UTA could not terminate his user rights.

244. See id.
245. See id.
246. See id. at 535.
247. See Von Murdock, 132 F.3d at 537.
248. See id. at 535.
249. See id.
250. See id.
251. See id. The court opted to "issue... a revised opinion nunc pro tunc to October 20, 1997," and withdraw the opinion of October 20, 1997. Id.
252. See id. at 536.
253. See id.
254. See id. at 536-37. In Kimball v. Callahan, 493 F.3d 564 (9th Cir. 1974), decided in 1974, the Ninth Circuit held that the plaintiffs, five Kalamath Indians who withdrew from the Tribe, retained their treaty rights to hunt, trap, and fish without state interference, even though they had been compensated for their portions of tribal property. Kimball, 493 F.3d at 567. The Ninth Circuit based its opinion on the United States Supreme Court decision regarding the Menominee Termination Act in Menominee Tribe v. United States, where the Court found that because the statute did not specifically mention the hunting and fishing rights of the Tribe, it could not be used in a manner that abrogated such rights without explicit congressional intent. Id. (citing Menominee Tribe v. United States, 391 U.S. 404, 412 (1968)). In the second Kimball case, Kimball v. Callahan, 590 F.2d 786 (9th Cir. 1979), the Ninth Circuit affirmed its decision in the first Kimball case and explained that it had based its decision and analysis on the explicit language in the Ute Termination Act that indicated that withdrawal from the Tribe did not extinguish the right to hunt or fish on tribal lands.
In addition, the defendant argued that the tribal rights at issue in this case were only those of the Uintah Tribe and not the Ute Tribe. Therefore, the defendant claimed that he had rights to use the land as a member of the Uintah band.

The Tenth Circuit analyzed the decision by the district court by focusing a significant amount of attention on the *Felter* cases. In *Felter*, the state prosecuted the defendant, a mixed-blood Ute terminated from the Tribe after the passage of the statute, for fishing on the tribal lands without a permit. The district court found that the UTA did not explicitly deny mixed-blooded Utes the right to hunt and fish on tribal land, and conversely, that UTA did not have any statutory language preserving the rights of mixed-bloods to indivisible tribal assets. Using the decision in *Menominee Tribe*, the district court held that because the UTA did not specifically extinguish hunting and fishing rights or individual interests in these rights and that these rights were specifically preserved by the statute, withdrawal from the Tribe did not eliminate the right to hunt and to fish on tribal lands if not specifically stated in the statute.

In considering the hunting and fishing rights held by the Tribe and mixed-blooded Utes, the district court held that such rights and powers belong to the Tribe and that these rights are to be determined in relation to the Tribe’s right, noting that the rights of a tribe are “owned by the tribal entity, and not as a tenancy in common of the individual members, including hunting and fishing rights.” Therefore, while leaving the Tribe would eliminate all of the individual rights of the withdrawing member in the Tribe’s property, section 677(i) of the UTA preserved the rights of a mixed-blood Ute to use tribal property. Based on this analysis, the district court decided that Utes of mixed-blood listed on the final roll could hunt and fish on tribal lands while living, the right terminating at an individual’s death.

In *Felter*, the Tenth Circuit affirmed the decision of the lower court, holding that the language in *Menominee Tribe* dictated that UTA could not be interpreted as abridging the right to hunt and fish on tribal lands.

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255. *See Von Murdock*, 132 F.3d at 539.
256. *See id.*
257. *See id.* at 538–39.
258. *See id.* at 538.
259. *See id.* (citing United States v. Felter, 546 F. Supp 1002, 1017 (D. Utah 1982)).
260. *See id.* (citing *Kimball II*, 590 F.2d at 773).
261. *Id.* (citing *Kimball II*, 590 F.2d at 1021).
262. *See id.* (citing *Kimball II*, 590 F.2d at 1023). The district court decided that this right is a personal right that was not “alienable, assignable, transferable nor descendable.” *Id.* The court based its decision on *Grits v. Fisher*, which held that tribal lands and funds belonged to the community “and not to the members severally or as tenants in common.” *Id.* (citing *Gritts*, 224 U.S. 640, 642 (1912)). Individual rights to use of tribal property are predicated by tribal membership, a right that ends at death or termination. *See id.* (citing *Gritts*, 224 U.S. at 642).
because of the absence of any express language in the statute. The court agreed that hunting and fishing rights on reservation lands are tribal rights and that tribal members hold user rights to reservation lands. The court declined to impute a desire by Congress to eliminate hunting and fishing rights of mixed-blood Utes to the statute. In Von Murdock, the court emphasized that the defendant used the *Felter* cases as a basis for his claim that he had a right to hunt and fish on tribal lands. The court concluded that the *Felter* cases could not be interpreted in a manner that would support the defendant’s claims.

The Tenth Circuit rejected the defendant’s arguments. Citing the statute, the court decided that the UTA specifically ended the tribal membership of Native Americans of mixed-ancestry. The court reinforced its decision by explaining that a tribe had the right to determine its own membership. In addition, the court also decided that the Ute Constitution specifically abolished the Uintah Band of the Ute Tribe. It also rejected the defendant’s arguments claiming that the UTA was unconstitutional and violated his right to equal protection. The court upheld the UTA against claims that it arbitrarily and capriciously discriminated against Utes of mixed ancestry. The court underpinned this conclusion by noting that the racial classifications used by the Utes were permissible considering the relationship between the federal government and Native American tribes.

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264. *See id.* at 539 (citing United States v. *Felter*, 752 F.2d 1505, 1506 (10th Cir. 1985)).
265. *See id.* (citing *Felter*, 752 F.2d at 1510).
266. *See id.* The court concluded that the right to hunt and to fish cannot be equitably and practically distributed. *See id.*
267. *See id.*
268. *See id.* The court noted that despite the fact that the district court and the Tenth Circuit cited to the Kimball cases in the *Felter* case, they only concurred with the decision of the Ninth Circuit that under *Menominee Tribe*, congressional intent to abolish tribal rights will not be found unless there is explicit language in the statute. *See id.* (citing *Felter*, 752 F.2d at 1509–10 & n.8; *Felter*, 546 F. Supp. at 1011, 1018).
269. *See id.* at 541. The court argued that defendant’s claim was precluded by the precedent in *Felter*, noting that user rights were predicated by the holder’s status as a tribal member, and were, therefore, personal rights that could not be conveyed to another. *See id.* at 539–40; cf. *Felter*, 752 F.2d at 1509.
271. *See id.*
272. *See id.* at 541. The court noted that “jurisdiction over what was formerly the territory of the Uintah Band was to be exercised by the Ute Tribe, and that the rights formerly vested in the Uintah Band were to be defined by the Ute Constitution.” *Id.*
273. *See id.* The court decided that the defendant did not have the standing to raise any of the constitutional issues in his claims. *See id.* at 542. Nonetheless, the court proceeds to address the defendant’s equal protection and due process arguments anyway. *See id.*
274. *See id.*
275. *See id.* The court noted that “[f]ederal regulation of Indian tribes . . . is governance of once-sovereign political communities; it is not to be viewed as legislation of a racial group consisting of Indians.” *Id.* (quoting United States v. Antelope, 430 U.S. 641, 645–46 (1977)) (footnote and internal quotations omitted).
nor any violation of the defendant’s procedural due process claim, explaining that the notice of termination of mixed-ancestry Native Americans received adequate notice in the Federal Register. Finally, the court rejected the defendant’s claim that the statute violated the Tribe’s First Amendment rights, noting that the defendant had no standing to assert his claim. The opinion noted that since Von Murdock was not a member of the Tribe, he had no standing to assert an infringement of the constitutional rights guaranteed to the Tribe.

C. Analysis

The Tenth Circuit remained consistent with legislative and judicial policies granting deference to Native Americans in regulating their internal affairs and membership. The court’s opinion followed the express language of the statute and allowed the Tribe to determine its membership and whether an individual of Native American ancestry falls within the prescribed criteria established for tribal membership. Native Americans have complete authority to govern themselves within the confines of the reservation. In this instance, the only decision by the Tenth Circuit in the survey period addressing this issue remained consistent with congressional intent and recent public policy regarding tribal sovereignty and self-government. Only the respective tribe can assess who can remain as a member of a tribe and establish the criteria in determining the ancestry (i.e., ethnic composition) necessary to remain as a member of the tribe. Because such determinations belong solely to a tribe, federal courts will not to involve themselves in issues involving who can claim himself or herself of tribal membership.

III. INDIAN TRUST LANDS

A. Background

During the nineteenth century, the federal policy of removing Native Americans from their ancestral homelands slowly gave way to the policies of the reservation and allotment. As the American frontier ex-

276. See id. In fact, the court explained that statutes that expressly address Native American tribes is a permissible classification and that such classification has express constitutional provisions as well as historical roots in the relations between the federal government and Native American tribes. See id.
277. See id.
278. See id.
279. See id.
281. Cf. id. at 540.
282. Cf. COHEN, supra note 6, at 122–24.
panded farther west, the federal government concluded that the constant removal of the Native American tribes to new and isolated areas frustrated the American policy goal to "civilize" and to facilitate the assimilation of the Native American into mainstream culture. 283 This concern, as well as the constant collision of the American frontier with tribal lands, prompted the federal government to focus not on removal, but on the establishment of fixed, definitive tracts of land known as reservations, land specifically designated for tribal use. 284

Sensing that Native Americans had not assimilated quickly enough into the dominant American culture, later in the century, Congress readjusted its policy of allotment to hasten assimilation. 285 The policy of allotment began in the late-nineteenth century and involved doling out tribal land on American Indian reservations to individual groups of American Indians or to their families in an attempt to encourage homesteading and assimilation. 286 The federal government intensified this effort after the Civil War, 287 which culminated in 1887 with the passage of the General Allotment Act, a statute requiring mandatory allotment of Native American tribal lands. 288 Allotment statutes granted land in fee to Native Americans with some restrictions on alienation. 289 The government began allotting land in trust to the United States for the benefit of Native Americans toward the end of the century, and the General Allotment Act provided the basis for the present technical definition of the term allotment. 290 After the cession of lands to each eligible Indian family, the government either sold or allowed homesteading on the remaining land. 291 The government abandoned the unsuccessful allotment process in the 1930s, 292 and the definition of the term "allotment" has not changed significantly in the modern era. 293

283. See id.
284. See id. at 124. Several of the removal treaties of the nineteenth century allowed Native American tribes to remain on land ceded by the federal government, which came to be known as reservations. See id.
286. See id.
287. See id. at 613.
289. See id.
290. Cf. id. Cohen notes that the present meaning for the term “allotment” is based on the 1887 Act. See COHEN, supra note 6, at 615-16.
291. Cf. COHEN, supra note 6, at 613–14. After each tribal allotment, the government often required the “cession” of the remaining tribal land back to the United States. See id. at 612–13. Cohen also suggests that the allotment policy was a not so subtle attempt to appropriate land from the tribes. See id.
292. See id. at 614.
293. See id. at 615–16. Cohen notes: allotment is a term of art in Indian law, describing either a parcel of land owned by the United States in trust for an Indian (“trust” allotment), or owned by an Indian subject to a
Individual tribal members cannot hold title to land on Native American reservations; instead, all title to the land rests in the tribe itself. Individuals also have no personal vested interest in tribal property. However, tribal members do have privileges and rights to the use of tribal property, although the rights and use are regulated by tribal law, policies, and custom. Tribal membership predicates how and whether an individual can use the land; withdrawal from the tribe or the loss of one’s membership eliminates a member’s right to the use of the land.

B. Tenth Circuit Case—Citizen Band Potawatomi Indian Tribe v. Collier

1. Facts

The Tenth Circuit affirmed the district court’s decision granting the Tribe’s motion for summary judgment, holding that a decision by the Interior Board of Indian Appeals (IBIA) for the Absentee Shawnee Tribe was “contrary to law.” The parcel in question received the reservation designation in 1867 in a treaty between the federal government and the Tribe. Individual members of the Absentee Shawnee Tribe had already settled on the land in question, which was later to become the Potawatomi reservation. Absentee Shawnee tribal members requested that the federal government give them title to the land. In turn, the Potawatomi Tribe agreed to allow the Absentee Shawnees to remain and petitioned the federal government for an expansion of their land that included and area equivalent to the area occupied by the Absentee Shawnees.

To finalize this arrangement, Congress passed an allotment act in 1872 allotting land to each member of the Potawatomi Tribe and to the Absentee Shawnees living on the Potawatomi’s reservation. In 1890, the federal government and the Potowatomi Tribe negotiated a treaty restriction on alienation in favor of the United States or its officials (“restricted fee” allotment).

Id. See id. at 605.

Id. See id. at 606.

Id. See id. Cohen notes that an American Indian’s “right to tribal property is no more than the prospective and inchoate, unless federal of tribal law recognizes a more definitive right.” Id.

Id. See id. at 607. Cohen notes that the right is neither inheritable nor assignable. See id. at 608.


See id.

See id.

See id.

See id.

See id. at 1327–28.

See Act of May 23, 1872, ch. 206, 17 Stat. 159. The statute also provided for allotments for the Absentee Shawnees. See id. § 2.
through which the reservation was ceded to the government. 305 Several years later, the Potawatomi Tribe filed a claim against the federal government for additional compensation for surplus land on the reservation. The government countered this claim and argued that the Tribe had allowed the Absentees Shawnees to remain on the surplus land. 306 The Court of Claims rejected the government’s claim, noting that the Tribe had never waived its claim of ownership of the land occupied by the Absentee Shawnees. 307

A century later in 1992, the Potawatomi Tribe learned that the Absentee Shawnee Tribe had applied to take the lands on which they resided into trust. 308 The Bureau of Indian Affairs (BIA) determined that the Potawatomis and the Shawnees commonly shared a reservation and that the Potawatomi’s consent was not necessary to put the lands into trust. 309

The Potawatomis sued the Absentee Shawnees and the federal government to stop the BIA from placing the lands in question into trust. 310 The government countered with a motion to dismiss the Potawatomi’s claim for failure to join the Absentee Shawnees as an indispensable party and for failure to exhaust its administrative remedies. 311 The district court granted the government’s motion, and the Potawatomi Tribe appealed the decision. 312

The Tenth Circuit began its discussion with the governing statute, the General Allotment Act, which authorized the Secretary of the Interior to acquire land for Native Americans through “purchase, relinquishment, gift, exchange or assignment, any interest in lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allotee be living or deceased, for the purpose of providing land for the Indians.” 313 The court defined a reservation as “an area of land over which the Tribe is recognized by the United States as having governmental jurisdiction, except that, in the state of Oklahoma . . . Indian reservation means that area of land constituting the former reservation of the Tribe as defined by the Secretary.” 314 The court also noted that under federal regulations, a Native American or a Native American tribe can only “acquire land in trust status on a reservation other than its own”
when the "governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition." For acquisition purposes, Indian consent is not required if the land is already owned in undivided trust or restricted interest in land.

2. Decision

The Tenth Circuit reversed the decision of the district court to grant the dismissal. On remand, the government renewed its motion, which was granted by the district court. Concurrently, the Interior Board of Indian Affairs (IBIA) affirmed the decision of the Director of the Bureau of Indian Affairs. The Potawatomis countered this action by filing an amended claim in district court challenging the IBIA decision. The government, again, renewed its motions for summary judgment, which the district court granted. On appeal, the defendants claimed that the IBIA's decision did not receive proper deference. The Tenth Circuit held that the statute did not sever the Potawatomi's treaty right to exclusive use and occupancy of its reservation. Finally, the Tenth Circuit found that the Secretary of Interior should have obtained the consent of the Potawatomi Tribe before it could acquire trust lands for the Absentee Shawnees.

The court's decision turned on whether the Tenth Circuit must defer to the IBIA's mandate that the Absentee Shawnee Tribe had a recognizable interest in the Potawatomi lands after June 15, 1890. The court noted that it must determine if the agency's decision contradicted congressional intent. It determined that the Potawatomis presented a compelling argument that IBIA should not receive the Chevron deference usually accorded to an agency decision because Congress had not delegated the implementation of the statute to IBIA. However, the court

315. Id.
316. See id.
317. See id.
318. See id. at 1330.
319. See id.
320. See id.
321. See id. The district court based its decision on two factors: (1) The Absentee Shawnees never had a reservation, and (2) The Absentee Shawnees had no interest before 1890, and Congress did not give any interest to it after the Shawnee surrender of the land. See id. at 1330-31.
322. See id. at 1331.
323. See id. at 1334.
324. See id.
325. See id. at 1332.
326. See id. The court indicated that it had to determine Congressional intent when it ratified the 1891 statute, the embodiment of the treaties under which reservations lands were given to the federal government. See id.
explained that it did not need to consider the issue of agency discretion because the statutory construction of the case indicated that the interpretation and decision of IBIA contradicted statutory intent.328

The court held that the Tribe did not obtain rights in the Potawatomi reservation between June 5, 1890 and the 1891 statute.329 The court rejected the defendant’s claim that the district court failed to give the IBIA decision proper deference.330 Noting that Congress has the right to abrogate treaty rights, the court found that the statutory language must be express.331 Ultimately, the court decided that the legislative history and the historical ramifications of the Act did not create clear congressional intent to breach the Potawatomi’s treaty right to the exclusive use and occupancy of its former reservation.332

D. Analysis

Again, as with tribal membership, the Tenth Circuit has remained consistent with recent American legislative and judicial policy regarding Native American self-determination.333 In this instance, the court retained the balance of power between the federal agency, in this case the Bureau of Indian Affairs, and the tribe’s right of self-determination. The court of appeals followed historical precedent to find in favor of the tribe, unless Congress had specifically stated limitations of tribal authority in the statute. The court deferred to tribal sovereignty because of the lack of express intent in the statute to limit the authority of the Potawatomi Tribe.334 As with Indian trust lands, the court focused completely on the express language in the statute in rendering its decision, and maintained tribal sovereignty in this instance.335 Because of the vagaries of the treaty and the fact that Native American tribes have almost absolute sovereignty within the confines of their reservations, the federal courts did not (and should not) involve themselves in the matter.

This is true unless the agency’s decision unless the agency’s decision violates express Congressional intent. See Chevron, 467 U.S. at 842–43.

328. See Citizen Band, 142 F.3d at 1332.
329. See id. at 1331–32.
330. See id. at 1332.
331. See id. at 1332–33.
332. See id. at 1333–34.
334. See id.
335. See id.
CONCLUSION

The decisions of the Tenth Circuit addressing Indian disputes in the past year demonstrate a consistency with past precedents and public policy concerns of allowing and encouraging Native American tribes to engage in self determination and self government. Tenth Circuit precedent dictates that if events occur on Indian lands and involve other Indians, that the tribe has exclusive jurisdiction over such events. Indeed, if Native Americans engage in transactions and associations with non-Indians, the courts have granted deference to the tribes, unless the tribe has actively and expressly acted to avail itself to the jurisdiction of a federal court. The majority of the decisions discussed in this analysis, including tribal membership, Indian trust lands, and sovereign immunity suggest and reinforce the notion that the federal government, and specifically the judiciary, has a policy of deference to the self-governance of Native American tribes. The courts, however, have not extended the same deference in the adjudication of disputes involving the now defunct Indian Gaming and Regulatory Act. The Supreme Court’s decision in Seminole Tribe has gutted the statute in the area of initiating and developing gambling facilities on their reservations. The tribes now remain at the mercy of the individual states in which their respective reservations are situated.

The history, culture, and present situation of the Native Americans and their reservations will continue to present difficult judicial, legislative, and policy problems for the American political and judicial systems. The lines that divide the exact authority of Native American tribes and that of the states and the federal government are imprecise and subject to the whims of politics, as the creation of IGRA and the Supreme Court’s decision in Seminole Tribe indicates. Consequently, the American government still struggles to walk the tightrope between self-determination for the Native Americans and benevolent paternalism.

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