American Indian Law Review

Volume 19 | Number 1

1-1-1994

# Federal Recent Developments

# FEDERAL RECENT DEVELOPMENTS

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### JUSTICIABLE CONTROVERSY: Standing

*Thompson v. County of Franklin*, 15 F.3d 245 (2nd Cir. 1994).

Dana Leigh Thompson appealed a district court order dismissing her complaint. The district court held that Thompson lacked standing to challenge a county government's collection of taxes on her real property which she alleges is within the boundaries of the St. Regis Mohawk Indian Reservation.[1] The Court of Appeals for the Second Circuit reversed the district court's decision by holding that an individual member of an Indian tribe has standing to challenge a county government's taxing authority.[2] The court further held that Thompson met the standing requirement by predicating her challenge on the jurisdictional boundaries of the Indian reservation, and not on the validity of conveyances of land interests within the reservation to non-Indians.[3]

Thompson, an enrolled member of the St. Regis Mohawk Indian Tribe, bought property in 1989.[4] The property was located in the area of Franklin County, New York and the St. Regis Mohawk Indian Reservation.[5] The County began assessing taxes on the real property in 1989.[6] Thompson did not pay the taxes on the ground that her property was located within the Reservation boundaries.[7] By being on the Reservation, her real property lay outside the County's jurisdiction. The County continued assessing taxes up until 1992, when Thompson filed suit.[8]

Thompson filed suit in the state court of New York, under 25 U.S.C. § 233.[9] The County had the action removed to federal court and filed a motion to dismiss.[10] Thompson filed a motion to remand the case back to state court

---

1. Thompson v. County of Franklin, 15 F.3d 245 (2nd Cir. 1994).
2. *Id.* at 247.
3. *Id.*
4. *Id.* at 245.
5. *Id.*
6. *Id.* at 246.
7. *Id.*
8. *Id.*
9. The statute states, in relevant part, "[t]hat nothing herein contained shall be construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes . . . ." 25 U.S.C. § 233 (1988).
10. *Thompson*, 15 F.3d at 246.

on the ground that the district court lacked subject matter jurisdiction pursuant to the Tax Injunction Act.[11] The federal court denied Thompson's motion to remand by finding that the Tax Injunction Act[12] did not preclude federal jurisdiction in this case. The district court also granted the County's motion to dismiss, holding that Thompson lacked standing[13] because the case was ultimately based on the Nonintercourse Act.[14]

Thompson contended that the district court mischaracterized her claim as dependent upon the Nonintercourse Act.[15] Rather, Thompson claimed that her case turned on the distinction between title and property located within a reservation and the jurisdictional boundaries of the reservation.[16] The County had relied on conveyance agreements dating back to 1816, which gave New York interest in several parcels of land within the boundaries of the Reservation, to give the County jurisdiction.[17] An attack on these conveyances under the Nonintercourse Act,[18] which the County alleged Thompson was pursuing, would need to be carried out by an Indian tribe, not an individual member of a tribe. The court found that the district court holding based upon the Nonintercourse Act[19] was irrelevant to this case's disposition.[20]

Thompson claimed that the County lacked jurisdiction to assess taxes on real property in Indian country.[21] The court referred to *Solem v. Bartlett*,[22] which held that Indian country included lands held by non-Indians within reservation boundaries.[23] The court held that the conveyance of reservation land to non-Indians does not dissolve the reservation boundaries for jurisdictional purposes.[24]

---

11. 28 U.S.C. § 1341 (1988).

12. *Id.*

13. *Thompson*, 15 F.3d at 247.

14. 25 U.S.C. § 177 (1988). The Act states, in pertinent part: "No purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." *Id.*

15. *Id.*

16. *Thompson*, 15 F.3d at 249.

17. *Id.* at 250.

18. 25 U.S.C. § 177 (1988).

19. *Id.*

20. *Thompson*, 15 F.3d at 251.

21. 18 U.S.C. § 1151 (1988). The statute "define[s] Indian country broadly to include formal and informal reservations . . . and Indian allotments, whether restricted or held in trust by the United States." Oklahoma Tax Comm'n v. Sac & Fox Nation, 113 S. Ct. 1985, 1991 (1993) (holding that an Indian tribe member need not live on a reservation to be outside State's taxing jurisdiction; the member need only live in "Indian country").

22. 465 U.S. 463 (1984).

23. *Thompson*, 15 F.3d at 250 (interpreting *Solem*, 465 U.S. at 468).

24. *Id.*

The court further stated that the holding was not dispositive of whether Thompson had standing.[25] The court also stated it had an independent obligation to inquire into the standing of litigants to bring actions in the lower courts, regardless of whether either party raised the issue.[26] The County claimed that to allow individual Indian tribal members to challenge a local government tax based on jurisdictional boundaries would impede the rights of the Tribe and threaten established reservation boundaries.[27] The court disagreed and held that the federal courts will vindicate the rights of individual taxpayers where the government has sought to impose a tax burden beyond its borders.[28] The court failed to see a difference between Thompson's claim and "the plethora of lawsuits routinely brought in federal courts by individual . . . taxpayers . . . who challenge the territorial boundaries of a government's taxing jurisdiction."[29]

The Court of Appeals for the Second Circuit held that Thompson had standing to bring this action and reversed the district court's dismissal of the claim.[30] The case was remanded to the district court and reinstated for further proceedings.[31]

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

GAMING: Indian Gaming Regulatory Act

*Shakopee Mdewakanton Sioux Community v. National Indian Gaming Commission*, 16 F.3d 261 (8th Cir. 1994).

The Shakopee Mdewakanton Sioux Community, Little Six, Inc., the Lower Sioux Community and the Sisseton-Wahpeton Sioux Tribe (the Tribes), appealed three district court decisions upholding the regulations of the National Indian Gaming Commission (the Commission). The decisions classified "keno" as a class III game under the Indian Gaming Regulatory Act (IGRA).[32] The district courts granted summary judgment to the Commission, applying the doctrine of deference to agency rule making as defined in

25. *Id.* at 251.

26. *See, e.g.*, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990); Warth v. Seldin, 422 U.S. 490, 500 (1975); National Wildlife Fed'n v. United States, 626 F.2d 917, 924 (D.C. Cir. 1980).

27. *Thompson*, 15 F.3d at 251.

28. *Id.* at 252.

29. *Id.* at 253.

30. *Id.*

31. *Id.* at 254.

32. 25 U.S.C. §§ 2701-2721 (1988).

*Chevron v. Natural Resources Defense Council*.[33] The Court of Appeals for the Eighth Circuit affirmed the district courts' decisions by holding that the Commission did not act arbitrarily or capriciously in regulating keno as a class III game under IGRA.[34]

However, the Tribes asserted that the Commission's classification of keno as a class III game[35] was arbitrary and capricious. The Tribes also argued that keno has a close relationship to bingo and should have been considered "similar to bingo"[36] so that it would be within class II gaming.[37]

The court used the *Chevron* test to determine whether the Commission acted arbitrarily.[38] The *Chevron* test consists of two parts. First, the court must determine if congressional intent is clear from the plain language of the statute.[39] If the language is ambiguous, the court then looks to legislative history.[40] When clear intent is found through either part of the *Chevron* test, then an agency ruling contrary to that intent is not given deference.[41] However, if the language is ambiguous and the legislative history provides no

---

33. 467 U.S. 837 (1984).

34. Shakopee Mdewakanton Sioux Community v. National Indian Gaming Comm'n, 16 F.3d 261, 265 (8th Cir. 1994).

35. IGRA states that class III gaming includes all forms of gaming that are not class I gaming or class II gaming. This class requires a tribal-state compact governing the gaming. 25 U.S.C. § 2703(8) (1988).

36. *Shakopee*, 16 F.3d at 264.

37. IGRA states, in pertinent part:

> (7)(A) The term "class II gaming" means:
>
> (i) the game of chance commonly known as bingo (whether or not electronic, computer or other technologic aids are used in connection therewith)—
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and
>
> (III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo . . . .
>
> . . . .
>
> (B) The term "class II gaming" does not include —
>
> (i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or
>
> (ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

25 U.S.C. § 2703(7) (1988).

38. *Shakopee*, 16 F.3d at 264; *see* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).

39. *Shakopee*, 16 F.3d at 263 (applying *Chevron*, 467 U.S. at 842-43).

40. *Id.*

41. *Id.*; *see* K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988).

clear congressional intent, deference is given to a reasonable agency decision.[42]

The court found the language of the statute "similar to bingo"[43] to be ambiguous. The court also found that the legislative history did not reveal a clear congressional intent to classify keno as a game similar to bingo.[44]

The Tribes argued that the *Chevron* deference standard should not be applied to the Commission because it is a new agency.[45] The Tribes claimed that the Commission did not have the specialized expertise that *Chevron* assumes.[46] The court stated that agency decisions cannot be lightly replaced by the courts regardless of the agencies experience.[47]

The second part of the *Chevron* test reviews legislative history in considering whether the Commission acted arbitrarily when it classified keno as a class III game.[48] The court found that the Commission classified keno as a class III game because it is a house banking game.[49] The Tribes claimed that this classification was ambiguous.[50] The tribes asserted that the canon of statutory construction which construes statutes with ambiguous provisions liberally in favor of Indians had been violated.[51]

The court found that IGRA has dual purposes:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences . . . .[52]

The court held that the Commission separated house banking games from other types of games in order to shield Indian gaming from corrupting influences.[53] The Tribes' claim that the Commission was not interpreting IGRA in their favor was rejected by the court.[54] The court concluded that the Commission did not act arbitrarily or counter to the requirement that statutes with ambiguous provisions be interpreted in favor of Indian tribes simply

---

42. *Id.*; *see Chevron*, 467 U.S. at 843.
43. 25 U.S.C. § 2703(7)(A)(i) (1988).
44. *Shakopee*, 16 F.3d at 264.
45. *Id.* at 264 n.4.
46. *Id.*
47. *Id.*
48. *Id.* at 264.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 265 (quoting 25 U.S.C. § 2702 (1988)).
53. *Id.*
54. *Id.*

because it reached a disfavored result.[55] The court stated that it "need not be persuaded that an agency reached the best possible decision in order to uphold reasonable agency action."[56] The district court's decisions to defer to the Commission's regulations including keno in class III gaming were affirmed by the court.[57]

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GAMING: Indian Gaming Regulatory Act

*Seminole Tribe v. Florida*, 11 F.3d 1016 (11th Cir. 1994).

This appeal is a consolidation of two cases from two district courts.[58] Both cases question whether Congress can abrogate the states' Eleventh Amendment[59] sovereign immunity from suit by enacting the Indian Gaming Regulatory Act (IGRA).[60] The first case involved the Seminole Tribe, where the State of Florida moved to dismiss for lack of subject matter jurisdiction based on sovereign immunity. The district court denied the motion and the State of Florida filed an interlocutory appeal.[61] The second case, against the Poarch Band of Creek Indians, was dismissed under a defense of sovereign immunity.

The Court of Appeals for the Eleventh Circuit reversed and remanded the Florida district court's action and affirmed the District Court of Alabama's dismissal.[62] The court held that: (1) The states did not consent to suits in any way; (2) Congress intended to abrogate the states' Eleventh Amendment immunity by enacting IGRA; and (3) Congress enacted IGRA pursuant to the Indian Commerce Clause[63] which does not grant Congress the power to abrogate the states' sovereign immunity.[64]

---

55. *Id.*

56. *Id.*

57. *Id.*

58. The two cases are Seminole Tribe v. Florida, 801 F. Supp. 655 (S.D. Fla. 1992) and Poarch Band of Creek Indians v. Alabama, 776 F. Supp. 550 (S.D. Ala. 1991) (*Poarch I*). *See also* Poarch Band of Creek Indians v. Alabama, 784 F. Supp. 1549 (S.D. Ala. 1992) (*Poarch II*).

59. U.S. CONST. amend. XI. The amendment states: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State." *Id.*

60. 25 U.S.C. §§ 2701-2721 (1988).

61. *Seminole Tribe*, 801 F. Supp. at 656.

62. Seminole Tribe v. Florida, 11 F.3d 1016 (11th Cir. 1994).

63. U.S. CONST. art. I, § 8, cl. 3. The Clause states, in relevant part: "The Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

64. *Seminole Tribe*, 11 F.3d at 1016.

The Seminole Tribe of Florida and the Poarch Band of Creek Indians (the Tribes) attempted to negotiate with Florida and Alabama respectively (the States) for tribal-state gaming compacts.[65] Under the statute, tribes initiate negotiations with the states. IGRA mandates that states negotiate in good faith with tribes in order to reach a compact. The Secretary of the Interior must then agree to the compact.[66]

If a state refuses to negotiate in good faith, IGRA provides the tribes with a remedy in the federal courts. The federal courts have jurisdiction over any cause "initiated by an Indian Tribe arising from the failure of a state to enter into negotiations with the Tribe . . . or to conduct such negotiations in good faith."[67] The court may order the state and tribe to come to an agreement within a certain period.[68] If this fails, the Secretary of the Interior is authorized to provide the regulations for the gaming.[69]

IGRA classifies Indian gaming into three categories. The categories are class I, class II and class III.[70] Class III gaming, which is implicated in this action, is the only category of gaming under IGRA in which the states are allowed some regulation in the form of the tribal-state compact.[71]

The Tribes asserted that the States' Eleventh Amendment immunity was limited because the States consented to this suit.[72] The court relied on Supreme Court holdings that consent may be found in three circumstances.[73] The first is express consent which must be explicitly authorized by the state in its constitution or statutes.[74] The court found that Alabama had a provision in its constitution which reserved Alabama's sovereign immunity.[75] Even though Florida did not claim a similar defense, the court held that the Tribes failed to show that either state had expressly consented to this suit.[76]

The second form of consent is derived from the states' ratification of the U.S. Constitution and is called the "plan of the convention" consent.[77] This form implies that by ratifying the Constitution, the states waived their immunity to suit in certain cases.[78] The court cited *Blatchford v. Native Village of Noatak*[79]

---

65. 25 U.S.C. § 2710(d)(1) (1988).

66. *Id.* § 2710.

67. *Seminole Tribe*, 11 F.3d at 1024 (quoting 25 U.S.C. § 2710(d)(7)(A)(i) (1988)).

68. 25 U.S.C. § 2710 (d)(7)(B)(vi) (1988).

69. *Id.*

70. *Id.* § 2703(6), (7)(A), (8).

71. *Id.* § 2710(d)(1).

72. *Seminole Tribe*, 11 F.3d at 1022.

73. *See, e.g.*, United States v. Texas, 143 U.S. 621, 641-46 (1892); South Dakota v. North Carolina, 192 U.S. 286 (1904); Parden v. Terminal Ry., 377 U.S. 184 (1964).

74. *Seminole Tribe*, 11 F.3d at 1022; *see, e.g.*, Silver v. Baggiano, 804 F.2d 1211, 1214 (11th Cir. 1986) (quoting Ford Motor Co. v. Department of Transp., 323 U.S. 459, 467 (1945)); Edelman v. Jordan, 415 U.S. 651 (1974).

75. *Seminole Tribe*, 11 F.3d at 1022.

76. *Id.*

77. *Id.*

78. *See, e.g.*, United States v. Texas, 143 U.S. 621, 641-46 (1892); South Dakota v. North

as a basis for rejecting the argument that the States waived their immunity to suit by the Tribes based upon the States' ratification of the U.S. Constitution. *Blatchford* held that states have a mutuality of concession with other states because they all have ratified the U.S. Constitution. This makes the surrender of immunity possible between the states.[80] However, the Indian tribes have never ratified the U.S. Constitution, so there is no mutuality of concession between the Indian tribes and the states. Thus, the States have not waived their immunity to suit by the Tribes based upon the plan of the convention consent.[81]

The final form of consent is very limited. It is based on the states participation in a federal program which compels the state to consent to suit as a requirement for participation.[82] This form of consent has only been found in one case: *Parden v. Terminal Railway of Alabama*.[83] As in *Parden*, the Tribes asserted that the States consented to suit by participating in negotiations with the Tribes as mandated by IGRA.[84] The court distinguished *Parden* because it was based on the fact that the state had left the area of state authority and entered into the private market, which made the state subject to the same requirements as all participants including consent to suit.[85] In the present action, the court found that *Parden* was inapplicable because the negotiation between the States and the Tribes was not a private activity.[86]

The Eleventh Amendment immunity issue was addressed by the court with a two-part inquiry. The first part involved determining if congressional intent in the statutory language is unequivocal and textual.[87] The court found that Congress had expressed unequivocally its intent under IGRA to abrogate the states' Eleventh Amendment immunity.[88] The court found that to give effect to subsection 2710(d)(7)(A)(i) of IGRA, which allows federal jurisdiction over cases that arise from the states' failure to enter into negotiations or to negotiate in good faith with Indian tribes for a gaming compact, is an abrogation of states' sovereign immunity.[89] The second part of the inquiry asks whether Congress possessed the power under the Constitution to abrogate the states' Eleventh Amendment immunity.[90] The Supreme Court has held that Congress possesses the power to abrogate states' sovereign immunity under section 5 of the

---

Carolina, 192 U.S. 286 (1904); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

79. 111 S. Ct. 2578 (1991).

80. *Id.* at 2582-83.

81. *Seminole Tribe*, 11 F.3d at 1022 (interpreting *Blatchford*, 111 S. Ct. at 2582-83).

82. *Id.*

83. 377 U.S. 184 (1964).

84. *Seminole Tribe*, 11 F.3d at 1022.

85. *Id.* at 1023.

86. *Id.*

87. *Id.* at 1024; *see* Dellmuth v. Muth, 491 U.S. 223, 230 (1989).

88. *Seminole Tribe*, 11 F.3d at 1024.

89. *Id.*

90. *Id.* at 1025.

Fourteenth Amendment,[91] and under the Interstate Commerce Clause.[92] Therefore, the Tribes alleged that in enacting IGRA, Congress acted in accordance with Section 5 of the Fourteenth Amendment and the Interstae Commerce Clause, as well as the Indian Commerce Clause.[93]

The Tribes asserted that IGRA creates a liberty interest as well as a property interest, which are both entitled to constitutional protection.[94] The Tribes declared that the States' input into the negotiations under IGRA is similar to a licensing requirement. Therefore, failure by the States to enter into a compact is similar to an unconstitutional denial of a license.[95]

The court reasoned that liberty and property interests are created only when there is an entitlement to them.[96] The court further reasoned that IGRA does not create an entitlement for gambling operations; it only establishes standards for conducting gambling on Indian lands.[97] Therefore, the court held that section 5 of the Fourteenth Amendment was not used to abrogate the States' Eleventh Amendment immunity.[98]

The Tribes alleged that Congress legislated against organized crime[99] because it was a burden to interstate commerce.[100] Noting that Congress' goal in enacting IGRA included shielding Indian gaming from organized crime,[101] the Tribes argued that IGRA was enacted pursuant to the Interstate Commerce Clause,[102] a constitutional tool used to stop organized crime as well as to abrogate the States' sovereign immunity.[103] The court disagreed with the Tribes' assessment and found that Congress intended instead for IGRA to promote tribal economic development, ensure the tribes were the primary beneficiary, and assure the games were operated fairly and honestly.[104]

The court further held that Congress enacted IGRA solely under the Indian Commerce Clause.[105] The Tribes claimed that Congress has the power to

---

91. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). The Fourteenth Amendment states, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, §§ 1, 5.

92. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

93. *Seminole Tribe*, 11 F.3d at 1025.

94. *Id.*

95. *Id.* (interpreting Board of Regents v. Roth, 408 U.S. 564 (1972)).

96. *Id.*

97. *Id.*

98. *Id.*

99. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.).

100. *Seminole Tribe*, 11 F.3d at 1025.

101. *Id.*

102. U.S. CONST. art. I, § 8, cl. 3.

103. *Seminole Tribe*, 11 F.3d at 1025.

104. *Id.* at 1026 (citing 25 U.S.C. § 2702(1)-(2) (1988)).

105. *Id.*

abrogate states' Eleventh Amendment immunity under the Indian Commerce Clause.[106] The Tribes relied on *Pennsylvania v. Union Gas Co.*,[107] which held that Congress has the power to enact legislation, pursuant to the Interstate Commerce Clause, which may abrogate states' Eleventh Amendment immunity.[108] The Tribes asserted that *Union Gas* controls all Interstate Commerce Clause and Indian Commerce Clause cases.[109]

The court distinguished *Union Gas* and limited its application to interstate commerce only.[110] The court reasoned that the Interstate Commerce Clause and the Indian Commerce Clause have different underlying purposes and should be treated distinctly.[111] The court further reasoned that since Congress only has power to abrogate states' Eleventh Amendment immunity pursuant to the Interstate Commerce Clause or section 5 of the Fourteenth Amendment, no power exists under the Indian Commerce Clause.[112] Since IGRA was enacted solely under the Indian Commerce Clause, the court found that Congress acted improperly.[113]

The Tribes' final argument was that they may sue the governors of Alabama and Florida to compel negotiations under IGRA.[114] The Tribes relied on *Ex Parte Young*,[115] which states that an individual may force a state officer to comply with federal law.[116] The court held that the *Young* doctrine did not apply because of two exceptions.[117]

The first exception was that the doctrine cannot be used to compel a state officer to undertake a discretionary task.[118] The court found that IGRA provides for the negotiation of a compact and gives the states and tribes the discretion regarding its terms.[119] The states are also given the choice as to negotiate or not.[120] The holding of the court was that the States retained their Eleventh Amendment immunity through the exception to the *Young* doctrine, which does not allow a state official to be compelled to undertake a discretionary task.[121]

---

106. *Id.* at 1027.
107. 491 U.S. 1 (1989).
108. *Seminole Tribe*, 11 F.3d at 1026 (interpreting *Pennsylvania*, 491 U.S. at 19-20 (1989)).
109. *Id.* at 1027.
110. *Id.* at 1028.
111. *Id.* at 1025 n.9.
112. *Id.* at 1026.
113. *Id.*
114. *Id.* at 1028.
115. 209 U.S. 123 (1908).
116. *Seminole Tribe*, 11 F.3d at 1028.
117. *Id.*
118. *Young*, 209 U.S. at 158.
119. *Seminole Tribe*, 11 F.3d at 1028.
120. *Id.*
121. *Id.* at 1028-29.

The second exception was that if the suit is in reality against the state and not its officials, the *Young* doctrine is inapplicable.[122] The court held that the *Young* doctrine did not survive this exception either, by finding that IGRA addresses the states and never imposes any duties or responsibilities on any officer of the state.[123] The court reversed the Southern District Court of Florida's decision and remanded the case to the district court so it could dismiss the case.[124] Therefore, the court affirmed the Southern District Court of Alabama and dismissed the case.[125]

## UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GAMING: Indian Gaming Regulatory Act

*Cabazon Band of Mission Indians v. National Indian Gaming Commission*, 14 F.3d 633 (D.C. Cir. 1994).

Cabazon Band of Mission Indians, et al. (the Tribes)[126] appealed a district court order that granted summary judgment to the National Indian Gaming Commission (the Commission).[127] The district court held that computerized pull-tab games are "clearly . . . facsimiles of games of chance and therefore are class III gaming."[128] The Tribes then sought and were granted an injunction, which prohibited the Commission from interfering with the Tribes' use and operation of computerized pull-tab games.[129] The Court of Appeals for the District of Columbia vacated the injunction and affirmed the holding of the district court.[130] The court held that video pull-tab games are, under the Indian Gaming Regulatory Act (IGRA), class III "electronic

122. *Id.* at 1029 (interpreting Pennhurst State Sch. & Hospital v. Halderman, 465 U.S. 89, 101-02 (1984)).

123. *Id.* (citing 25 U.S.C. § 2710 (d)(7)(B)(iii) (1988)).

124. *Id.*

125. *Id.*

126. The eight tribes are: Cabazon Band of Mission Indians, Eastern Band of Cherokee Indians, Poarch Band of Creek Indians, Pueblo of Isleta, Rumsey Rancheria, San Manuel Band of Mission Indians, Spokane Tribe, and Delaware Tribe of Western Oklahoma.

127. Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 14 F.3d 633, 634 (referring to Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 827 F. Supp. 26 (D.D.C. 1993)).

128. *Id.* at 636 (quoting Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 827 F. Supp. 26, 32 (D.D.C. 1993)).

129. *Id.* at 634. A panel of the Court of Appeals for the District of Columbia granted the injunction on September 23, 1993.

130. *Id.*

facsimiles"[131] rather than class II pull-tab games which use "electronic, computer or technologic aids."[132]

The Tribes asserted that sections 502.7 and 502.8 of the Commission's regulations[133] improperly included computerized pull-tab games[134] in a different class than noncomputerized pull-tab games.[135] The court held that no need existed to consider the Commission's regulations because the decision was "a simple one that may be accomplished solely be examining the statute itself."[136]

The Tribes conceded that the computerized version of pull-tab games is the same as the paper version.[137] The court held that this concession demonstrated that computerized pull-tab gaming is not in the class II category,

---

131. 25 U.S.C. § 2703(8) (1988).

132. *Cabazon*, 14 F.3d at 635 (quoting 25 U.S.C. §§ 2703(7)(A), 2703(7)(B)(ii) (1988)).

133. 25 C.F.R. § 502.7-.8 (1993). Section 502.7 states:

> *Electronic, computer or other technologic aid* means a device such as a computer, telephone, cable, television, satellite or bingo blower and that when used—
>
> (a) Is not a game of chance but merely assists a player or the playing of a game;
>
> (b) Is readily distinguishable from the playing of a game of chance on an electronic or electromechanical facsimile; and
>
> (c) Is operated according to applicable Federal communications law.

*Id.* § 502.7. Section 502.8 states: "Electronic or electromechanical facsimile means any gambling device as defined in 15 U.S.C. § 1171(a)(2) or (3)." *Id.* § 502.8. Title 15 U.S.C. § 1171(a) states, in pertinent part:

> (a) The term "gambling device" means—
>
> . . . .
>
> (2) any other machine or mechanical device (excluding slot-machines; including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or
>
> (3) any subassembly or essential part intended to be used in connection with such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

11 U.S.C. § 1171(a) (1988).

134. *Cabazon*, 14 F.3d at 635. The game of "pull-tabs" in its common form is the paper version. A card is purchased from a deck and the tab is pulled open to reveal if the purchaser is a winner. In the paper version, each player competes against all others in the room playing pull-tab. There are a predetermined number of winning cards with each deal. In the computerized version of pull-tabs, the computer selects the card for the player, pulls the tab open when the player directs it to, and displays the result on the screen. The player in the computerized version does not play against other players.

135. *Id.*

136. *Id.* (quoting Cabazon Band of Mission Indians v. National Indian Gaming Comm'n, 827 F. Supp. 26, 32 (D.D.C. 1993)).

137. *Id.* at 636.

because class II gaming does not include "electronic or electromechanical facsimiles of any game of chance."[138] The court stated that facsimiles are exact copies or duplicates and quoted *Sycuan Band of Mission Indians v. Roache*,[139] which defined facsimiles as "a device that preserves the fundamental characteristics of a game."[140] The court then concluded that the computerized version of pull-tab gaming is an electronic facsimile in that it exactly duplicates the paper version of pull-tab gaming.[141]

The Tribes alleged that the use of technology would create a class III pull-tab game only if that technology created a different game than what the game would be without the technology.[142] According to the Tribes, the computerized pull-tab games are considered to be aids to the paper pull-tab games, not a different version.[143] The court held that IGRA excluded electronic facsimiles from class II gaming when those games are wholly incorporated into an electronic or electromechanical version.[144]

The Tribes' last assertion was that statutes which are ambiguous must be construed in the Tribes' favor.[145] The court held that the Tribes focused only on IGRA's purpose of advancing tribal economic interests.[146] IGRA was also enacted to protect tribes from the dangers of large-scale gambling operations.[147] The court found that the construction which most favors the Tribes is the one which places the computerized version of pull-tab gaming in the more restrictive class III grouping.[148] In addition, the court stated that the statutory language is clear, rendering the Tribes' contention meritless.[149]

## LEGISLATION

Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004-08 (codified at 25 U.S.C.A. §§ 3601-3631 (West Supp. 1994))

The purpose of the Indian Tribal Justice Act (the Act) is to assist the development of tribal justice systems.[150] The Act was passed to improve

138. *Id.* (quoting 25 U.S.C. § 2703(7)(B)(ii) (1988)).
139. 19 Indian L. Rep. (Am. Indian Law. Training Program) 3079 (S.D. Cal. 1992).
140. *Id.* at 3080-81, *quoted in Cabazon*, 14 F.3d at 636.
141. *Cabazon*, 14 F.3d at 636.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 637; *see* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).
146. *Cabazon*, 14 F.3d at 637.
147. *Id.*
148. *Id.*
149. *Id.*
150. H.R. REP. NO. 205, 103d Cong., 1st Sess. 5 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2425.

administration and provide resources for the tribes to operate tribal forums with adequate resources, training, funding, and guidance.[151] The Act was also set up to help Indian tribal justice systems achieve respect and "congressional support for the recognition of tribal court judgments by state courts and authorities."[152]

A government-to-government relationship, Congress declared, exists between the United States and each Indian tribe.[153] Congress recognized the inherent sovereignty of each tribe and that each tribe possesses the authority to establish their own form of a tribal justice system.[154] Congress found that inadequate funding of tribal justice systems impairs their operation.[155] This Act's purpose is to involve tribal governments in improving their tribal justice systems.[156]

The Act establishes the Office of Tribal Justice Support (the Office) within the Bureau of Indian Affairs of the Department of the Interior.[157] The purpose of the Office is to "further the development, operation and enhancement of tribal justice systems and Courts of Indian Offenses."[158] In order to accomplish this purpose, the Office shall: (1) provide funds to Indian tribes for the development and operation of tribal justice systems and traditional tribal judicial practices;[159] (2) provide, upon request by the tribes, technical assistance and training, including, but not limited to, developing tribal codes, rules of procedure, tribal court administrative procedures, court records management systems, methods of alternate dispute resolution, methods of reducing cost delay, long-range plans for improving tribal justice systems, and tribal standards for judicial administration and conduct, either directly or by contract with independent entities of through grants to the tribes;[160] (3) research the operation of tribal justice systems;[161] (4) promote cooperation and coordination among tribal justice systems and federal and state judiciary systems;[162] and (5) oversee the operations of the Court of Indian Offenses.[163] The Office is also required to maintain information on staffing,

151. H.R. CONF. REP. NO. 383, 103d Cong., 1st Sess. 13 (1993), *reprinted in* 1994 U.S.C.C.A.N. 2453, 2457.

152. H.R. REP. NO. 205, *supra* note 150, at 5, 6, *reprinted in* 1994 U.S.C.C.A.N. at 2426 (quoting U.S. COMM'N ON CIVIL RIGHTS, INDIAN CIVIL RIGHTS ACT: A REPORT 74 (1991)).

153. 25 U.S.C.A. § 3601(1) (West Supp. 1994).

154. *Id.* § 3601(3)-(4).

155. *Id.* § 3601(8).

156. *Id.* § 3601(9).

157. *Id.* § 3611(a).

158. *Id.* § 3611(a).

159. *Id.* § 3611(c)(1), (6).

160. *Id.* § 3611(c)(2), (e).

161. *Id.* § 3611(c)(3).

162. *Id.* § 3611(c)(4).

163. *Id.* § 3611(c)(5).

funding, model tribal codes, tribal justice activities, and tribal justice decisions.[164]

Beginning June 3, 1994, the Secretary of the Interior must arrange a survey of the local conditions of the tribal justice systems and Courts of Indian Offenses.[165] This survey will allow for a determination of resources and funding needed to "provide expeditious and effective administration of justice."[166] The survey is to be conducted annually by a nonfederal entity.[167]

The local conditions to be surveyed include the geographic and demographic area, the volume and complexity of the caseloads, the facilities and resources available, the funding levels and staffing requirements for the tribal justice systems, the functioning and capacity levels of the tribal justice systems, and the training and technological assistance needs of the tribal justice systems.[168] The Indian tribes are to be consulted regarding the conduct of the survey.[169] The tribes are also to be given the opportunity to review and make recommendations regarding the survey findings before they are reported to the Secretary of the Interior and Congress.[170]

The Secretary of the Interior is authorized, pursuant to the Indian Self-Determination and Education Assistance Act,[171] to enter into contracts, grants, or agreements with the Indian tribes for the performance of any Office function.[172] Any financial assistance provided through the agreements, contracts or grants, may be used for the development, enhancement, and continuing operation of tribal justice systems and traditional tribal judicial practices by Indian tribes, as well as tribal judicial conferences.[173]

Tribal judicial conferences are to be supported with funds provided for by the Act.[174] The conferences are established pursuant to the Indian Self-Determination and Education Assistance Act.[175] The money provided to these conferences may be used for hiring judges and other court officials.[176] Law libraries and computer research materials may also be purchased.[177] In

164. *Id.* § 3611(f).
165. *Id.* § 3612(a).
166. *Id.*
167. *Id.* § 3612(a).
168. *Id.* § 3612(b).
169. *Id.* § 3612(c).
170. *Id.*
171. 25 U.S.C. § 450(a)(1) (1988). The Act states, in relevant part: "[F]ull opportunity [shall be provided] to develop leadership skills . . . [for] self-government . . . [giving Indians] an effective voice in planning and implementing programs for the benefit of Indians . . . ." *Id.*
172. 25 U.S.C.A. § 3613(a) (West Supp. 1994).
173. *Id.* § 3613(b).
174. *Id.* § 3614.
175. 25 U.S.C. §§ 450-450n, 455-458e (1988 & Supp. II 1990).
176. 25 U.S.C.A. § 3614(1) (West Supp. 1994).
177. *Id.* § 3614(3).

addition, tribal judicial personnel training programs and continuing education may be established.[178] These funds provide for the planning for the development, enhancement, and operation of tribal justice systems is provided for by these funds.[179]

The base support funding for the tribal justice systems will be established by the Secretary of the Interior with full participation by the Indian tribes no later than June 1994.[180] Factors to be considered in establishing the base support funding include, but are not limited to, the data developed as a result of the survey conducted according to the Act as well as any other relevant assessment standards.[181]

Congress has authorized the appropriation of funds to carry out the Provisions of the Act.[182] The funds are to be allocated for each fiscal year from 1994 to 2000.[183] A total of $7 million is provided to establish and provide funds for the functions of the Office of Tribal Justice Support.[184] This money may not be used for administrative expenses of the Office,[185] so an additional $500,000 is allotted for administrative expenses.[186] In addition, $50 million is provided for the base support funding for each tribal justice system.[187] The tribal judicial conferences receive $500,000 for each fiscal year and the annual survey is appropriated $400,000.[188] This funding is not to be subjected to the Indian priority system nor is it to be offset.[189]

178. *Id.* § 3614(4).
179. *Id.* § 3614(6).
180. *Id.* § 3613(c)(1).
181. *Id.* § 3613(c)(2)-(3).
182. *Id.* § 3621.
183. *Id.*
184. *Id.* § 3621(a).
185. *Id.*
186. *Id.* § 3621(c).
187. *Id.* § 3621(b).
188. *Id.* § 3621(d), (e).
189. *Id.* § 3621(f), (h).