

OFFICE OF THE ATTORNEY GENERAL
SOLICITOR GENERAL & OPINIONS SECTION
INTRAOFFICE MEMORANDUM

TO: GRANT WOODS,
Attorney General

FROM: REBECCA W. BERCH, *RB*
Solicitor General

DATE: June 8, 1993

RE: Indian Gaming

Here's a quick update on the status of Tenth Amendment issues in gaming cases.

In 1992, two district courts found IGRA unconstitutional on Tenth and Eleventh Amendment grounds. Ponca Tribe v. Oklahoma, No. CIV 92-988T (W.D. Okla. 1992); Pueblo of Sandia v. New Mexico, No. CIV 92-0613JC (D.C. N.M. 1992). These cases are pending in the Court of Appeals for the Tenth Circuit, No. 92-6331 (Ponca); No. 93-2018 (Sandia). Just a week ago, the District Court for the Eastern District of Washington held the class three gaming provisions of IGRA unconstitutional on Tenth Amendment grounds. Confederated Tribes of the Colville Reservation v. State of Washington, No. CS 92-0426WFN (filed June 4, 1993). As far as I have been able to determine, our case (Yavapai-Prescott Indian Tribe v. Arizona, 796 F. Supp. 1292, 1297 (D. Ariz. 1992)) is the only case in which a district court has held that IGRA's terms "do not force the state to enter into a compact" -- a flaw which we hope the Ninth Circuit will soon remedy.

The Washington District Court based its decision on a recent Ninth Circuit decision, which held that the Tenth Amendment limits the power of the federal government "to use the states as implements of regulation." Board of Natural Resources v. Brown, No. 92-35004, Slip Op. at 4401 (9th Cir. May 4, 1993). The Washington District Court notes Arizona's Yavapai-Prescott Tribe, but notes that that case was decided "without the benefit of Board of Natural Resources," indicating that the decision in Arizona would have been different had Judge Rosenblatt been able to foresee Board of Natural Resources. Confederated Tribes, Slip Op. at 3.

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In short, the Tenth Amendment argument has been winning everywhere except Arizona. I think we have an excellent chance of prevailing in the Ninth Circuit, particularly in light of the Ninth Circuit's recent decision in Board of Natural Resources.

If you have questions about the status of the case, give me a call.

cc: Mark W. Killian, Speaker of the House
Karen Clark, Assistant Attorney General

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