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Michigan v. Bay Mills Indian Community

Wesley J. Furlong
University of Montana School of Law, wfurlong@narf.org

***Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2025, 82 USLW 4398 (2014).**

Wesley J. Furlong

ABSTRACT

Justice Kagan's gambling metaphors aside, *Michigan v. Bay Mills Indian Community* stands as a resolute affirmation of the Supreme Court's refusal to qualify tribal sovereign immunity absent congressional action. *Bay Mills* reaffirms that as domestic dependent nations, tribes exercise inherent sovereign immunity, qualified only by the clear direction of Congress, not the Court. While the dissent vented its frustration with the precedent relied on by the majority, the Court reaffirmed that tribal sovereign immunity extends to all commercial activities occurring off Indian land.

I. INTRODUCTION

At issue in *Michigan v. Bay Mills Indian Community* was whether Bay Mills Indian Community ("Tribe") was immune from the State of Michigan's ("Michigan") suit to enjoin the Tribe's operation of class III gaming activities off its reservation on land owned by the Tribe.[1] Citing the Indian Gaming Regulatory Act ("IGRA"), Michigan sought to enjoin the tribe from operating the casino, contending that the Tribe's operation of the class III gaming activities off the reservation violated their Tribal-State Compact ("Compact").[2] Michigan argued that, while the gaming activities were located off of Indian land, the casino's management was on the reservation and should be considered part of the gaming activities.[3] Michigan also pressed the Court to overturn *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, which held that tribal immunity extended to commercial activities off Indian land, arguing that the case gave

[1] *Mich. v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2028 (2014).
[2] *Id.* at 2029; *see* Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 and 18 U.S.C. §§ 1166-1168 (1988).
[3] *Bay Mills*, 134 S. Ct. at 2032.

tribes an unfair commercial advantage.[4] Besides holding that IGRA did not grant Michigan a cause of action, the Court held that tribes, as domestic dependent nations, exercise inherent sovereign immunity unless explicitly qualified by Congress.[5] The Court refused to overturn *Kiowa*, holding that it was not within the power of the Court to qualify the extent of tribal immunity, reaffirming that tribal immunity extended to commercial activities off Indian land.[6]

II. FACTUAL AND PROCEDURAL BACKGROUND

IGRA provides the framework by which Indian gaming is regulated.[7] The act creates three categories of gaming.[8] At issue in *Bay Mills* was class III gaming, which includes slot machines and table games.[9] In order to operate a class III gaming facility, IGRA requires that a tribe must enter into a compact with the state in which it is located, detailing the rules by which the facility will operate, specifying the distribution of gaming proceeds, and creating the means by which the compact will be enforced.[10]

The Tribe entered into a Compact with Michigan to operate a class III gaming facility on its reservation in 1993, which specifically restricted class III gaming to Indian land, and did not waive either party's sovereign immunity.[11] In 2010, the Tribe opened a class III facility off its reservation on tribally owned land in Vanderbilt, Michigan.[12] The Tribe bought the land with money from a congressional appropriation, which stated that any land purchased with the money

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[4] *Id.* at 2036; *see Kiowa Indian Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998).
[5] *Bay Mills*, 134 S. Ct at 2039.
[6] *Id.*
[7] 25 U.S.C. § 2702 (2012).
[8] *Id*. at § 2703(6)-(8).
[9] Elizabeth Lauzon, *Jurisdiction Issues Arising Under Indian Gaming Regulatory Act*, 197 A.L.R. Fed. 459, 473 (2004).
[10] *Bay Mills*, 134 S. Ct. at 2028-2029.
[11] *Id.* at 2029; Compact Between the Bay Mills Indian Community and the State of Michigan Providing for the Conduct of Tribal Class III Gaming by the Bay Mills Indian Community, §§ 4(H), 7(B), http://www.bia.gov/cs/groups/xoig/documents/text/idc-038287.pdf (Aug. 20, 1993).
[12] *Bay Mills*, 134 S. Ct. at 2029.

"shall be held as Indian lands are held."[13] This language was the basis for the Tribe's assertion that the Vanderbilt casino complied with the Compact.[14]

Michigan's position that the new facility was not in compliance with the Compact was supported by a Department of the Interior opinion, issued the day Michigan filed its suit, which stated the Tribe's acquisition of the land did not convert it into Indian land for the purposes of gaming under IGRA.[15] Although the U.S. District Court for the Western District of Michigan granted Michigan a preliminary injunction, the U.S. Court of Appeals for the Sixth Circuit subsequently vacated the order, citing Michigan's lack of a cause of action, and tribal sovereign immunity.[16]

III. ANALYSIS

A. Indian Gaming Regulatory Act; Statutory Interpretation

Michigan argued that the Tribe violated the Compact by operating a class III gaming facility in Vanderbilt, off Indian land.[17] At the Sixth Circuit, Michigan argued that IGRA gave it the authority to sue the Tribe because 25 U.S.C. § 2710(d)(7)(A)(ii) allowed states to enjoin class III gaming activities violating Tribal-State compacts.[18] The court held that § 2710(d)(7)(A)(ii) clearly granted states a cause of action for an injunction only for gaming activities occurring on Indian land that violated the Compact.[19] Since the land was not Indian land for the purposes of gaming, the court held that IGRA did not provide Michigan a cause of action.[20]

In front of the Supreme Court of the United States, Michigan argued that while the casino was located off Indian land, IGRA still gave the State standing because the Tribe "'authorized,

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[13] *Id.*; *see* Michigan Indian Land Claims Settlement Act, Pub L. No. 105-143, § 107(a)(3), 111 Stat. 2652 (1997).
[14] *Bay Mills*, 134 S. Ct. at 2029.
[15] *Id.*
[16] *Id.*; *see Mich. v. Bay Mills Indian Community*, 695 F.3d 406 (6th Cir. 2012), *aff'd*, 134 S. Ct. 2024 (2014).
[17] *Bay Mills*, 134 S. Ct. at 2029.
[18] *Id.* at 2032.
[19] *Bay Mills*, 695 F.3d at 412.
[20] *Id.* at 412-413.

licensed, and operated'" the casino from a location on its reservation.[21] To this end, Michigan argued that the "necessary administrative action[s]" of the casino should be considered gaming activity under IGRA, and should provide a cause of action, trumping the Tribe's claim of sovereign immunity.[22] The Court held that "numerous provisions of the IGRA show that class III gaming activity means just what it sounds like – the stuff involved in playing class III games."[23] Pointing to numerous sections within IGRA that differentiated gaming activities from management, the Court held that the statute authorized the suit only if actual gambling that took place on Indian land violated the Compact.[24]

Michigan also argued that the Court should adopt a "'holistic method'" of interpreting IGRA, which would allow states to sue tribes for gaming violations off Indian land.[25] Michigan asked why Congress would allow states to enjoin only gaming activities on Indian lands but not on state lands.[26] IGRA, the Court noted, was passed in response to *California v. Cabazon Band of Mission Indians,* and gave states regulatory authority over class III gaming on Indian land, vis-à-vis Tribal-State compacts.[27] The Court was clear that it "does not revise legislation . . . just because the text as written created an apparent anomaly as to some subject it does not address."[28]

B. *Kiowa* and Tribal Sovereign Immunity; *Stare Decisis*

Michigan also argued that the Supreme Court should restrict tribal sovereign immunity to commercial activities on Indian land, overturning *Kiowa*.[29] Michigan argued that *Kiowa*, which held that tribal immunity extended to commercial activities off Indian land, was far too broad

[21] *Bay Mills*, 134 S. Ct. at 2032 (quoting Br. for Petr. *20, 2013 WL 4761311 (Aug. 30, 2013)).
[22] *Id.*
[23] *Id.*
[24] *Id.* at 2032-2033.
[25] *Id.* at 2033 (quoting Br. for Petr. *20).
[26] *Id.* (quoting Reply Br. *1, 2013 WL 6157114 (Nov. 22, 2013)).
[27] *Bay Mills*, 134 S. Ct. at 2034; *see Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (holding states have no regulatory authority over tribal gaming within the exterior bounderies of tribes' reservations).
[28] *Bay Mills*, 134 S. Ct. at 2033.
[29] *Id.* at 2036.

and offered tribes an unfair advantage in commercial activities, as tribes were increasingly assuming larger roles in off-reservation commerce.[30] The Court responded that despite the trajectory of tribes' commercial activities, *Kiowa* was unambiguous, had been relied on by tribes and subsequent cases, and had been considered by Congress, making any departure from it unmerited.[31]

Tribes, the Court pointed out, are domestic dependent nations that exercise sovereignty, subject to the limitation of Congress.[32] The Court stated that immunity "is 'a necessary corollary to Indian sovereignty and self-governance.'"[33] Tribal immunity is qualified only by being placed "in Congress's hands."[34] The Court held that any limitation of tribal immunity must come from a clear congressional decision.[35] In *Kiowa*, the Court refused to limit tribes' inherent immunity to commercial activities on Indian land, deferring any such action to Congress.[36]

In response to *Kiowa*, the Court noted, Congress considered legislation specifically meant to limit tribal immunity, but subsequently did not pass anything seriously qualifying it.[37] In *Bay Mills*, the Court therefore was not "confronting, as [it] did in *Kiowa*, a legislative vacuum[,]" but was acting "against the backdrop of a congressional choice."[38] The Court recognized that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."[39] Re-affirming *Kiowa*, the Court held that "[i]t is

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[30] *Id.* (citing Br. for Petr. **38, 41).
[31] *Id.* at 2037.
[32] *Id.* at 2030.
[33] *Id.* (quoting *Three Affiliated Tribes of Ft. Berthold Reservation v. World Engg.*, 476 U.S. 877, 890 (1986)).
[34] *Bay Mills*, 134 S. Ct. at 2030.
[35] *Id.* at 2031.
[36] *Id*.
[37] *Id.* at 2038; *see* Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 2(d)(2)(B)-(C), 114 Stat. 46 (2000) (codified at 25 U.S.C. § 81 (2012)) (requiring tribes to disclose or waive sovereign immunity when entering into contracts requiring the approval of the Secretary of the Interior).
[38] *Bay Mills,* 134 S. Ct. at 2038-2039.
[39] *Id.* at 2039.

fundamentally Congress's job . . . to determine whether and how to limit tribal immunity."[40] Absent congressional limitations, tribes exercise unqualified immunity, uninhibited by the Court.

IV. CONCLUSION

The Court, presented with an opportunity to abrogate, or at least qualify, tribal sovereign immunity, chose instead to defer to Congress any limitations on tribal immunity. *Bay Mills* is an unequivocal reaffirmation that tribal sovereign immunity extends to commercial activities off Indian land. Applied more broadly, *Bay Mills* appears to reinforce precedent that the Court will refuse to qualify tribal immunity without express action by Congress. The Court reiterated throughout its holding that limiting tribal immunity is the sole prerogative of Congress, and not the courts. Moreover, while the dissent contended that *Kiowa* "lack[ed] a substantive justification," and did not hold precedential value, the majority refused to overturn it, leaving intact its extension of sovereign immunity to commercial activities off Indian land.[41]

[40] *Id.* at 2037.
[41] *Id.* at 2046, 2054-2055 (Thomas, J., dissenting).