TRIBAL SUPREME COURT PROJECT MEMORANDUM

JANUARY 30, 2019

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 January 8, 2019, the U.S. Supreme Court heard argument in *Herrera v. Wyoming* (17-532). In this case Petitioner Clayvin Herrera, a member of the Crow Tribe, is challenging his 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. Mr. Herrera's position was supported by the United States, which filed an amicus brief and was granted argument time.

Overall, the arguments from the parties and questions from the Justices centered primarily around two topics: issue preclusion and the continued vitality of *Ward v. Race Horse* in light of *Minnesota v. Mille Lacs Band of Chippewa Indians*. Mr. Herrera and the United States emphasized the treaty's text, which provides four specific conditions that would trigger termination of the tribe's hunting rights in the ceded area, and that Wyoming's admission to the Union was not one of those conditions. Additionally, Mr. Herrera's attorney argued that the tribe's treaty hunting right was not terminated by implication because that is a theory firmly rejected by the Court in *Mille Lacs*. And although the treaty contemplates occupation of the lands as a terminating event, creation of the Bighorn National Forest was not an "occupation" as the treaty parties understood it. Mr. Herrera's attorney also stressed that Wyoming's reliance upon *Ward v. Race Horse* is misplaced because the subsequent *Mille Lacs* decision repudiated *Race Horse*'s reasoning.

A number of justices – and Justice Alito in particular– asked several questions regarding the preclusive effect of *Crow Tribe of Indians v. Repsis*, a Tenth Circuit decision issued prior to *Mille Lacs* that relied on *Race Horse* for its conclusion that the Crow Tribe's treaty hunting right in the ceded area had terminated upon creation of the Big Horn National Forest. Both Mr. Herrera's attorney and the attorney for the United States argued that the question of whether *Repsis* should be given preclusive effect was not raised or passed on by the Wyoming court below here and the argument was likely forfeited by Wyoming.

When Justice Gorsuch asked whether the Court should "just be done with *Race Horse* and overrule it," Frederick Liu, Assistant to the Solicitor General, responded that the United States would invite the Court to do so, but that it is not necessary. He pointed out that the tribe involved in that case, the Shoshone-Bannock Tribe, is located in Idaho and that the Idaho Supreme Court and the Ninth Circuit already consider *Race Horse* a dead letter.

John Knepper, Chief Deputy Attorney General of the State of Wyoming, argued that *Repsis* decided this issue 25 years ago, and nothing since then – including the *Mille Lacs* opinion – would merit the Court revisiting an issue long after the final judgment and exhaustion of all appeals. He continued, "*Repsis* ruled that this particular treaty right had expired, and this Court should not on collateral review allow it to spring back, especially as, when you look at the decision in *Mille Lacs*, *Mille Lacs* went out of its way not to overrule the result in *Race Horse*." To this argument, Justice Kagan remarked that *Mille Lacs* had repudiated all of *Race Horse*'s reasoning and although "it did not go all the way to overruling the case . . . it came up like half a step short of that. It basically said the case was wrong, and then it found some distinction that wasn't even relevant to the question and said we don't have to overrule it because there is this distinction." Justices Sotomayor and Breyer made similar statements as well, and Justice Breyer observed that *Race Horse* relied on the notion that tribal treaty rights could be impliedly repealed and that *Mille Lacs* expressly rejected this proposition.

A transcript and audio recording of the argument is available at: https://sct.narf.org/documents/herrera_v_wyoming/oral_argument.pdf.

On January 7, 2019, the Court denied review in three Indian law cases, preserving lower court victories for the tribes: *Stand Up for California! v. U.S. Dep't of the Interior* (18-61); *Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation* (17-1301); and *Osage Wind v. United States* (17-1237). We are awaiting decisions in all three Indian law cases argued so far this term. At this time none of the pending petitions in Indian law cases are scheduled for conference.

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 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. The case was argued on January 8, 2019.

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.

The Court heard oral argument on November 27, 2018, and, on December 4, 2018, the Court ordered supplemental briefing by the parties, the Solicitor General, and the Muscogee (Creek) Nation addressing two questions: (1) whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status, and (2) whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. §1151(a). All supplemental briefs have been filed.

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:

SAINT REGIS MOHAWK TRIBE V. MYLAN PHARMACEUTICALS (18-899) – On January 11, 2019, the Saint Regis Mohawk Tribe (Tribe) and Allergan Pharmaceuticals (Allergan) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit, which held that tribal sovereign immunity could not be asserted in *inter partes* review (IPR) proceedings before the United States Patent and Trademark Office, Patent Trial and Appeal Board (PTAB). Allergan sued Mylan alleging infringement of their patent for Restasis, a medication for treating chronic dry eyes. In turn, Mylan filed a petition for an IPR of patents with the PTAB. While that petition was pending, Allergan transferred title of the patents to the Tribe, who moved to terminate the IPR proceeding based on tribal sovereign immunity. The PTAB denied the motion and the Tribe and Allergan appealed to the Federal Circuit. Based on its conclusion that the IPR process is more akin to a federal government enforcement action, which is not barred by tribal sovereign immunity, than a civil suit brought by a private party, the Federal Circuit held that a Tribe may not rely on its immunity to bar an IPR proceeding. The brief in opposition is due February 11, 2019.

SALLY JIM V. UNITED STATES (18-891); MICCOSUKEE TRIBE OF INDIANS V. UNITED STATES (18-895) – On January 10, 2019, a member of the Miccosukee Tribe of Indians (Tribe) as well as the Tribe, filed separate petitions seeking review of a U.S. Eleventh Circuit Court of Appeals decision, which affirmed a federal district court's conclusion that per capita distributions from the Tribe were subject to federal taxation because they were derived from gaming revenue. The dispute arose when the Internal Revenue Service (IRS) assessed taxes, penalties, and interest against the tribal member who did not pay federal income tax on certain distributions from the Tribe and the IRS brought suit in federal district court to reduce the assessments to judgment. The Tribe intervened as a defendant. The member and the Tribe asserted the affirmative defense that the distributions were not taxable income because they were subject to the Tribal General Welfare Exclusion Act (GWEA), which excludes from federal taxation "any payment made or services provided to or on behalf of a member of an Indian tribe . . . pursuant to an Indian tribal government program." The IRS took the position that the distributions were taxable income because they were derived from gaming revenue – specifically a gross receipts tax levied on businesses operating on-reservation, income from which comes primarily from the on-reservation casino enterprise. The trial court concluded that the distributions were taxable under the Indian Gaming Regulatory Act, and not subject to the GWEA based on its determination that the per capita payments were derived primarily from gaming revenue, not from tribal land. The Eleventh Circuit affirmed, accepting the lower court's factual findings and holding that the GWEA did not exempt per capita payments of gaming revenue from federal taxation. The briefs in opposition are due February 11, 2019.

MCNEAL V. NAVAJO NATION (18-894) – On January 10, 2019, a petition was filed seeking review of U.S. Tenth Circuit Court of Appeals decision, which held that the Indian Gaming Regulatory Act (IGRA) does not authorize an Indian tribe to allocate jurisdiction over a tort claim arising on Indian land to a state court. This case arose from a slip and fall accident that allegedly occurred in a casino owned by a Navajo Nation (Nation) owned business enterprise. In its gaming compact with New Mexico, the Nation agreed to waive its sovereign immunity for personal-injury lawsuits brought by visitors to its on-reservation gaming facilities and to permit state courts to take jurisdiction over such claims "unless it is finally determined by a state or federal court that IGRA does not permit the shifting of jurisdiction over visitors' personal injury suits to state court." The plaintiff sued the Nation and its casino in New Mexico state court, and the tribal defendants moved to dismiss the complaint, arguing that neither IGRA nor Navajo law permits the shifting of jurisdiction to a state court over personal-injury claims. The state court denied that motion and the Nation brought a declaratory judgment suit against the state court judge and the personal injury plaintiff in federal district court asserting that the state court lacked jurisdiction. The district court granted summary judgment in favor of the casino patrons and the state court judge. In reversing the district court, the Tenth Circuit reasoned that state courts generally lack jurisdiction over civil actions against Indians arising in Indian country, unless specifically authorized by Congress. The court further held that IGRA narrowly authorized such sovereign immunity waivers in connection to the licensing and regulation of gaming activities – "each roll of the dice and spin of the wheel" – and not any claim merely arising in close physical proximity to gaming activity. The brief in opposition is due February 11, 2019.

CASINO PAUMA V. NATIONAL LABOR RELATIONS BOARD (18-873) – On January 4, 2019, Casino Pauma, a tribally-owned gaming enterprise, filed a petition seeking review of the U.S. Ninth Circuit Court of Appeals decision, which upheld the National Labor Relations Board's (NLRB) determination that the tribally-owned business is an "employer" within meaning of the National Labor Relations Act (NLRA), thus allowing it to regulate Casino Pauma's relationship with its employees. The dispute arose from labor organizing activities within non-work areas on Casino Pauma's property. When Casino Pauma attempted

to stop these activities, the NLRB determined that it was engaging in unfair labor practices in violation of the NLRA and an NLRB administrative law judge affirmed that determination. The NLRB filed a petition for enforcement of its order and a union intervened in opposition to Casino Pauma. On appeal, the Tenth Circuit concluded that the NLRB's determination that tribal employer was "employer" within meaning of the NLRA was entitled to *Chevron* deference and, applying the three-part test from *Donovan v. Coeur d'Alene Tribal Farm*, that the NLRA is a generally applicable federal law that applies to Indian tribes. The brief in opposition is due February 7, 2019.

POARCH BAND OF CREEK INDIANS V. WILKES (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, on which the Court heard argument on December 6, 2018.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

STAND UP FOR CALIFORNIA! V. U.S. DEP'T OF THE INTERIOR (18-61) – On January 7, 2019, the Court denied a petition filed by Stand Up for California! and several individuals (collectively "Stand Up") 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.

HARVEY V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (17-1301) – On January 7, 2019, the Court denied a petition 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.

OSAGE WIND V. UNITED STATES (17-1237) – On January 7, 2019, the Court denied a petition 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.

WHITE V. UNDERWOOD (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 (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 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 V. DEP'T OF HOUSING AND URBAN DEVELOPMENT (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).**