No. 98-50

In the Supreme Court of the United States

OCTOBER TERM 1998

KEWEENAW BAY INDIAN COMMUNITY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a Tribe must satisfy the requirements in Section 20 of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2719, before conducting Class III gaming pursuant to a compact on off-reservation land taken in trust by the United States after October 17, 1988.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 136 F.3d 469. The first opinion of the district court (Pet. App. 13-23) is reported at 914 F. Supp. 1496. The second opinion of the district court (Pet. App. 24-33) is reported at 940 F. Supp. 1139.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1998. A petition for rehearing was denied on April 1, 1998. Pet. App. 34. The petition for a writ of certiorari was filed on June 30, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, established a framework for the regulation of gaming on Indian land. IGRA divides gaming into three categories. Class I gaming encompasses "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. 2703(6). Such gaming is subject to the exclusive jurisdiction of the Tribes and is not subject to regulation under IGRA. 25 U.S.C. 2710(a)(1). Class II gaming includes bingo and similar games, 25 U.S.C. 2703(7), and is subject to tribal regulation and federal oversight by the National Indian Gaming Commission, 25 U.S.C. 2710(a)-(c), 2706(b). Class III gaming encompasses all other forms of gaming, 25 U.S.C. 2703(8), and includes slot machines, casino games, banking card games, dog racing, and lotteries. Class III gaming is lawful only if it is (1) authorized by a tribal ordinance, (2) located in a State that permits such gaming for any purpose by any person, organization, or entity, and (3) conducted in conformance with a Tribal-State compact. 25 U.S.C. 2710(d)(1).

In addition, except in limited circumstances, "gaming regulated by [IGRA] shall not be conducted on [off-reservation] lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988" (after-acquired land). 25 U.S.C. 2719. One of the circumstances in which such gaming may be conducted is when "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would

be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A).

2. In September 1990, a tract of land in Marquette County, Michigan, was taken into trust by the United States for the benefit of the Keweenaw Bay Indian Community (petitioner). Pet. App. 2. In 1993, petitioner and the State of Michigan entered into a Tribal-State compact which permits Class III gaming on "Indian lands." *Ibid.* The compact specified that it would take effect upon the fulfillment of certain conditions, including endorsement by the Governor of Michigan and approval by the Secretary of the Interior. *Ibid.* All specified conditions were fulfilled. *Ibid.*

In August 1994, petitioner sought approval from the Secretary of the Interior to operate a Class III casino gaming operation on the Marquette County property. Pet. App. 3. The Bureau of Indian Affairs (BIA) informed petitioner that it would have to satisfy the requirements set forth in Section 2719 before Class III gaming operations could commence. *Ibid.* Petitioner opened the facility on the Marquette County property without complying with Section 2719. *Ibid.*

Petitioner subsequently filed suit in the United States District Court for the Western District of Michigan against the United States seeking declaratory and injunctive relief that would permit Class III gaming on the Marquette County property. Pet. App. 3. The United States filed a counterclaim against the Tribe. *Ibid.* It sought (1) a declaration that the gaming activities at petitioner's casino violate state and federal law; (2) an injunction preventing petitioner from licensing,

authorizing or operating a Class III gaming facility until the requirements of 25 U.S.C. 2719 had been met; and (3) abatement of the gaming and confiscation of the unlawful gaming devices. *Ibid.*

The district court granted summary judgment in favor of petitioner. Pet. App. 13-23. The district court ruled that the requirements of 25 U.S.C. 2719 do not apply to petitioner's Marquette County gaming operation. Pet. App. 21. The court reasoned that Section 2719 applies only to gaming "regulated by" IGRA, and that the Marquette County gaming operation is regulated by petitioner's compact with the State of Michigan and not by IGRA. *Ibid.* The district court also concluded that it would be "nonsensical" to require compliance with 25 U.S.C. 2719, because such compliance would require petitioner to obtain two approvals each from the Governor of Michigan and the Secretary of the Interior. *Ibid.*

The United States moved for reconsideration, and the State of Michigan intervened and filed a similar motion. Pet. App. 3. The district court denied the motions for reconsideration. *Id.* at 24-33.

3. The court of appeals reversed. Pet. App. 1-12. The court held that the approval requirements in Section 2719 apply to petitioner's Marquette County gaming operation. *Id.* at 7. The court of appeals rejected the district court's view that Class III gaming conducted pursuant to a compact is not "regulated by" IGRA within the meaning of Section 2719. *Ibid.* The court of appeals explained that "any gaming subject to a tribal-state compact is necessarily regulated by the IGRA," because "the compact mechanism is created and governed by the IGRA" and because "provisions of the IGRA other than the compact provisions regulate compact-authorized gaming." *Id.* at 7. The court of

appeals noted (*ibid.*) that the Chairman of the National Gaming Commission has the power to approve pre-1988 Class III tribal gaming ordinances, 25 U.S.C. 2712(a), and that the National Indian Gaming Commission has power to levy civil penalties and to order temporary closure of Indian gaming, 25 U.S.C. 2713.

The court of appeals also rejected the district court's conclusion that it would be "nonsensical" to apply Section 2719 to gaming authorized by a compact because it would require the Secretary of the Interior and the Governor of a State to approve such gaming twice. Pet. App. 9-10. The court of appeals noted that the two approvals by the Secretary of the Interior involve different considerations. The Secretary must approve a Tribal-State compact under Section 2710 unless the compact violates a provision of IGRA, another federal law, or the United States' trust obligations to a Tribe. 25 U.S.C. 2710(d)(8)(B). Pet. App. 9. In contrast, in circumstances like those presented here, the Secretary may approve gaming on after-acquired land only if "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, [the Secretary] determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and only "if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." *Ibid.* (quoting 25 U.S.C. 2719(b)(1)(A)). The court also concluded that "the Michigan Governor's endorsement of the compact per the terms of the compact itself is * * * of a qualitatively different nature from his concurrence in the Interior's Secretary's discretionary 'best-interests waiver' of [Section]

2719's general gaming prohibition." Pet. App. 10 (citation omitted).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that Class III gaming authorized by a compact is not subject to the requirements set forth in Section 2719 for the conduct of gaming on off-reservation, after-acquired land. That contention is without merit and does not warrant review.

Section 2719(a) provides that, subject to certain exceptions, "gaming regulated by this subchapter shall not be conducted" on off-reservation, after-acquired land. 25 U.S.C. 2719(a). By its plain terms, Section 2719 applies to all gaming regulated by IGRA; there is no exception for Class III gaming conducted pursuant to a compact.

Petitioner contends (Pet. 6) that Section 2719 does not apply to gaming authorized by a compact, because such gaming is "regulated by" the compact and not by IGRA. As the court of appeals concluded, however, gaming subject to a compact is "necessarily regulated by" IGRA, because "the compact mechanism is created and governed by the IGRA," and because "provisions of the IGRA other than the compact provisions regulate compact-authorized gaming." *Id.* at 7. For example, as the court of appeals noted (*ibid.*), the National Indian Gaming Commission has power to levy civil penalties and to order temporary closure of such gaming. 25 U.S.C. 2713. Section 2719 therefore unambiguously applies to compact-authorized gaming, and such gaming may not be conducted on off-reservation, after-acquired land unless one of the exceptions to Section 2719 is applicable.

Applying Section 2719 to compact-authorized gaming does not, as petitioner asserts, "diminish[] the central importance of the tribal-state compact in the statutory scheme." Pet. 6. A valid Tribal-State compact is a necessary condition for all Class III gaming. 25 U.S.C. 2710(d)(1). In light of the special considerations involved in expanding gaming to off-reservation after-acquired land, however, Section 2719 introduces an additional set of requirements before gaming regulated by IGRA may be conducted on such land. In particular, in circumstances like those presented here, Class III gaming may be permitted only if "the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and only if "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. 2719(b)(1)(A). The existence of a valid compact does not eliminate the need to conduct that special inquiry, which takes into account local interests that are not taken into account in the compact approval process. Indeed, since Class III gaming is not authorized under IGRA on *any* Indian lands in the absence of a valid compact, petitioner's contention would have the implausible effect of rendering the special requirement of Section 2719 totally inapplicable to Class III gaming.

2. Petitioner errs in suggesting (Pet. 7) that the decision below conflicts with *Wisconsin Winnebago Nation* v. *Thompson*, 22 F.3d 719, 723 (7th Cir. 1994), and *Rhode Island* v. *Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir.) cert. denied, 513 U.S. 919 (1994).

Neither of those cases involved Class III gaming on off-reservation land acquired after October 17, 1988. *Wisconsin Winnebago Nation*, 22 F.3d at 722; *Narragansett Indian Tribe*, 19 F.3d at 689. The courts in those cases therefore had no occasion to address the question resolved by the court of appeals in this case—whether the requirements in Section 2719 apply to compact-authorized gaming on off-reservation, after-acquired land. Consistent with the plain language and purposes of Section 2719, the court of appeals in this case correctly held that Section 2719 applies to such gaming, and the court's holding does not conflict with a decision by any other court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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