No. 01-445

In the Supreme Court of the United States

WYANDOTTE NATION, FKA WYANDOTTE TRIBE OF OKLAHOMA, PETITIONER

v.

SAC AND FOX NATION OF MISSOURI, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

JOHN C. CRUDEN
Acting Assistant Attorney General

DAVID C. SHILTON
JEFFREY C. DOBBINS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Huron Cemetery in Kansas City, Kansas, is not an Indian "reservation" for purposes of a provision of the Indian Gaming Regulatory Act, 25 U.S.C. 2719(a)(1).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

In the Supreme Court of the United States

No. 01-445

WYANDOTTE NATION, FKA WYANDOTTE TRIBE OF OKLAHOMA, PETITIONER

v.

SAC AND FOX NATION OF MISSOURI, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37) is reported at 240 F.3d 1250. The opinion of the district court (Pet. App. 38-49) is reported at 92 F. Supp. 2d 1124.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 2001. Petitions for rehearing were denied on June 14, 2001 (Pet. App. 50). The petition for a writ of certiorari was filed on September 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of the efforts of the Wyandotte Tribe of Oklahoma to open a casino on property located in downtown Kansas City, Kansas. The proposed site of the casino is the so-called Shriner Tract, which was once the site of a Shriner temple. Adjoining the Shriner Tract is the Huron Cemetery. Pet. App. 9, 39-40.

Under an 1855 treaty, the Wyandotte Tribe ceded most of its land in Kansas to the United States, with certain exceptions. One of those exceptions was that "[t]he Portion now enclosed and used as a public burying-ground, shall be permanently reserved and appropriated for that purpose." Pet. App. 66. Since 1855, that "burying ground"—the Huron Cemetery—has been held in trust by the United States for the benefit of the Wyandottes. See *Conley* v. *Ballinger*, 216 U.S. 84, 90 (1910) (addressing ownership of the cemetery).

In 1996, the Wyandottes asked the Secretary of the Interior to take the Shriner Tract into trust for the Tribe. The Tribe informed the Secretary that the Shriner Tract was to be purchased with funds appropriated by an Act of Congress to satisfy an Indian Claims Commission judgment in favor of the Tribe, and argued that the Act mandated that land purchased with such funds be taken into trust by the Secretary. See Act of Oct. 30, 1984, Pub. L. No. 98-602, § 105, 98 Stat. 3151. In July 1996, the Secretary took the Shriner Tract into trust. See Pet. App. 10-12, 131-140.

The Indian Gaming Regulatory Act (IGRA) generally prohibits gaming on land taken into trust after October 17, 1988. 25 U.S.C. 2719(a). But IGRA contains an exception to that prohibition for property

"within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. 2719(a)(1). Although the main reservation of the Wyandotte Tribe is located in Oklahoma, the Department of the Interior, through an Associate Solicitor, determined that the Huron Cemetery is a "reservation" of the Tribe, because that land was expressly "reserved" from cession under the 1855 treaty. See Pet. App. 124-130. Under that interpretation, the Wyandotte Tribe would be permitted to engage in some gaming, such as bingo, on the adjoining Shriner Tract; in addition, if the Tribe entered into a gaming compact with the State of Kansas, the Tribe could engage in casino gaming there. See 25 U.S.C. 2710; see also 25 U.S.C. 2703(7) (defining class II gaming); 25 U.S.C. 2703(8) (defining class III gaming).

2. The respondent Tribes operate casinos pursuant to tribal-state compacts negotiated in the mid-1990s. In 1996, those Tribes, together with the Governor of Kansas, filed suits to challenge the Secretary's decision to take the Shriner Tract into trust for the Wyandottes and the determination that, because the adjoining Huron Cemetery is a "reservation," the Wyandottes could lawfully conduct gaming on the Shriner Tract.[*]

The district court dismissed the suits. Pet. App. 38-49. The court held that the Wyandotte Tribe, which had intervened in one of the suits, was an indispensable party that could not be joined without its consent because of sovereign immunity. *Id.* at 40-45. In the

---

[*] The district court consolidated this action with *Kickapoo Tribe of Indians* v. *Deer*, which raised virtually identical questions. The court of appeals considered the two cases together and resolved them on similar grounds. See *Kickapoo Tribe of Indians* v. *Deer*, No. 00-3095, 2001 WL 193810 (10th Cir. Feb 27, 2001).

alternative, the court rejected various challenges to the Secretary's decisions. The court held that the Secretary was obligated to take into trust any real property acquired by the Tribe with funds appropriated under Public Law No. 98-602. *Id.* at 45-47. The court also held that the Secretary's decision to take the Shriner Tract into trust was not subject to analysis under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, or the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.* Pet. App. 47-48. The court declined to decide, however, whether the Huron Cemetery is a "reservation" for purposes of IGRA. *Id.* at 49.

3. The court of appeals reversed. Pet. App. 1-37. First, the court of appeals held that the Wyandotte Tribe was not an indispensable party to the action. Pet. App. 14-19. The court reasoned that the United States could adequately represent the Wyandottes' interest in the case, because the United States and the Tribe shared the same interest in defending the Secretary's decisions. *Id.* at 16-19. The court also noted that the Wyandotte Tribe had participated in the case as an intervenor. *Id.* at 16-17 n.10.

Second, the court of appeals held that the Secretary had a non-discretionary duty to take into trust any real property acquired by the Wyandotte Tribe with funds appropriated under Public Law No. 98-602. Pet. App. 21-24. The court further held that the Secretary reasonably determined that, because he had no discretion whether to take the Shriner Tract into trust, he was not required to review that action under the NEPA or the NHPA. *Id.* at 24-26. The court held, however, that the Secretary's determination that the Shriner Tract was purchased only with funds appropriated under Public Law No. 98-602 was not adequately supported by the

record, and therefore directed that the matter be remanded to the Secretary for further consideration. *Id.* at 26-28.

Finally, the court of appeals held that the Secretary erred in characterizing the Huron Cemetery as a "reservation" of the Wyandotte Tribe for purposes of IGRA. Pet. App. 28-36. After acknowledging that "IGRA does not specifically define the term 'reservation,'" the court declined to defer to the Secretary's construction of the term, reasoning that "neither the Secretary nor the Department of the Interior in general is charged with administering IGRA." *Id.* at 31. Rather, the court concluded that the National Indian Gaming Commission (NIGC), by virtue of its authority to promulgate regulations to implement IGRA, see 25 U.S.C. 2706(b)(10), has the authority to interpret any ambiguous terms contained in IGRA. Pet. App. 31. But the court found no indication that the NIGC had spoken to the question. *Id.* at 32.

Accordingly, the court of appeals, examining the matter without deference to the Secretary's views, concluded that Congress used the term "reservation" in IGRA to refer only to "land set aside by the federal government for the occupation of tribal members." Pet. App. 34. The court found support for that construction in IGRA's use of the phrase "*the* reservation of the Indian tribe," 25 U.S.C. 2719(a)(1) (emphasis added), which suggested to the court "that Congress envisioned that each tribe would have only one reservation for gaming purposes." Pet. App. 35. The court also suggested that a broader construction would blur the distinction between reservation lands and trust lands. *Ibid.* Applying its construction, the court concluded that the Huron Cemetery is not a reservation for purposes of IGRA, because it was reserved under the 1855

treaty only as a burial ground, and not as a residence for tribal members. *Id.* at 35-36.

ARGUMENT

The court of appeals' decision does not warrant this Court's review. The decision does not conflict with any decision of this Court or of any other court of appeals. Nor is the court of appeals' construction of the term "reservation" for purposes of 25 U.S.C. 2719(a)(1) likely to have implications for other cases.

1. The court of appeals held, contrary to the views of the Department of the Interior, that the Huron Cemetery is not a "reservation" of the Wyandotte Tribe for purposes of 25 U.S.C. 2719(a)(1). Section 2719(a) generally prohibits tribal gaming on lands, such as the Shriner Tract, that were taken into trust by the Secretary after October 17, 1988. 25 U.S.C. 2719(a). Section 2719(a)(1) creates an exception to that prohibition if "such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988." 25 U.S.C. 2719(a)(1).

The court of appeals construed the phrase "the reservation of the Indian tribe" in Section 2719(a)(1) to refer only to "land set aside by the federal government for the occupation of tribal members." Pet. App. 34. The Department of the Interior construed the statutory reference to "the reservation of the Indian tribe" to encompass *all* lands reserved for a Tribe under a treaty or executive agreement, regardless of the location of the lands relative to the Tribe's principal reservation or the purpose for which the lands were reserved. *Id.* at 124-130; see, *e.g.*, *United States* v. *Pelican*, 232 U.S. 442, 449 (1914) (defining "reservation" as lands "validly set apart for the use of the Indians as such, under the superintendence of the Government"). Under that

definition, drawn from broader principles of Indian law, the Huron Cemetery would qualify as a reservation.

2. Contrary to petitioner's suggestion (see Pet. 10-19), however, the court of appeals' decision does not conflict with any decision of this Court. The court of appeals addressed the definition of "reservation" only as that term is used in IGRA (and, indeed, Section 2719(a)(1) of IGRA). See, *e.g.*, Pet. App. 35 (applying what the court "believe[s] to be the proper definition of the term 'reservation' for purposes of IGRA"); see also *id.* at 36 (rejecting "the Secretary's determination that the Huron Cemetery is a 'reservation' for purposes of IGRA"); *id.* at 37 (concluding that "the Huron Cemetery is not a 'reservation' for purposes of IGRA"). Nothing in the court's decision purports to determine whether the Huron Cemetery is a reservation of the Wyandotte Tribe for other purposes.

The decisions of this Court on which petitioner relies—most of which predate the enactment of IGRA—concern the status of Indian lands in other contexts. See, *e.g.*, *United States* v. *Celestine*, 215 U.S. 278, 285 (1909) ("The word [reservation] is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide."); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 390 (1902) (describing a "reservation" as "a certain defined tract appropriated to certain purposes"); *Spalding* v. *Chandler*, 160 U.S. 394, 403 (1896) (establishment of a reservation gave a Tribe "the right to possess and occupy the lands for the uses and purposes designated"); cf. *Conley* v. *Ballinger*, 216 U.S. 84, 90 (1910) (describing the Huron Cemetery after the 1855 treaty as "remain[ing] * * * in the ownership of

the United States, subject to the recognized use of the Wyandottes"). Those decisions are thus easily reconcilable with the decision below. Petitioner does not suggest any conflict with a decision of any other court of appeals.

3. Moreover, the court of appeals' decision is unlikely to have any application beyond this case. The decision is confined to disputes about the reservation status under IGRA of lands, such as the Huron Cemetery, that are not contiguous to a Tribe's principal reservation *and* that were originally set aside, and subsequently used, solely for purposes other than providing a home for tribal members. Although there are a number of non-contiguous pieces of Indian land that the Secretary of the Interior considers to be reservations, the unusual combination of facts in this case will limit the practical effect of the court of appeals' decision.

Finally, in any future cases that present arguably similar questions, the courts' legal analyses may well be affected by a recent Act of Congress, which purports to "clarif[y]" the Secretary's authority to determine reservation status for purposes of IGRA. See Pub. L. No. 107-63, § 134, 115 Stat. 442. Section 134 provides, in pertinent part, that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988." Section 134 contains a proviso that gaming is not to be permitted "on the lands described in section 123 of Public Law 106-291," which refers to the Huron Cemetery, and on "any lands contiguous to such lands that have not been taken into trust by the Secretary of the Interior." Section 134 thus appears to confirm the Secretary's authority to determine the reservation status of the Huron Cemetery. Nonetheless,

the question whether the Secretary properly exercised that authority in the particular circumstances of this case does not present a question that warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

DAVID C. SHILTON
JEFFREY C. DOBBINS
Attorneys

NOVEMBER 2001