TRIBAL SUPREME COURT PROJECT MEMORANDUM

NOVEMBER 8, 2018
UPDATE OF RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy, and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (http://sct.narf.org).

On October 30, 2018, the Court heard argument in the first Indian law case of the term, *Washington State Dep't of Licensing v. Cougar Den* (16-1498), in which the Washington State Department of Licensing (Department) seeks reversal of a Supreme Court of Washington decision, which held that the right-to-travel provision of the Yakama Nation Treaty of 1855 preempts the Department's imposition of taxes and licensing requirements on a tribally chartered corporation that transports motor fuel across state lines for sale on the Reservation.

Justices Kagan, Sotomayor, and Gorsuch dominated the questioning of the Department's attorney, Noah Purcell, with Justice Kavanaugh asking a few questions as well. These justices kept returning to the theme of the Tribe's bargained-for right to transport goods to market on highways off-reservation, and were skeptical of the Department's argument that the state tax did not run afoul of the Tribe's treaty because it is non-discriminatory. These justices repeatedly returned to a theme in their questions that transporting goods to and from market free from state-imposed burdens is exactly what the Tribe bargained for in their treaty.

The United States filed an amicus brief supporting the Department's position and was granted argument time. During her argument, the United States' attorney argued that while the treaty protected a Yakama citizen's right-to-travel on public highways, it did not immunize them from excise taxes on the goods obtained off-reservation and carried inside their vehicles, distinguishing between an impermissible burden on use of the highway and a permissible economic burden on goods carried inside a vehicle. She also argued that the phrase "in common with" has a different meaning in the context of the "right-to-travel" treaty provision at issue here than it has with regard to tribal fishing rights, which drew sharp responses from Justices Kavanaugh and Gorsuch.

It was also notable that Chief Justice Roberts, Justice Alito, and Justice Ginsburg asked no questions of the attorneys for the Department or the United States. Justice Breyer did not ask any questions of the Department's attorney, but did ask a series of questions to the United States' attorney that appeared aimed at determining what level of burden on Tribal citizens may be permissible.

When Cougar Den's attorney took the podium, Chief Justice Roberts and Justices Alito and Breyer appeared more skeptical of the company's position. Justice Breyer posed questions and hypotheticals that

raised concerns about Yakama citizens not paying taxes on goods that all others in the state are required to pay – a theme that was similarly present in some of Chief Justice Roberts' questions. Justice Alito appeared to disagree with the legal test Cougar Den argued should be applied. The company asserted that the focus of the analysis should be on what the Tribal citizen is doing (i.e., transporting goods, or merely possessing them), which Justice Alito then referred to as "artificial" and a "metaphysical question." And Justice Kavanaugh asked a few questions toward the end that might signal support for Cougar Den's position, including the closing question for Cougar Den's attorney: "To state the obvious, the value, current value of the land the tribe gave up is enormous, right?"

Finally, it is worth noting an issue that did not come up during oral argument: In its briefing, the Department urged the Court not to apply the Indian canon and construe the treaty provision as the Yakama Nation understood it in 1855, when it entered into the treaty, but instead to apply a "clear statement" canon typically applied statutes, which requires Congress to use clear, express language in order to preempt state taxes. The State did not press this position during argument, and none of the Justices asked questions about which approach the Court should take.

The transcript of the argument and briefs are available at: https://sct.narf.org/caseindexes/washington_v_cougar_den.html.

As discussed further below, the Court is holding the petition in *Bearcomesout v. U.S.* (16-30276) (double jeopardy) pending the Court's resolution of *Gamble v. United States* (17-646), pursuant to the Solicitor General's request. No other Indian law cases are currently scheduled for conference. The next argument in an Indian law case will be November 27, 2018, when the Court will hear *Carpenter v. Murphy* (17-1107), which involves the alleged disestablishment of the Muscogee (Creek) Reservation.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in three Indian law cases that have not been decided by the Court:

WASHINGTON STATE DEPARTMENT OF LICENSING V. COUGAR DEN (16-1498) – On June 25, 2018, the Court granted a petition filed by the Washington Department of Licensing seeking review of a decision by the Supreme Court of Washington, which held that the right-to-travel provision of the Yakama Nation Treaty of 1855 preempts the imposition of taxes and licensing requirements by the Department on a tribally chartered corporation that transports motor fuel across state lines for sale on the Reservation. The Department filed its merits brief on August 9, 2018, and the United States was among those that filed an amicus brief supporting the Department. Cougar Den filed its merits brief on September 17, 2018, and amicus brief supporting Cougar Den will be filed on or before September 24, 2018. The case was argued on October 30, 2018.

HERRERA V. WYOMING (17-532) – On June 28, 2018, the Court granted a petition for review filed by a member of the Crow Tribe that challenges a Wyoming state court conviction for unlawfully hunting elk in the Bighorn National Forest. The Crow Tribe's 1868 treaty with the United States reserves hunting rights in ceded lands, which includes what is now the Bighorn National Forest, so long as those lands remain "unoccupied." However, the state court did not allow Petitioner to assert the Tribe's treaty hunting right as a bar to prosecution, instead holding that Wyoming's admission to the Union abrogated the Tribe's treaty hunting rights, and in the alternative that the creation of the Bighorn National Forest constituted an "occupation" of those lands. A state appellate court affirmed, and the Wyoming Supreme Court denied

review. On January 8, 2018, the Court called for the views of the Solicitor General, and on May 22, 2018, the United States filed its brief recommending that the Court grant the petition. Mr. Herrera filed his brief on September 4, 2018, and 10 amicus briefs were filed supporting him, including one by the United States. The State of Wyoming's response brief is due November 13, 2018. Argument has not yet been scheduled.

CARPENTER V. MURPHY (17-1107) – On May 21, 2018, the Court granted a petition filed by the State of Oklahoma seeking review of a U.S. Tenth Circuit Court of Appeals decision in a habeas corpus action, which reversed the District Court and held that the State of Oklahoma was without jurisdiction to prosecute and convict a member of the Muscogee (Creek) Nation because the crime for which he was convicted occurred in Indian country, within the boundaries of the Muscogee (Creek) Reservation. After Mr. Murphy was convicted of murder in Oklahoma State court and exhausted his appeals, he filed a habeas corpus petition in federal district court asserting that because the crime occurred within the Muscogee (Creek) Nation's reservation boundaries, and because he is Indian, the state court had no jurisdiction. The federal district court denied his petition, holding that Oklahoma possessed jurisdiction because the Muscogee (Creek) Reservation was disestablished. On appeal, the Tenth Circuit Court of Appeals utilized the three-factor *Solem* reservation disestablishment analysis and not only found that Congress did not disestablish the Muscogee (Creek) Reservation, but also that statutes and allotment agreements showed that "Congress recognized the existence of the Creek Nation's borders." Likewise, the court held that the historical evidence indicated neither a Congressional intent to disestablish the Muscogee (Creek) reservation, nor a contemporaneous understanding by Congress that it had disestablished the reservation. Accordingly, the court concluded that (1) Mr. Murphy's state conviction and death sentence were invalid because the crime occurred in Indian Country and the accused was Indian, (2) the Oklahoma Court of Criminal Appeals (OCCA) erred by concluding the state courts had jurisdiction, and (3) the federal district court erred by concluding the OCCA's decision was not contrary to clearly established federal law. Oral argument is on November 27, 2018.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

The following petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

STAND UP FOR CALIFORNIA! V. U.S. DEP'T OF THE INTERIOR (18-61) – On July 9, 2018, Stand Up for California! and several individuals (collectively "Stand Up") filed a petition seeking review of a D.C. Circuit Court of Appeals decision, which affirmed a district court's entry of summary judgement against them. Stand Up brought suit against the Department of the Interior (DOI) and the North Fork Rancheria Band of Mono Indians (North Fork), challenging DOI's decisions to take land into trust for the benefit of North Fork and to authorize it to operate a casino on that land. Among other things, Stand Up claimed that DOI's decision to allow gaming on North Fork's newly acquired land was erroneous because it would have detrimental impacts on the surrounding community. Stand Up also asserted that North Fork is not a "Tribe" under the Indian Reorganization Act, and therefore that DOI was not authorized to take the parcel into trust. The district court granted partial summary judgement to DOI and North Fork, and the D.C. Circuit affirmed. After filing of the petition at the Supreme Court, North Fork and the United States waived their right to respond; however, the Court requested responses, which are due November 26, 2018.

HARVEY V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (17-1301) – On March 7, 2018, a petition was filed seeking review of a Utah Supreme Court decision, which affirmed the state trial court's conclusion that the plaintiffs must first exhaust tribal court remedies before proceeding in state court. The dispute arose from the Ute Tribe Employment Rights Office's revocation of the plaintiff companies' licenses to operate on Tribal lands for failure to comply with a tribal ordinance. An individual and two corporations brought an action against the Tribe, tribal officials, companies owned by the tribal officials, and other private companies, alleging state law causes of action as well as federal claims that the tribe and tribal officials exceeded their jurisdiction. The plaintiffs did not file an action in tribal court, but went directly to Utah state court. The state trial court dismissed the case against the tribe and tribal officials on several bases, and stated that the plaintiffs' claim that the tribal officials exceeded their jurisdiction or acted outside the scope of their authority under tribal law must be addressed by the tribe's courts. The Utah Supreme Court affirmed the trial court's holding of tribal court exhaustion and remanded to the trial court to determine whether the case should be dismissed or stayed pending tribal adjudication. On June 25, 2018, the Court called for the views of the solicitor general.

OSAGE WIND V. UNITED STATES (17-1237) – On March 2, 2018, a petition was filed seeking review of a Tenth Circuit Court of Appeals decision, which reversed the district court and held that (1) the Osage Minerals Council was entitled to appeal district court's grant of summary judgment to a wind energy company, even though it had not intervened in the district court; and (2) the activity of Osage Wind (a private company not affiliated with the Tribe) constituted "mining" under the Osage Act and the Department of the Interior's implementing regulations, thus requiring them to obtain a federally approved lease. The United States, as trustee for the Osage Nation, filed suit to enjoin excavation work being done by Osage Wind as part of the construction of a wind farm and on land where the Tribe owned the subsurface oil, gas, and mineral rights. The district court, in granting summary judgement for Osage Wind, concluded that the company's activities were not "mining" under applicable regulations and, therefore, no federally approved mineral lease was required. The United States did not appeal, but the Osage Minerals Council moved to intervene after summary judgement and filed an appeal. In reversing the trial court, the Tenth Circuit found ambiguities in the relevant regulatory definition of "mining" and, utilizing the Indian canon of construction, construed the term in the Tribe's favor. On May 14, 2018, the Court called for the views of the Solicitor General.

POARCH BAND OF CREEK INDIANS, ET AL. V. WILKES, ET AL. (17-1175) – On February 16, 2018, the Poarch Band of Creek Indians (Tribe) filed a petition seeking review of an Alabama Supreme Court decision, which reversed a state lower court and held that the Tribe was not entitled to sovereign immunity from a tort claim brought by a non-member in state court. Two non-members of the Tribe sued the Tribe in Alabama state court seeking compensation for injuries they received in an automobile accident that occurred off tribal land and was caused by an employee of the Tribe's casino. The state trial court granted the Tribe's motion for summary judgement based on the Tribe's sovereign immunity. The Supreme Court of Alabama reversed, holding that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members." The Respondents waived their right to respond, and the petition was scheduled for the Court's April 13, 2018, conference; however, the Court requested a response, which was filed on June 8, 2018. On October 1, 2018, the Court called for the views of the Solicitor General.

BEARCOMESOUT V. UNITED STATES (16-30276) – On November 14, 2017, a Native American defendant in a criminal case filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court and held that the Double Jeopardy Clause of the Fifth Amendment does not bar federal court prosecution subsequent to a conviction for the same offense in tribal court. The Petitioner

was charged with homicide in tribal court for the killing of another Indian on the Northern Cheyenne Reservation. She reached a plea agreement and served two consecutive one-year sentences in tribal custody. Near the end of her sentence, she was indicted on federal homicide charges. She moved to dismiss the federal indictment on Double Jeopardy grounds, which was denied by the federal district court, and the Ninth Circuit affirmed. The United States waived its right to respond to the petition, and it was scheduled for the January 5, 2018, conference, but was held over 10 times. On June 27, 2018, the Court requested a response from the United States. The United States filed a memorandum recommending the Court hold this petition pending the disposition of *Gamble v. United States* (17-646), a case challenging the constitutionality of successive state and federal prosecutions that the Court will hear this term.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

WHITE, ET AL. V. UNDERWOOD, ET AL. (18-297) – On October 29, 2018, the Court denied a petition filed by a tribal retailer located on the Seneca Nation's reservation that sought review of a New York State Court of Appeals decision. That court held that a New York State law requiring the retailer to prepay a cigarette sales tax levied on non-member customers is not a direct tax on the tribal retailer and, therefore, violates neither a state law prohibiting imposition of state taxes upon Indians living on-reservation nor a similar provision in the Tribe's 1842 treaty with the United States.

CITIZEN POTAWATOMI NATION V. OKLAHOMA (17-1624) – On October 15, 2018, the Court denied a petition filed by the Citizen Potawatomi Nation (the Tribe) seeking review of a Tenth Circuit Court of Appeals decision, which reversed and remanded to the district court with instructions to vacate an arbitration award. The dispute arose over the sale and taxation of liquor at one of the Tribe's casinos. When the state's Alcoholic Beverage Laws Enforcement Commission and the Oklahoma Tax Commission initiated administrative proceedings, the Tribe invoked the arbitration provision of the tribal-state gaming compact and prevailed in the arbitration proceedings. At the Tribe's request, a federal district court entered an order enforcing the arbitration award. On appeal, the Tenth Circuit agreed with the district court that the *de novo* review provision of the compact's binding arbitration clause was legally invalid, but found that provision to be a material aspect of the arbitration clause and, accordingly, held that the entire arbitration clause must be severed from the compact.

MAKAH INDIAN TRIBE V. QUILEUTE INDIAN TRIBE, ET AL. (17-1592) – On October 1, 2018, the Court denied a petition filed by the Makah Indian Tribe seeking review of the Ninth Circuit Court of Appeals decision regarding a subproceeding of *U.S. v. Washington*. The subproceeding was initiated by the Makah Indian Tribe and sought a court determination of the usual and accustomed fishing grounds of two other tribes. The Ninth Circuit described "the crux of this appeal" as "whether the term 'fish' in the [Treaty of Olympia] includes whales and seals," and held that the district court did not clearly err when it determined that the word "fish" as used in that treaty included sea mammals.

COUNTY OF AMADOR, CALIFORNIA V. U.S. DEP'T OF THE INTERIOR (17- 1432) – On October 1, 2018, the Court denied a petition filed by a California county government seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court's summary judgement in favor of the Department of the Interior (DOI) and Intervenor Ione Band of Miwok Indians (Ione). Amador County sued DOI, challenging a record of decision announcing its intention to take land into trust for benefit of Ione pursuant to the Indian Reorganization Act ("IRA") and allowing Ione to build a casino on that land. Ione intervened as a defendant. On appeal, the Ninth Circuit held that: (1) the phrase "recognized Indian tribe now under Federal jurisdiction" in the IRA includes all tribes that are "recognized" at the time of the

relevant decision and that were "under Federal jurisdiction" at the time the IRA was passed; (2) DOI set forth the best interpretation of the phrase "under Federal Jurisdiction" in the IRA, which defines an "Indian" entitled to IRA's benefits; (3) DOI's determination that tribe was "under Federal jurisdiction" when IRA was passed was not arbitrary and capricious; and (4) a grandfathering provision in the DOI regulation implementing the "restored tribe" exception in the Indian Gaming Regulatory Act ("IGRA") was in accordance with IGRA.

LUMMI TRIBE OF THE LUMMI RESERVATION, ET AL., V. UNITED STATES (17-1419) – On October 1, 2018, the Court denied a petition filed by an Indian Tribe and three Tribal housing entities seeking review of a United States Court of Appeals for the Federal Circuit decision, which held that the Native American Housing Assistance and Self Determination Act (NAHASDA) was not a money-mandating statute and, therefore, that the Federal Court of Claims was without subject matter jurisdiction over a suit seeking damages for grant funds withheld by the Department of Housing and Urban Development (HUD). The Tribe and Tribal housing entities sued HUD under the Tucker Act and Indian Tucker Act, claiming that HUD illegally reduced their NAHASDA grant funds in order to recapture allegedly improper payments previously paid by the agency.

FORT PECK HOUSING AUTHORITY, ET AL., V. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ET AL. (17-1353) – On October 1, 2018, the Court denied a petition filed by several Indian Tribes seeking review of a Tenth Circuit Court of Appeals decision, which affirmed in part and reversed in part the District Court. The dispute arose out of the Department of Housing and Urban Development (HUD) attempting to recapture alleged overpayments made to the Tribes under an affordable housing program. The Tenth Circuit affirmed the District Court's holding that HUD lacked the authority to recapture alleged overpayments via administrative offset. However, it reversed the District Court's order to repay the Tribes, holding that it was in the nature of money damages, which is precluded by sovereign immunity.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Kurt Sodee, 1516 P Street, NW, Washington, DC 20005. **Please contact us if you have any questions or if we can be of assistance: Derrick Beetso, NCAI General Counsel, 202-630-0318 (dbeetso@ncai.org), or Joel West Williams, NARF Senior Staff Attorney, 202-785-4166 (williams@narf.org).**