25 U.S.C. § 81 *QUI TAM* PROCEEDINGS:

A FEDERAL STATUTORY REMEDY FOR RESOLVING GAMING COMPACT DISPUTES

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INTRODUCTION

In response to the growing omnipresent tribal interest in conducting gaming operations (Class I through III), Congress enacted the Indian Gaming Regulatory Act of 1988 [IGRA].[1] The intent of IGRA is twofold. First, gaming is viewed as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.[2] Second, the IGRA provisions are intended to offset the presence of unsavory elements usually associated with loosely enforced or nonexistent operational controls.[3]

New Mexico's history of Indian gaming reveals an ongoing and bitter dispute between tribal governments, state legislators, and private sector interests. Historically, attempts to effect a viable compact under the auspices of IGRA have resulted in ongoing litigation and opposition.[4] In March, 1997, the New Mexico Legislature enacted the Indian Gaming Compact (hereinafter "Compact"), which sets forth provisions for Class III gaming operations in Indian Country within New Mexico.[5] The Compact, a highly controversial document, was forwarded to Bruce Babbitt, Secretary of the Interior, who subsequently "declined to approve

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[1] 25 U.S.C. §§ 2701-2721 (1988).

[2] See generally S. Rep. No. 104-241 (1996).

[3] Id.

[4] See generally Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997); Clark v. Johnson, 904 P.2d 11 (N.M. 1995).

[5] N.M. Stat. Ann. §11-13-1 (Michie 1997).

or disapprove" the Compact.[6]

Many tribal officials consider Babbitt's lack of action as a sort of "reprieve" for the gaming tribes, in light of the Compact's controversial nature.[7] A definitive approval would sanction the problematic clauses as valid, and a disapproval would force the tribes to cease operations until a valid (i.e., more acceptable) compact was negotiated. A declination, on the other hand, is considered an approval by the Secretary "only to the extent that the compact is consistent with the provisions of [IGRA]."[8]

Essentially, the gaming tribes argue that the provisions of the Compact cut against the intent and requirements of IGRA, and undermine basic principles of tribal sovereignty. Although there are numerous points of contention, e.g., jurisdiction, good faith negotiation, at particular issue for the tribes are the revenue-sharing scheme and the various regulatory fees imposed by the State.[9] Secretary Babbitt tacitly acknowledged and supported the pueblos' concerns by documenting his own apprehension regarding these controversial financial provisions in the Compact.[10]

This paper will discuss the controversial elements contained in the New Mexico Gaming Compact, and conclude that certain regulatory fees and the revenue-sharing plan are actually

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[6] See Secretary Babbitt's Letter to the Honorable Wendell Chino at 1 (August 23, 1997).

[7] See Interview, Ernest Jaramillo, Isleta Pueblo Gaming Commissioner (October 2, 1997).

[8] 25 U.S.C. § 2710(d)(8)(C).

[9] See Interview, supra n. 7.

[10] See Letter, supra n.6 at 2-3.

examples of state-imposed taxation of tribal activities conducted in Indian Country. Further, this paper will present a historical analysis of *qui tam* civil proceedings, and demonstrate that Congress both impliedly and explicitly intended this type of proceeding to remedy financial disputes, trust relationship violations, and affronts to Indian sovereignty and commerce. In applying elements of *qui tam*, this paper will propose a viable future course of litigation that is legally and procedurally available to gaming tribes, albeit grossly under-utilized. Through a *qui tam* action, the pueblos may sue the State of New Mexico in federal court despite the prohibitions of Seminole[11] and may seek to recover excess payments as well as unauthorized tax liabilities which the New Mexico Legislature has impermissibly levied and ultimately collected.[12]

I. ESTABLISHING A CAUSE OF ACTION

Prior to initiating any type of proceeding in any court, any plaintiff must state a viable and nonfrivolous claim. In this case, the cause of action is the unauthorized imposition of taxes upon tribal enterprises by the State of New Mexico.

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[11] See Seminole Tribe v. Florida, 116 S.Ct. 1114 (1996) (holding that Congress, through IGRA, could not compel states to submit to suit by tribes. IGRA's attempt to abrogate 11th Amendment prohibitions against such suits was viewed as an illicit circumvention.)

[12] Some tribes, e.g., Mescalero Apache Tribe, continue to place their payments to the state in escrow pending resolution and clarifications of several components of the Compact. See, e.g., NBC Local News (channel 4), Albuquerque NM, October 29, 1997.

A. THE REVENUE PROVISION IS, BY DEFINITION AND LEGISLATIVE INTENT, A TAX.

In general, a tax is defined as:

> a charge by the government on the income of an individual, corporation, or trust, as well as the value of an estate or gift. The objective in assessing the tax is to generate revenue to be used for the needs of the public. [13]

While there are many different types of taxes, the revenue provision appears to be a franchise tax:

> a special privilege to do certain things conferred by government on individuals or corporations, and which does not belong to citizens generally of common right. [14]

and,

> a tax upon the privilege of existing or the privilege of doing certain things. An annual tax on the privilege of doing business in a state. [15]

A franchise tax differs from an "income tax" in that it is not a direct tax on income.[16] It does, however, necessarily involve the computation of the net income of a business, since the tax is measured by the net income of the business.[17]

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[13] See Black's Law Dictionary 1457 (6th ed. 1990).

[14] Id. at 658.

[15] Id. at 659.

[16] See generally Hoosier Eng'g Co. v. Shea, 205 A.2d 821, 8212 (Vt. 1964) (emphasis added).

[17] Id. at 823.

The New Mexico Compact guarantees Tribes the "exclusive right" to provide Class III gaming, with the sole exception being that the State "may" permit limited gaming (video poker, slot machines) at racetracks, veterans' organizations, and fraternal organizations.[18] Accordingly, the tribal gaming operation can be viewed as a franchise.

To date, New Mexico tribal governments retain a "pure" exclusive right, as there have been no provisions, regulation, or activation of this alternative use of gaming machines. Even in the event that the State enacts provisions for non-Indian Class III gaming, the general Class III activity could still be considered a franchise, as the general public is not granted the privilege to conduct such activities.

According to the Compact, the revenue provision is 16% of the net win.[19] "Net win" is calculated by an indirect measure of the annual income, i.e., annual income less prizes paid out, state regulatory fees, and tribal regulatory fees.[20] Additionally, the revenue paid to the State is deposited into the General Fund of the State.[21] Thus, the disposition and calculation of "revenue" owed to the State reflect the classic definition of franchise tax.

During the 43rd legislative session, intent to tax Indian gaming in New Mexico was inherent in proposed bills submitted to the various House Committees.[22] These proposals

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[18] N.M. Stat. Ann. § 11-13-2 (1)(A).

[19] N.M. Stat. Ann. § 11-13-2(3)(A).

[20] Id.

[21] N.M. Stat. Ann. § 11-13-2(2).9

[22] See, e.g., H.B. 872, 43rd Leg., 1st Reg. Sess. (NM 1997) (excise tax proposed, as well as liquor tax, cigarette tax, Corporate Income and Franchise tax, telecommunications relay service charge, severance tax, etc.); H.B. 741, 43rd Leg., 1st Reg. Sess. (NM

appear to be subsumed into the Compact as"revenue"; yet, they provide only a transparent shield against consideration as a tax.

New Mexico may contend that the revenue scheme is not a tax, but rather a cash payment "in consideration" to dissuade the state from legalizing further off-reservation gambling.[23] New Mexico may assert that an "exclusive right" was granted the tribes via the Compact, and that 16% is not unreasonable nor unprecedented compared to other states' granting of "exclusivity."[24]

The New Mexico gaming tribes can counter this argument by a showing that the guaranteed "exclusivity" is not so exclusive so as to warrant such a high percentage of revenue sharing. First, the Compact provides an exception for Class III gaming (video poker and slot machines) for racetracks as well as veterans' and fraternal organizations.[25] Second, New Mexico, while claiming its public policy is to "restrain gambling", actually allows, without

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(1997) (graduated revenue payment based on net income similar to N.N. Stat. Ann, § 7-2A-5, Corporate Income and Franchise Tax).

[23] See Julian Schreibman, *Developments in Policy: Federal Indian Law*, 14 Yale L. & Pol'y Rev. 353, 361 (1996) (possibility that states will legalize forms of gambling off-reservation gives tribes incentive to pay states considerable fees).

[24] See, e.g., Phil Primack, *Pequots Sweeten Bridgeport Casino Proposal*, Boston Herald, September 21, 1995 at 25 (Pequots agreed to pay 20% of revenue from Bridgeport Casino and 25% from Foxwood Casino).

[25] N.W. Stat. Ann. § 11-13-2 (1)(A). It is interesting to note that "Exclusive" has been judicially defined as "apart from all others, without the admission of others to participation." People on the Complaint of Samboy v. Sherman, 158 N.Y.S.2d 835, 837 (1965). See also Black's Law Dictionary at 564 (vested in one person alone).

penalty, other forms of Class III gaming in the state.[26] Finally, the New Mexico Criminal Code provided a complete exculpatory defense to illegal gambling.[27] If a gambler initiates civil action to recover gambling losses, he/she is exempt from prosecution.[28] Thus, it is difficult to see that "New Mexico exclusivity" is actually exclusive and therefore appropriate "consideration" for the 16% revenue sharing. In using the term "exclusive", the State, in essence, purportedly extended the tribes sole "ownership" to Class III gaming within the state in exchange for 16% revenue. However, this extension was neither warranted, absolute, accurate, nor justifiable in light of the true circumstances.

B. THE REGULATORY FEES PROPOSED IN N.M. STAT. ANN. § 11-13-1(4)(E)(5) ARE, BY THEIR OPERATING INCIDENCE, TAXES; AND, BY DEFINITION, *AD VALOREM* TAXES.

In general, the nature of a charge that a law imposes is not determined by the label given, but by its "operating incidence."[29] Fees imposed by a governmental entity tend to fall into one

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[26] See New Mexico Lottery, N.M. Stat. Ann. § 6-24-1 et seq., (Michie 1995); Statement of Gilbert Tafoya, Santa Clara Pueblo, October 2, 1997; Interview, Ernest Jaramillo, supra n.7 (Santa Fe Downs is broadcasting simulcast horse races).

[27] N.M. Stat. Ann. § 22-10-14 (Michie 1995).

[28] See New Mexico v. Schwartz, 374 P.2d 418 (N.M. 1962).

[29] See City of Huntington v. Bacon, 473 S.E.2d 743, 752 (W.Va. 1996) (holding that it is a universal principle that courts determine and classify taxation on the basis of "realities" rather than what the tax is "called" in the taxing statute or ordinance). See also Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (holding that while "the intention of the legislature deserves judicial respect, the nature of a monetary exaction must [ultimately] be determined by its operation rather than its specially descriptive phrase.")

of two principal categories: "user fees", based on the rights of the entity as a proprietor of the instrumentalities used, or "regulatory fees", founded on the police power to regulate particular businesses or activities.[30]

To distinguish between a fee and a tax, a number of jurisdictions have adopted a test formulated by Emerson College v. City of Boston.[31] According to the Emerson College analysis, a monetary exaction is a fee when (1) the exaction is a charge in exchange for a particular governmental service which benefits the party paying the exaction in a manner "not shared by other members of a society"[32]; (2) the monetary exaction is paid by choice, in that the party paying the exaction has the option of not utilizing the governmental service and thereby avoiding the exaction[33]; and, (3) the exactions collected are not to raise revenue but to compensate the governmental entity providing the services for its expenses.[34] Moreover, if the "fee" unreasonably exceeds the value of the specific services for which it is charged, it will be held to be a tax, and may or may not be valid.[35]

Subsequent to its opinion in Emerson College, the Massachusetts Supreme Court modified

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[30] See generally Emerson College, 462 N.E.2d 1098.

[31] See generally 462 N.E.2d 1098; see also State of Hawai'i v. Medeiros, 1999 WL 9698 (Hawai'i, January 11, 1999) (adopting a "modified" Emerson College analysis).

[32] See National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974).

[33] See Vanceburg v. Federal Energy Regulatory Comm'n, 571 F.2d 630, 644 n.48 (D.C. Cir. 1977).

[34] See Emerson College, 462 N.E.2d at 1105.

[35] See Executive Aircraft & Consulting, Inc. v. City of Newton, 845 P.2d 57, 62 (Kan. 1993).

its stance regarding the second identifying factor (voluntariness), reasoning that the element of choice is not a compelling consideration which can be used to invalidate an otherwise legitimate charge.[36] Other jurisdictions have also either expressly or implicitly declined to place great value or reliance on the voluntariness of a service in assessing whether a charge is a tax or a fee.[37]

In line with this modification, the Hawai'i Supreme Court very recently promulgated a modified Emerson College factor test for determining whether a charge mandated by a city ordinance was a tax or a fee.[38] The factors included: (1) whether the charge applies to the direct beneficiary of the particular service; (2) whether the charge is allocated directly to defraying the costs of providing the service; and, (3) whether the charge is reasonably proportionate to the benefit received.[39] The Hawai'i Supreme Court, in deciding Medeiros, determined that because the ordinance allowed receipts of the "fee" to be channeled for "other law enforcement purposes", the fee in controversy reflected taxation.[40] Additionally, the court held that as the "service" not only benefitted society at large but also only benefitted the

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[36] See Nuclear Metals, Inc. v. Radioactive Waste Management Board, 656 N.E.2d 563, 570 (Mass. 1995) (holding that an assessment was a valid fee, despite the fact that the plaintiff could not decline to pay the fee and remain in business.)

[37] See, e.g., Bloom v. City of Fort Collins, 784 P.2d 304, 310-11 (Colo. 1989) ("[W]e decline to engraft a "voluntariness" factor onto the tax-fee distinction."). This regional precedent may estop New Mexico from arguing that the consent of the tribes, expressed by the signing of the Compact, renders the revenue-sharing voluntary and therefore not a tax.

[38] See State of Hawai'i v. Medeiros, 1999 WL 9698 (Hawai'i, January 11, 1999).

[39] Id. at *6.

[40] Id. at *6.

payors on a *de minimis* and incidental level, the fee was incontrovertibly a tax.[41]

In applying this analysis to the New Mexico Compact § 11-13-4, Regulation of Class III Gaming, several significant and interesting points emerge. First, the "service" of being "regulated" clearly does not "benefit" the tribes. Rather, a viable argument can be made that the "service" actually benefits society at large, i.e., to ensure that gaming machines comply with mandated "pay-off" ratios. With the sophistication and emerging skills of gaming tribes to internally and effectively manage casino affairs, this "service" appears to be more in line with goals of protecting gamblers than to assist the tribal operation per se. As in Medeiros, the tribes are only incidental beneficiaries of the "service." Second, the proceeds of the regulatory fees go into the General Fund of the State,[42] with no direction or implication of disposition of monies. When a governmental entity can use the proceeds of regulatory fees for unrelated purposes and or even marginally related purposes,[43] it gives the appearance of general revenue raising, i.e., the "classic realm of taxation."[44]

Third, perhaps the most telling factor in the New Mexico Compact, that of proportionate reasonableness, appears to be significantly lacking. The particular assessments in § 13-11-4 are not true and legal regulatory fees. According to Isleta Gaming Commissioner Ernest

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[41] Id. at *7-8. The court never had to reach the third prong, i.e., whether the assessment was "reasonably proportionate."

[42] N.M. Stat. Ann. § 11-13-4(E)(5).

[43] See, e.g., Medeiros, 1999 WL 9698 at *6.

[44] Id. at *6-7.

Jaramillo, the State has no direct interaction with any machine in the casinos.[45] Rather, each machine is connected to a central computer which stores essential data. The State's agent to is to review these printouts, and the agent does not calibrate, enter into, nor individually inspect each gaming machine and table. Yet, an individual "regulatory fee" is assessed on each gaming machine and table in the establishment.[46] The agent's actual and sanctioned activity belies the purpose and meaning of "fee", which is defined as a "fixed charge or perquisite charged as recompense for labor."[47] Thus, it is clear that the regulatory fees mandated in § 13-11-4 are taxes by definition and analysis.

In general, an *ad valorem* tax is defined as:

> A tax imposed on the value of property...a tax levied on property or an article of commerce in proportion to its value.[48]

In New Mexico, the State Constitution provides the power to tax tangible property, at *ad valorem* rates not to exceed 33 1/3%.[49] There are several instances in which the New Mexico Legislature has mandated that business equipment will be subjected to *ad valorem* taxation.[50]

The New Mexico tribal casinos have a variety of gaming machines and tables which are

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[45] See Interview, supra n.7.

[46] N.M. Stat. Ann. § 13-11-4. (provides for regulatory fees of $1200 per year per machine and $3000 per gaming table).

[47] See Black's Law Dictionary at 614.

[48] See Black's Law Dictionary at 51.

[49] See N.M. CONST. art VIII, § 1.

[50] See, e.g., Oil and Gas Production Equipment *Ad Valorem* Tax Act, N.M. Stat. Ann. § 7-34-4 (1995).

obviously tangible business property. The average cost of a slot machine is $3700.[51] The regulatory scheme stipulates that casinos will pay $1200 per year per gaming machine, which totals to approximately 32% of the new sale price. This calculation, when taken in totality with the above Emerson College analysis, strongly suggests that the individual regulatory assessments are in fact, *ad valorem* business taxes.

New Mexico may explain that over nine years (the duration of the Compact), the "regulatory fee is to increase by 5% every year,[52] ultimately surpassing the constitutionally mandated *ad valorem* ceiling of 33 1/3%. The State may argue that this fact negates the fees' reclassification as a tax.

The tribes may counter with a description of the State agent's duties as they relate to the individual machines. If the agent is doing no more per year than the previous year, yet the tribes are being charged increasingly more, then the payment may not be a regulatory fee. If in fact these are regulatory fees, the question of reasonableness enters into consideration, and the tribes can argue that this mandate is not good faith.[53] However, if the assessment is indeed

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[51] See Telephonic Interview, A-Basic Service, Ruidoso NM, October 29, 1997. A-Basic Service is an approved gaming equipment manufacturer/distributor.

[52] N.M. Stat. Ann. § 13-11-4 (5).

[53] Tribal representatives were not actively involved in negotiations. See Statement of Gilbert Tafoya, supra n.26; Interview with Ernest Jaramillo, supra n.7. Further, the Legislature left the gaming issue to the last few hours of the Session. Id. Pressed for time, the tribes were forced to rely on the representations without much informed reflection, in order to continue their enterprises. Id. There may have been an element of duress, with the result of "not signing" being "no gaming in New Mexico." Id. Faced with the prospect of losing a substantial portion of tribal economy, the tribes were essentially backed into a corner. See Interview with Ernest Jaramillo, supra n.7.

found to be an *ad valorem* tax, it is not a legitimate exercise of state police power in Indian Country, and further is unconstitutional because it ultimately exceeds the mandated 33 1/3% ceiling.

C. CAN NEW MEXICO LEGITIMATELY TAX INDIAN GAMING DESPITE IGRA?

The United States Supreme Court has ruled that the federal interest requires states to justify any assertion of authority that would impose any additional burdens on tribes.[54] With respect to taxation, the issue is whether a state can legitimately claim more than a general interest in raising revenues to justify taxes.[55]

In Cabazon Band of Mission Indians v. Wilson, the Ninth Circuit held that a state-imposed license fee was actually a tax on wagers made at the casino and ordered the state to return the monies exacted.[56] However, the court also opined that state taxation could be allowed under IGRA, implying that if the tax was not too burdensome, it could be acceptable.[57] The court also suggested that while IGRA did not empower the states to impose a gambling tax on Indians, it also did not prohibit such a tax.[58] In 1997, the Ninth Circuit again revisited the state taxation issue with the same parties in interest, but appeared to somewhat soften their

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[54] See New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983).

[55] Id. at 336.

[56] 37 F.3d 430 (9th Cir. 1994).

[57] Id. at 435.

[58] Id. at 433 (holding that tribe's interpretation of IGRA was erroneous because it equated the failure to confer authority to tax with a prohibition to tax).

stance toward the potential feasibility of state taxation on activities in Indian Country.[59] Within the Tenth Circuit, the Court of Appeals has succinctly ruled that states have only a minimal interest in taxing tribal gaming operations, and that interest was also significantly outweighed by federal and tribal interests.[60]

Legal incidence of taxation is important in determining whom a state is targeting, and whether the resultant taxation is permissible. In this case, New Mexico is taxing the gaming tribes. However, despite IGRA's failure to "empower states with authority to tax" gaming operations, the United States Supreme Court, in 1995, ruled that taxation of tribes is simply not permitted.[61] Accordingly, the Supreme Court's 1995 holding "trumps" dicta arising out of the Ninth Circuit with respect to what IGRA "could" allow and to what extent individual states "could" tax tribal activities without being "burdensome."[62]

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[59] See Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050 (9th Cir. 1997). For the purposes of this paper, it is interesting to note that the Cabazon sought a declaratory judgment in federal court, requesting that the license fee be declared a tax. Upon affirmation by the Ninth Circuit that the fee was a tax, the state was ordered to return the monies. Certainly, seeking a declaratory judgment is one option that the New Mexico gaming tribes have at their disposal.

[60] See Indian Country, U.S.A., Inc. v. State of Oklahoma Tax Comm'n, 829 F.2d 967, 985 (10th Cir. 1987) (applying preemption analysis to state efforts to tax tribe's bingo operation).

[61] See Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995). See also Sac and Fox Nation of Missouri v. Lafaver, 31 F.Supp.2d 1298 (D. Kan. 1998).

[62] See also Laguna Industries, Inc. v. New Mexico Taxation and Revenue Dept., 845 P.2d 167 (N.M.App. 1992) (holding that New Mexico may not impose a gross receipts tax on services performed on Laguna Pueblo for an entity owned by the Pueblo).

II. ONCE A CAUSE OF ACTION IS ESTABLISHED, TRIBES, AS RELATORS, MAY SUE NEW MEXICO IN FEDERAL COURT UNDER THE AUSPICES OF *QUI TAM* PROCEEDINGS

A. THE IMPLICATIONS OF SEMINOLE TRIBE V. FLORIDA

The United States Supreme Court, in Seminole Tribe v. Florida, held that Congress may not abrogate state's Eleventh Amendment immunity against suit without the state's consent.[63] In Seminole, a statutory provision of IGRA was at issue, i.e., whether Congress could allow tribes to sue states in federal court if gaming compact negotiations were not conducted in good faith. Chief Justice Rehnquist, writing the majority opinion, stated that "even when the Constitution vests in Congress complete law-making authority over a particular area...the Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limits placed upon federal jurisdiction."[64] This holding "constitutionalized" Hans v. Louisiana, in which it was decided that a state may not be sued by its own citizens.[65] Justice Rehnquist was of the belief that Hans interpreted the Eleventh Amendment.

Justice Souter, in dissent, opined that Hans was not a decision about the meaning of the Eleventh Amendment, but rather a holding that as a matter of nonconstitutional federal commonlaw, the federal courts should honor traditional sovereign immunity and not hear suits

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[63] 116 S.Ct. 1114 (1996).

[64] Id. at 1131-32.

[65] 134 U.S. 1 (1890).

against states by their own citizens.[66] Additionally, Justice Souter believed that Congress was free to change the sovereign immunity principle behind Hans whenever it wished, so as to allow individuals to sue their own states in federal court on a federal question claim, and asserted that this was what Congress had, in fact, legitimately done through the disputed provision in IGRA.[67]

The holding in Seminole effectively bars tribes from seeking recourse against states in federal court. Given the strict limitations of Seminole, there are nevertheless a number of techniques which can be employed to circumvent Seminole and the Eleventh Amendment issues. Specifically, the Eleventh Amendment does not bar suits by the federal government against states in the federal forum, i.e., *qui tam* suits.

B. *QUI TAM* ACTIONS -- HISTORICAL DEVELOPMENT AND ENGLISH COMMONLAW

"QUI TAM" is an abbreviation for the Latin phrase "*qui tam pro domino rege quam pro si ipso in hac parte sequitur*", meaning "who sues on behalf of the King as well as for himself."[68] Essentially, a private citizen may join a governmental body in a cause of action if there is a substantial interest on the part of the governmental body.[69] The governmental entity becomes the primary plaintiff, and the citizen a relator. A *qui tam* suit, then, involves a combination of

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[66] Id. at 1152-54.

[67] Id.

[68] See Black's Law Dictionary 1251.

[69] Id.

two distinct interests, one of which is public, the other private. This manner of combining interests is unique to *qui tam.*[70]

Qui tan has its roots in the formative stages of English law. Since the thirteenth century, *qui tam* suits have consolidated royal and private interests. Traditionally, in English law, the king's interests were a separate and special class of private interests. As sovereignty developed national status, this notion of the king's interests underwent alteration.[71] Some of the king's interests remained immediate and personal, e.g. interest in lands held under royal tenure, interest in the safety and well-being of his men, and the dignity of the crown.[72] Other interests, directed toward the general well-being of the kingdom, were considered public. These public interests were frequently expressed in laws.[73]

Similarly, there were two types of private party interests in *qui tam* actions.[74] The first type included the interests of persons who had allegedly suffered a wrong and were suing for

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[70] Although the legal term "joinder" was not utilized in the early English law, it is evident that *qui tam* was, in part, a type of joinder.

[71] See generally 3 W. Holdsworth, A History of English Law, 458-69 (1923).

[72] See, e.g., Select Cases in the Exchequer of Pleas, 48 Seldon Society, 215 (1931); Baldwin Tyrel's Case (1214), Select Pleas of the Crown, 1200-1225, 1 Seldon Society 67 (1888).

[73] See, e.g., 27 Edw. 3, c.20 (1353); 2 Rich. 2, c.15 (1380); 2 Car. 2 c.32 (1625) (statutes encouraging commerce); 13 Rich. 2, c.5 (1536); 15 Rich. 2, c.3 (1391) (statutes regulating jurisdiction); 28 Hen. 8, c.5 (1536) (statutes regulating apprenticeships).

[74] See, e.g., Phillips v. Smith, 93 Eng. Rep. 433, Strange 1354 (K.B. 1719).

redress.[75] The second type comprised the interests of common informers, who sued to recover part of a penalty and were thus viewed as a separate category of "bounty hunters."[76] In comparison with the aggrieved party, an informer was motivated by the chance of gain, *not by the need for recovery*.[77]

Initially, *qui tam* proceedings were not dependent upon statutory authority. An aggrieved party would bring a *qui tam* action to obtain a common law remedy in the royal courts for a private wrong that also affected the king's interests.[78] At that time, a plaintiff could only gain access to the royal courts by alleging a royal interest, as all private wrongs were adjudicated, at times ineffectively, at the local courts.[79] As a result, various techniques were devised to expand the jurisdiction of the royal courts, *qui tam* being only one example of this legal maneuvering.[80] By the fourteenth century, royal courts heard suits involving private wrongs

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[75] See 2 Hawkins 369; 3 J. Stephen, Commentaries on the Laws of England, 585 (1868).

[76] A commoner's suit belonged to the informer and was not the king's suit. See Kirkham v. Wheeley, 91 Eng. Rep. 1118, Salkeld 29 (K.B. 1965). The informer's rights to the penalty did not attach until the suit was filed, whereupon his rights attached absolutely and to the exclusion of all other informers. 3 Blackstone 160. There were several acts which permitted common informer suits. See 21 Jac. c.28 (1623) (discussed in 3 Coke Institutes 191); The Common Informers Act, 14 & 15 Geo. 6, c.29 (1951).

[77] This becomes a relevant distinction between 25 U.S.C. § 81 and other statutes employing a "whistle blower's" provision.

[78] See T. Milsom, Trespass from Henry III to Edward III, Law Q. Rev. 429, n.49, 50 (1958).

[79] Id. at 585.

[80] See 2 Holdsworth 369, 449 (some of the techniques included a demand for punitive damages). Other techniques included allegations of "*contra pacem*", (Milsom supra n.78) and allegations of aggravating circumstances which constitute a loss to the King. Id. at 429.

without requiring the use of techniques such as *qui tam*. Consequently, as the need for the non-statutory *qui tam* proceeding disappeared, the use of it also diminished.[81] However, even as non-statutory *qui tam* fell into disuse, statutes began to emerge that permitted private parties to initiate actions to remedy public wrongs. In some of these statutes, the plaintiff was required to have suffered some particular injury over and above the public wrong: he had to be an aggrieved party. In others, any informer could initiate the action.[82]

Parliament enacted the first *qui tam* statute for aggrieved parties in 1400.[83] This statute provided penalties for violations of the statute which limited the jurisdiction of Admiralty courts. A party improperly sued in this court could counterclaim against his "prosecutor" for double damages and a fine, payable to the king.[84] Consequently, a defendant could recover for loss and enforce the statute simultaneously.[85]

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[81] See Milson, supra n.78 at 429.

[82] In early English criminal law, enforcement of penal statutes was limited by the lack of an effective public police force. See 2 L. Radzinowick, A History of the English Criminal Law, 33-167 (1957). To rectify this inadequacy, the courts permitted private accusers to bring bills to enforce penal laws. See Select Cases Before the King's Council, 1243-1482, 35 Seldon Society, xxxv *et seq* (1918). In the fourteenth century, Parliament enacted the first statute which permitted a private informer to sue for the violation of a penal law, and gave the private prosecutor a one-fourth share of the penalty imposed upon conviction of the defendant. See, e.g., 21 Jac., c.28 (1623) (repealing numerous obsolete informer statutes from the 1300's). There was never a requirement that the private prosecutor suffer any individualized injury. Id.

[83] See A Remedy By Him Who Is Wrongfully Pursued in Admiralty Court, 2 Hen. 4, c.11 (1400).

[84] Id.

[85] See, e.g., Bytola v. Pointel, 73 Eng. Rep. 346, 2 Dyer 159b (K.B. 1558).

By the seventeenth century, the *qui tam* concept had wide acceptance. The two forms of statutory *qui tam*, one for informers and the other for aggrieved parties, although derived from similar sources, were quite different in terms of procedural limitations. Generally, the aggrieved party statutes provided remedies, while the informer statutes provided for a share of the penalty. There was the added confusion as to whether an aggrieved party had to proceed *qui tam* if that avenue was open to him.[86] This mass of confusion and complexity continued throughout the seventeenth and eighteenth centuries. It was this legal chaos that the American colonies inherited when they adopted English laws.

There are two basic views on the American colonial adoption of English law. One view asserts that the whole of the common law of England was adopted.[87] The conflicting view asserts the adoption of the common law of England did not mean the adoption of the whole common law, but the adoption of the common law as it existed in England prior to some particular period, so that only the English cases prior to that time were binding upon the American courts.[88] The only conclusion that can be drawn from these conflicting authorities is that the American courts are not bound by the decisions of the English courts, but may look to these decisions to ascertain the principles and rules of the common law.

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[86] There was some question whether an aggrieved party could pursue his commonlaw remedy without joining the King's interest if the *qui tam* remedy was available. See, e.g., Lady Waterhouse v. Bawde, 79 Eng. Rep. 116, Cro. Jac. 133 (K.B. 1606) (judgment for defendant where plaintiff failed to sue *qui tam*).

[87] See, e.g., Chilcott v. Hart, 45 P. 391 (1896). See also Williams v. Miles, 68 N.W. 151 (1903).

[88] See People v. Williams, 33 N.E. 849 (1893); Guest v. Reynolds, 68 Ill. 478 (1873).

Applying these general principles to *qui tam*, it appears that *qui tam*, as it existed in England, could have been received in the United States in three ways.[89] First, the common law *qui tam* action by which an aggrieved party sought to redress his injuries may have been adopted generally along with other portions of the common law.[90] Second, specific English statutes which could be enforced by a *qui tam* suit may have been adopted by colonial or state legislatures. Third, American legislatures may have used English law as a model for *qui tam* provisions in American statutes.

There are numerous examples of statutory *qui tam* in early American history. Many colonies expressly adopted *in toto* certain English statutes which could be enforced by *qui tam* procedures.[91] In addition, other statutes were adopted with minor modifications.[92] Moreover, American legislatures did use *qui tam* provisions similar to those found in English law. This technique was employed in two ways. First, some statutes permitted informers or aggrieved

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[89] Learned Hand, in Sutherland v. International Ins. Co. of New York, 43 F.2d 969, 970 (3nd Cir. 1930) noted, "This was a *qui tam* action, well known in England, whence we imported it..."

[90] This is unlikely. No evidence has ever been found of a commonlaw *qui tam* suit in America's early history. Despite the acknowledgment of the commonlaw *qui tam* existence in eighteenth century England, its usage in English courts was minimal during that period. See Milson, supra n.78 at 429. This sparse usage may also explain its absence in American courts.

[91] See, e.g., The Miller's Toll in Colonial Connecticut. This provision was enacted in 1672 and was still being enforced in 1828. State v. Bishop, 7 Conn. 24 (1828).

[92] The penalty provisions of the early New Jersey Gaming Law, Act of Feb. 2, 1797, §§ IV, V (1800) (N.J. Laws 224-25 (repealed 1847)) were very similar to the English Gaming Law, 9 Anne c.14 § 2 (1710).

parties to sue *qui tam*.[93] Second, other statutes provided rewards to informers without permitting them to sue.[94] Nevertheless, statutes providing for *qui tam* suits were common in eighteenth century American, and the notion that *qui tam* was a joinder of public and private interests was generally accepted.[95] In the nineteenth century, however, the frequency of *qui tam* actions decreased. One reason for the reduction stemmed from legislation which nearly eliminated all *qui tam* statutes, most particularly those of the informer genre. This apparently was an attempt to avoid problems with "vexatious and collusive" informers, a common problem within the English system.[96]

Judicial interpretation is frequently necessary to determine when statutory phrases authorize a *qui tam* proceeding. The problem of statutory interpretation can be broken down into two elements. First, the legislature's general attitude toward *qui tam* must be determined.

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[93] See Tarde v. Benseman, 31 Texas 277 (1868) (tax assessor brought *qui tam* action for the violation of a revenue statute). This was similar to the use of *qui tam* by paid inspectors to enforce commercial law during the reign of Elizabeth I.

[94] See, e.g., State v. Smith, 49 N.H. 155 (1870) (if a statute created a penalty without providing the means to recover it, a *qui tam* suit was not authorized). See also Wheeler v Goulding, 79 Mass (13 Gray) 539, 542 (1859) (discussing the distinctions between a *qui tam* statute and one which merely provided a reward to anyone who gave information leading to a conviction).

[95] See, e.g., Dickinson v. Potter, 4 Day 340, 342 (Conn. 1810) ("The private party cannot bring the suit but by joining the state in the prosecution..."). In some cases, the court referred to the state as an indispensable party. See, e.g., Houghton v. Havens, 6 Conn. 305, 307 (1826).

[96] Pennsylvania adopted sanctions under 4 Hen. 7, c.20 and 22 (1487); 23 Car. 2, c.9, reprinted in S. Roberts, Digest of Select British Statutes 138-39 (1847).

Second, assuming a favorable legislative attitude, the court must determine whether the particular statute before it permits a *qui tam* action.

The first element involves the existence of a legislative pronouncement permitting or precluding *qui tam* suits. The 1943 congressional reforms of the Informer Act provides an example of such legislative intent.[97] In 1943, the House of Representatives proposed an amendment to abolish the Act.[98] The Senate refused to accept this abolition, but agreed to limit the Act.[99] In 1960, the Act was again the subject of congressional concern, but as in 1943, the *qui tam* provision was retained.[100] Such activity indicates both an awareness and an approval of the *qui tam* provisions in the Informers Act.[101]

Once it has been determined that a legislature has an announced policy in favor of *qui tam* suits (or at least has not precluded such suits) the question then becomes in what instances are such suits authorized. As discussed previously, *qui tam* statutes either expressly or impliedly

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[97] See H.R. 1203, 89th Cong., 1st Sess. (1943). During the course of debate on the amendment, the False Claims Act was referred to as the Informers Act. 89th Cong. Rec. 10751, 10845 (1943).

[98] Id.

[99] See 89 Cong. Rec. 10752 (1943).

[100] In fact, no substantive changes were made in the Act.

[101] American judicial attitudes toward *qui tam* were also mixed, as evidenced by Justice Black's opinion in United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 541 (1943). In reversing the lower court's decision, Justice Black stated, "statutes providing for a reward to informers which do not specifically authorize or forbid the informer to institute the action are construed to authorize him to sue." Id. at 541, n.4.

give the informer or an aggrieved party the right to institute proceedings.[102] A clear implication of the right to sue *qui tam* arises when a share of the penalty is given to one who will sue for it.

C. *QUI TAM* SUITS AND THE DEVELOPMENT OF FEDERAL INDIAN LAW

Federal statutes continue to provide that Indian interests may be protected through the institution of *qui tam* litigation, i.e., 25 U.S.C. § 175 and 25 U.S.C. § 81. Interestingly, these two statutes arose during the same era (post-Civil War), and appear to fit with the English law notions of "informer" and "aggrieved party" standing to bring claims.

§ 175 provides that:

> In all States and Territories where there are reservations or allotted Indians, the United States attorney shall represent them in all suits at law and equity.

§ 81 provides that:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other

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[102] The courts in Bush v. Republic of Texas, 1 Tex. 455 (1946) and Campbell v. Board of Pharmacy of New Jersey, 45 N.J.L. 241 (1883) dealt with statutes which specifically provided for enforcement by *qui tam* suits. The strength of an implication, however, varies with the wording. Because the implication must be clear, a presumption exists against the presence of implied authority. Courts have permitted *qui tam* actions to be brought on the following wordings: "to anyone who would prosecute therefore", Chicago v. Alton R.R. v. Howard, 287 Ill. 414 (1865); "one who would sue for the same", Adams v. Commonwealth, 1 Woodward Dec. 417, (D. Pa. 1866); "to the use of the informer", Adams *qui tam* v. Woods, 6 U.S. (2 Cranch) 336 (1804); "one-half to the use of the informer". Payne v. Coursey, 20 Ga. 585 (1856).

person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, of official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority, and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian Tribe, or anyone else, for or on his or their behalf, in account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.[103]

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[103] In the apparent absence of any guiding legislative intent, this statutory provision has interesting implications. First, if read in a traditional "informer" context, anyone could bring suit as a private attorney general on behalf of the United States without joining the tribes as an indispensable party. The informer would receive half of the recovered

25 U.S.C. §§ 175 and 81 may have had the seeds of their origin planted by the trade and intercourse laws,[104] although *qui tam* proceeding were not formulated in the successive Acts per se. President George Washington, in the early 1790's proposed a system of "trading houses" or "factories" whereby bitter and unfair competition by private sector interests would be ameliorated, thus eliminating fraud and extortion.[105] The Supreme Court, in 1960, acknowledged the historical fact that Indians were shielded from "artful scoundrels inclined to make sharp bargains".[106]

As the nation grew, so did trade opportunities and commerce. As such, the fiduciary relationship between the United States and Indian tribes became more clearly defined. The duration of the Civil War proved to be a trying time for the federal government. There were

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money, with the other half going in trust to the tribe. It is only by virtue of the trust relationship that tribes would benefit from the actions of a private informer. However, if read in an "aggrieved party" context, the tribe would essentially recover all of monies, with half going directly to the relator, and the other half going indirectly to the tribe through trust. Thus, from a historical perspective, this is an unusual *qui tam* statute.

[104] Some courts have held that the Indian Nonintercourse Act, codified at 25 U.S.C. § 177, is the statutory recognition of the trust relationship. See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F.Supp. 649, 667 (D. Me 1975), aff'd 528 F.2d 370 (1st Cir. 1975).

[105] See generally Francis Paul Prucha, American Indian Treaties at 100-102 (1994). It is equally significant that during this era, the southern states, led by Georgia, were adamant about asserting state control over Indian affairs, including trade, despite the ratification of the United States Constitution. Thus, the trade and intercourse laws were also designed to counter state movements toward control over the tribes within their boundaries. Id.

[106] See McMorran v. Tuscarora Nation of Indians, 362 U.S. 60-8 (1960).

numerous miscarriages of justice and fraud in relation to governmental contracts, and Indian commerce was no exception.[107]

However, the political climate did not boil over until the introduction of Andrew Johnson into the public arena.[108] The Republican party nominated Andrew Johnson in 1864 to run as Vice President because he was a Democrat and a Southerner, and they hoped that he would help carry some of the crucial border states.[109] When Johnson assumed the presidency after Lincoln's assassination, he and Congress were immediately in direct conflict. While Congress' goal was to punish those responsible for secession and rebellion, enforce civil rights and normalize economic rehabilitation,[110] Johnson was overly generous with pardons and vetoed the Civil Rights Act of 1866 as well as other Reconstruction bills.[111] A number of historians have described Andrew Johnson as committed to white supremacy as well as to

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[107] William Belknap, Secretary of War under President Grant, was charged with selling lucrative trader post positions, receiving approximately $12,000 annually through a middleman. When discovered, Belknap was impeached, and he resigned hours after his impeachment. See generally Daniel Pollitt, Sex in the Oval Office and Coverup Under Oath: Impeachable Offenses? 77 N.C.L.Rev., 259, 272 (1998). At that time, Indian affairs were directed under the Secretary of War.

[108] The Court of Claims, in United States v. Kiowa, Comanche, and Apache Tribes of Indians, stated, "[t]he tenure of President Andrew Johnson" marked an era "when the animosity of Congress toward a President was the greatest this country has ever experienced." 470 F.2d 1369 (Ct. Cl. 1973).

[109] See generally Steve Tally, Bland Ambition 134 (1992).

[110] See generally Walter Erlich, Presidential Impeachment: An American Dilemma (1974).

[111] Id. at 56-57.

States' exclusive power to define the rights of all inhabitants.[112]

The situation reached a climax when Johnson tried to replace Secretary of War Stanton (who had been tough on the South) with Lorenzo Thomas, a Southern sympathizer.[113] Shortly before Johnson fired Stanton, Congress, aware of the animosity between Stanton and Johnson, enacted a law which stipulated that Senate advice and consent was required for the removal of any appointment that had required Senate advice and consent for initial appointment.[114] Despite the Tenure of Office Act, Johnson fired Stanton and appointed Thomas. After weeks of debate and impeachment trial, Johnson was acquitted by one vote.[115] Simultaneously during this era, the United States Supreme Court worked in combination with Congress to limit presidential powers and in particular, place control of Indian affairs in the hands of Congress, despite Chief Justice Salmon P. Chase's expansive view of federal authority over Native Americans.[116] Justice Chase himself appeared to have a personal agenda. It is alleged that Justice Chase, angry at losing the Republican Party presidential nomination to Ulysses Grant, did everything he could to undermine the impeachment proceedings by stressing the judicial rather than the political content of the trial, thereby damaging the Republicans' efforts to place

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[112] See, e.g., Michael Les Benedict, Salmon P. Chase and Constitutional Politics, 22 Law & Soc. Inquiry 459, 476 (1997).

[113] Id. at 57.

[114] Tenure of Office Act, Act of March 2, 1867, ch. 154, § 1, 14 Stat. 430.

[115] See 2 Trial of Andrew Johnson 485-98 (Washington, Govt. Printing Office 1868).

[116] See, e.g. Lone Wolf v. Hitchcock, 187 U.S. 553 (1871).

Johnson's offenses in a political context where they rightfully belonged.[117] Nevertheless, upon his election, President Grant appointed two new Justices to the Supreme Court who continually and (speculatively) deliberately worked against Chase.[118] Thus, between Johnson, Grant, Congress, and the internally fractious Supreme Court, the office of the President was ultimately bereft of the power to independently deal with Indian affairs.[119]

25 U.S.C. § 81 was enacted on May 21, 1872 as a "bounty hunter" provision.[120] A year earlier, in 1871, the treaty era had ended.[121] The Commissioner of Indian Affairs had reported to Congress that "The Indian Tribes of the United States are not sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this

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[117] See Les Benedict, supra note 112 at 477-78.

[118] Id. at 485.

[119] 25 U.S.C. § 71 essentially provided that Congress could maintain a direct interest in the affairs of Indian Nations independent of the President's authority and independent of the treaty process.

[120] This statute arose from the combined effect of the Act of Mar. 3, 1871 and Act of May 21, 1872, ch. 117, 17 Stat. 136. This was not unheard of, as a "bounty hunter" statute had been enacted by Congress in 1863 to remedy defense procurement fraud. See Act of Mar. 2, 1863, c.67, 12 Stat. 696. The False Claims Act was re-enacted at 36 U.S. Rev. Stat. §§ 3490-3494 (1875), later codified as 31 U.S.C. §§ 231-235 (1976) and again recodified at 31 U.S.C. §§ 3729-31 (1982).

[121] The Appropriations Act of Mar. 3, ~~1981~~ 1871, ch. 135, § 1, 16 Stat. 544, 566. In reality, the shift in policy did not originate in the belief that Indian tribes were no longer sovereign entities, but in institutional jealousy. See Robert N. Clinton et al., American Indian Law: Cases and Materials, 147 (3rd ed. 1983) (describing the political scene which suggests that the House of Representatives had grown jealous and dissatisfied with the Senate's control over shaping Indian policy through its treaty power.) The House of Representatives had sought to impose its will over federal Indian policy by cutting off funds for treaty negotiations as early as 1867. Id. at 148.

character."[122] At that time, Indians were not considered citizens who had stnading to bring claims in the nation's courts.[123] § 81 may have developed as a legitimate vehicle to address tribal legal claims in fulfillment of self-assumed trust relationship responsibilities, despite its paternalistic and insulting underpinnings. However, because § 81 and § 175 had historically been read by the courts, government agencies, and U.S. Attorneys as implying a discretionary power rather than a mandatory duty to represent, there is a distinct possibility that many meritorious tribal claims have been lost due to anti-Indian sentiment, political expediency, and the disastrous effects of Manfiest Destiny principle. Sadly, the United States Supreme Court has been an inconsistent advocate of tribal sovereignty, seeming to view tribal rights against a backdrop of changing conditions (demographic, social, political, economic) and the expectations they create in the minds of non-Indians.

D. THE PRACTICAL APPLICATION OF *QUI TAM* LITIGATION

Historically, *qui tam* proceedings in cases involving tribes have been sparingly initiated, and almost exclusively in the area of gaming management contracts.[124] The court in Steele appeared to offer an unsolicited hint that *qui tam* actions under 25 U.S.C. § 81 could provide a

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[122] See Comm'r Ind. Aff. Ann. Rep., H.R. Exec. Doc. No. 1, 41st Cong. 2nd Sess. 448 (1869).

[123] In fact, they were not considered citizens at all

[124] See generally United States *ex rel.* Hall v. Tribal Dev. Corp., 49 F.3d 1208 (7th Cir. 1995); United States *ex rel.* Mosay v. Buffalo Bros. Management Inc., 20 F.3d 739 (7th Cir. 1994); United States *ex rel.* Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F.Supp. 658 (D.S.D. 1996); United States *ex rel.* Steele v. Turn Key Gaming, Inc., 1997 WL 155405 (March 18, 1997, D.N.D.); United States *ex rel.* Gulbronson v. D & J Enter., 1993 WL 76789 (December 23, 1993, W.D. Wis.).

remedy for tribes who wished to contest revenue-sharing provisions.[125]

In order to proceed with a *qui tam* action against New Mexico, the gaming tribes must first establish that there is a substantial interest on the part of the federal government. Certainly, a substantial interest in the gaming issue is demonstrated by virtue of the trust relationship.[126]

In 1997, the Chemehuevi Tribe sought to invoke § 175 against the State of California because they felt that the State was not negotiating in good faith.[127] The tribe requested that the U.S. Attorney and the Department of Justice represent them, reasoning that Seminole had left any tribe dissatisfied with the progress of negotiations without a clear legal remedy.[128] The U.S. Attorney declined, and the Department of Justice never responded to the tribe's request.[129] The tribe then filed suit for declaratory and injunctive relief against the United States, the Department of Justice, Janet Reno in her official capacity, and the U.S. Attorney in his official capacity.[130] The federal defendants moved to dismiss for lack of jurisdiction,

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[125] 1997 WL 155405 at *2 [FN2]. "This statute also provides a remedy for violations of the Indian Gaming Regulatory Act."

[126] See Secretary Babbitt's Letter at supra n.6 at 2 (...because of the Department's trust responsibility, we seek to ensure that the cost to the tribe is appropriate in light of the benefit conferred on the Tribe..."); see also Montana Bank of Circle, N.S. v. United States, 7 Ct. Cl. 601 (Ct. Cl. 1985); Navajo Tribe of Indians v. United States, 624 F.2d 981 (Ct. Cl. 1980) (holding that where federal government has an interest in tribal economics, there is a fiduciary duty toward such economics); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1972) (Secretary of Interior must fulfill fiduciary duties to tribes).

[127] See Chemehuevi Indian Tribe v. Wilson, 987 F.Supp. 804 (N.D. Cal. 1997).

[128] Id. at 805-06.

[129] Id. at 806.

[130] Id.

claiming the district court did not have the authority to require the Attorney General or the U.S. Attorney to exercise prosecutorial discretion.[131] In a surprise move, the court upheld the tribe's contention that the combination of 25 U.S.C. § 175 and the fiduciary relationship between the United States and Indian tribes provided a limited exception to absolute prosecutorial discretion.[132] In essence, the court held that the United States has a mandatory duty to sue a state on a tribe's behalf when tribes have no other legal remedy by which to obtain benefits Congress intended them to have.[133] The court further stated that whatever the full extent of the fiduciary relationship, it "should include a duty to represent" tribes in situations where, absent representation, the tribes will have no legal remedy.[134] In solidifying the opinion, the court examined the legislative intent and history of IGRA and reasoned that the history "compels the conclusion that a federal remedy is necessary to preserve Congress' balancing of tribal and state interests and to secure the benefits of IGRA to the tribes."[135]

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[131] Id.

[132] Id. at 807.

[133] Id. Although § 175 has been interpreted in only a number of cases, no court had found a mandatory duty on behalf of the federal government to represent an Indian tribe. However, it is only dicta that the duty is purely discretionary. See Pyramid Lake Paiute Tribe v. Morton, 499 F.2d 1095, 1096 (D.C. Cir. 1974); Rincon Band of Mission Indians v. Escondido Mut. Water Co., 459 F.2d 1082, 1085 (9th Cir. 1972). Only one case prior to Chemehuevi analyzed circumstances under which the U.S. Attorney might have a duty to sue on behalf of tribes. See Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995) (holding that neither § 175 nor the fiduciary relationship limited the Attorney General's discretion to refuse to assert tribal claims to certain water rights.)

[134] 987 F.Supp. at 809.

[135] Id. at 809, citing S.Rep. No. 100-446 at 2-3, reprinted in 1988 U.S.C.C.A.N. 3071, 3071-72. The court also asserted that Congress recognized the potential unfairness in

Assuming that there is a mandatory duty for federal representation, the tribe itself, at first glance, should be the relator. However, the Eighth Circuit recently ruled that long as the relator's and the tribe's interests are identical, a tribal representative, tribal official, or private citizen could invoke a *qui tam* action without joining the tribe.[136] Each Tribal Council can determine whether it should join in one case or whether separate actions should be taken, As this New Mexico case would be a case of first impression, there is no prior precedent or guiding principle to follow.[137]

E. 25 U.S.C. § 81

25 U.S.C. § 81, as previously stated, provides a statutory *qui tam* cause of action remedy for breaches against the tribe, i.e., "all money paid...by any tribe...in excess of the amount

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the compacting process and the potential for subjecting tribes to unwarranted state control. 134 Cong. Rec. 24, 036-27; 25, 376; 25, 380-81. But see United States v. 1020 Electronic Gambling Machines, 1999 WL 144810 (Jan. 19, 1999, E.D. Wash.) (declining to follow Chemehuevi).

[136] See Fed. R. Civ. P. 19; see also United States *ex rel.* Steele v. Turn Key Gaming, Inc. 135 F.3d 1249 (8th Cir. 1998).

[137] New Mexico gaming tribes can establish a fiduciary interest on the part of the United States based upon the government's interest in economic development. Even if the United States fails to provide a U.S. Attorney to actually and directly conduct the litigation due to scarcity of litigation funds, the tribes may still proceed with the case in the United States' name and hire a private attorney. The United States also has the option of hiring a private attorney to litigate on its behalf. Typically, the relator's attorney and the government attorney work together in preparing the case for litigation. See generally Evan Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341 (1989). In any event, the U.S. Attorney is definitively estopped from assuming an adversarial stance against the tribes because of the inherent nature of *qui tam* litigation. The *qui tam* litigation also designs a paradigm in which the U.S. Attorney's adversarial stance would present a conflict of interest for the U.S. government.

approved by the Commissioner and Secretary...may recover by suit in the name of the United States..." This statute has been upheld as constitutional.[138] Although the majority of cases invoking § 81 have been against private management companies, there is no reason to believe that such action would be barred against states, or that a state could not meet the definition of 'person' as mandated in the statute.

In United States *ex rel.* Long v. SCS Business & Technical Institute, the district court originally held that *qui tam* actions are not barred by the Eleventh Amendment, and states are not protected from actions brought on behalf of the United States.[139] Further, the court ruled that although the word "person" is ordinarily construed to exclude a sovereign when interpreting a statute, this reading may be disregarded if the purpose, subject matter, context, or legislative history indicate an intent to bring a state or nation within the scope of the law.[140]

Several months later, however, the Court of Appeals, in an interlocutory appeal, overturned this ruling, holding that states are not "persons" under the False Claims Act.[141] The appellate court opined that Congress did not clearly define "person " in the False Claims

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[138] See, e.g., United States *ex rel.* Shakopee Mdewakanton Sioux Community v. Pan American Management Co., 606 F.Supp. 1200 (D.C.Minn. 1985).

[139] 999 F.Supp. 78 (D.D.C. 1998).

[140] Id.

[141] United States v. SCS Business & Technical Institute, 1999 WL 178713 (April 2, 1999 D.C. Cir.). But see United States *ex rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2nd Cir. 1998); United States *ex rel.* Zissler v. Regents of the Univ. of Minn., 154 F.3d 870 (8th Cir. 1998) (both federal circuits holding that states are "persons" under the False Claims Act.)

Act despite its numerous chances to do so via amendments to the Act.[142] Thus, in deference to the traditional sovereignty of states and in recognition that other circuits have ruled differently, the court declined to impute "person" as including states.[143]

This very recent holding can be distinguished from a proposed course of litigation under the auspices of § 81. Unlike the False Claims Act, where defendants can arise from a diverse assortment of parties, e.g., companies, corporations, private individuals, etc., the state is the sole entity that is a possible respondent/defendant in compact issue disputes. Congress never intended the tribes to seek approval, negotiate, or otherwise formulate a gaming compact with any other entity. Because the contracts with states are under the authority and procedures of § 81, it is clear that "person" must refer to states in the case of gaming compact disputes.

In any *qui tam* action, there is an issue of the relator's standing, i.e., whether Article III of the Constitution permits a federal court to entertain a *qui tam* action brought by someone whose only stake in the suit is bounty.[144] The offer of a bounty as a "salary" may create an entitlement upon which a suit in federal court can be based without violating Article III, since one deprived of a salary has suffered the type of injury that is a traditional basis for seeking redress.[145] However, it is entirely another matter for Congress to provide a blanket statute that

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[142] See SCS Business, 1999 WL 178713 at *3-5.

[143] Id. at *5.

[144] See *ex rel.* Mosay, 20 F.3d at 742. However, this might only be applicable if the relator were an "informer", not an "aggrieved party." See comments, n.113.

[145] See generally Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

allows anyone in the United States to sue to enforce the rights of others.[146] If a litigant has not been injured, he generally has no standing to sue.[147]

A fairly recent Seventh Circuit decision qualified standing and *qui tam* actions brought by the United States on behalf of tribes.[148] In *ex rel.* Hall, the court held that the United States, for the purposes of § 81 proceedings, was the plaintiff for standing purposes.[149] Further, the court reasoned that § 81 reflects "what has been commonly referred to as the unique trust relationship between the United States and the Indians.[150] As such, it is the United States, as trustee, who owns the rights conferred by § 81, and thereby suffers the same and sufficient injury-in-fact as the tribes who suffered the direct injury.[151]

Further, if the government can be said to own, or hold in trust, the rights that 25 U.S.C. § 81 confers, then the relator in a § 81 action could be thought of as an assignee.[152] In a trust

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[146] See *ex rel.* Mosay, 20 F.3d at 742.

[147] See Lujan, 504 U.S. at 562; Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1526 (7th Cir. 1990).

[148] See United States *ex rel.* Hall v. Tribal Development Corp., 49 F.3d 1208 (7th Cir. 1990).

[149] Id. at 1213.

[150] Id. at 1214, citing Oneida County, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985).

[151] Id. at 1214.

[152] See United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993). What is somewhat disconcerting is that one District Court likened the trust relationship provisions to those of a "spendthrift" trust, insidiously implying that even now, Indians "need" management of business affairs. Keechi v. United States, 604 F.Supp. 267 (D.D.C. 1984).

situation, the government, as the trustee, has a right to sue a state while the tribe, as beneficiary, does not beneficiary, does not.[153] If the plaintiff, the United States, is correct that the Compact yields less income to the tribe than would a lawful compact not marred by taxation and in conformity with IGRA, the monetary recovery would exceed a simple "bounty" and the requirements of Article III would be met.[154]

The United States has immense powers under § 81 to enforce and validate contracts. It is interesting to note that Secretary Babbitt himself, under § 81, apparently has the authority to sever undesirable portions from the Compact, while leaving the New Mexico gaming business intact and operable.[155] Similarly, tribes have the authority to modify contracts without simultaneous conditional Secretarial approval.[156]

On its face, the New Mexico Compact appears to meet the five stipulations under § 81. The Compact is in writing; it is approved by the Secretary of the Interior; it qualifies the names and scope of authority for all parties; it has specific procedures for performance; and, it has a nine year limitation. Nevertheless, the Compact terms can still be litigated under the auspices of paragraph 3 and 5:

> ¶ 3 **Second. It shall bear the approval of the Secretary of the**

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[153] See *ex rel.* Mosay, 20 F.3d at 742.

[154] Id. at 743.

[155] See Rollins & Presbrey v. United States, 23 Ct.Cl. 106 (Ct.Cl. 1888) (a contract that provides for the performance of several acts may be approved as to one or more than one of them, with the effect of validating the contract for the part approved and no more).

[156] See Littell v. Morton, 369 F.Supp 411 (D.C.Md. 1974).

Interior and the Commissioner of Indian Affairs indorsed upon it.

¶ 5 **Fourth. It shall state...the special thing or things to be done under it, and, if for the collection of money, the basis of the claim...**

In utilizing this statute for maximum benefit, one must read the statute "horizontally", i.e., the two paragraphs must be read in tandem. First, Secretary Babbitt questioned the reasonableness of the regulatory fees and the high rate of revenue-sharing. He used this as a basis to decline to approve/disapprove the Compact.[157] A declination of approval/disapproval implies that the Secretary only approved those provisions which were consistent with IGRA, i.e., the portions of the Compact that were acceptable and within the bounds of the spirit of IGRA and Congressional intent.

Second, taxation of tribes is not authorized by either IGRA or Supreme Court precedent.[158] It is obvious why revenue-sharing and unreasonable fees, being a source of contention for the Secretary, were not given a blanket approval. However, if the revenue-sharing and the regulatory fees are determined to be, in fact, taxes, the basis of the claim for money is not only invalid but illegal under the scope of IGRA.[159] Thus, revenue-sharing payments (AKA franchise taxes) and regulatory fees (in excess of a reasonable fee) can be recovered by *qui*

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[157] See Secretary Babbitt's Letter supra n.6 at 2-3.

[158] See IGRA, §2710(d)(4); IGRA §2710(d)(3)(c)(iii); Chickasaw, 515 U.S. 450 (1995).

[159] As stated previously, the Secretary has the authority to sever undesirable portions of a contract while keeping tge contract and the performance operable. This is certainly one option that the Secretary has available but to date has not employed. See Rollins, 23 Ct.Cl. 106.

tam action under the authority of 25 U.S.C. § 81.

New Mexico could, along this line of reasoning, produce numerous cases in contract law which hold that "if A makes an offer to B and B remains silent, there is no contract."[160] The State may argue that IGRA violates established contract law (i.e. may raise a separation of powers issue if Congress overrules decades of contract law *stare decisis*), and that the Secretary's inaction voided the contract. In this argument, however, the State wold have to grossly minimize the sovereign authority of the tribes. In taking this position, the State would be forced to contend that tribes have no standing to negotiate compacts and conduct business *ab initio* without the Secretary of the Interior's direct input, i.e., if the Secretary is THE signatory and legal authority before a compact is valid, then why deal with tribes at all?[161] This argument, while conceivable, would present a very unpopular, racist, controversial, and archaic stance which dates back to the Jacksonian era (1825-1834) when tribal sovereignty was whittled away and carved into conformity with the needs of a white majority.

Tribes may counter that the Second Restatement of Contracts recognizes silence as a mode of acceptance in several instances.[162] As applicable to this case, the tribes may argue that the Secretary's prior conduct in accepting other compacts makes silence reasonable as a form of acceptance (although it is a qualified acceptance). The test is whether a person (tribe/state)

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[160] See generally A. Prescott v. Jones, 69 N.H. 305 (1898).

[161] Essentially, the State would argue that in the case of gaming compacts, approval is equal to acceptance.

[162] § 69(1).

could reasonably expect to be notified if a contract was rejected.[163] Thus, the tribe could argue that IGRA is not meant to usurp contract law or judicial powers. Rather, the provision in IGRA is only to serve notice that an express rejection will be executed in writing, if appropriate.

Secretary Babbitt apparently would prefer that Compact issues be negotiated and resolved in a less harsh manner.[164] However, given the nature and quality of past "negotiations", allegations of New Mexico's bad faith, the omnipresent influence of private sector interests, and devious legislative intent, Babbitt's goal seems unattainable at this juncture.

CONCLUSION

In conclusion, it appears that there are sufficient grounds to contest the revenue provisions of the Compact through a statutory *qui tam* action under the auspices of 25 U.S.C. §§ 175 and 81. Although this type of proceeding would be a case of national first impression, there is suitable basis to justify standing, jurisdiction, and cause of action. *Qui tam* actions can serve to enhance and advance the substantial federal fiduciary interest in tribal sovereignty, particularly in the area of tribal economic development.

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[163] See RESTATEMENT (SECOND) OF CONTRACT § 69.

[164] See Secretary Babbitt's Letter supra n.6 at 3.