TRIBAL SUPREME COURT PROJECT MEMORANDUM

APRIL 23, 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 March 19, 2019, the U.S. Supreme Court issued its opinion in *Washington State Department of Licensing v. Cougar Den* (16-1498). While a majority of the Justices voted to affirm the Washington Supreme Court's decision in favor of the business owned by a Yakama Nation tribal member, that majority was split between a three-Justice plurality opinion authored by Justice Breyer, and a two-Justice concurring opinion written by Justice Gorsuch. The dissenting justices were similarly split between two dissenting opinions. More detail on this case and the Court's decision is provided below.

We are still awaiting the Court's decisions in the two other Indian law cases argued this term: *Herrera v. Wyoming* (17-532); and *Carpenter v. Murphy* (17-1107). Additionally, the United States has not yet filed its brief in which the Court called for the views of the Solicitor General (CVSG): *Poarch Band of Creek Indians v. Wilkes* (17-1175). This CVSG has been pending since October 2018, and we expect the United States to file its brief this spring, which will allow the Court to schedule the petition for conference before its summer recess. At this time, none of the pending petitions in Indian law cases are scheduled for conference.

INDIAN LAW CASES DECIDED BY THE SUPREME COURT

The Court has decided one Indian law case:

WASHINGTON STATE DEPARTMENT OF LICENSING V. COUGAR DEN (16-1498) – On March 19, 2019, the Court affirmed the Washington Supreme Court's decision in favor of the Cougar Den, a business owned by a Yakama Nation tribal member. In this case, the Washington State Department of Licensing (Department) sought reversal of a Washington Supreme Court 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.

The Court issued a plurality opinion written by Justice Breyer (joined by Justices Sotomayor and Kagan). The plurality opinion first reasons that the incidence of the tax is a matter of state law, and the Washington Supreme Court determined that the tax is imposed on the "importation of fuel, which is the transportation of fuel" and that "travel on public highways is directly at issue because the tax [is] an

importation tax." Additionally, the opinion concludes that the statute, regardless of how one construes it, has the practical effect of being a charge assessed to Yakamas who exercise their treaty right. In holding that the tax was accordingly pre-empted by the Yakama's treaty, Justice Breyer emphasized that each of the four times the Court has examined this treaty, it has stressed the importance of reading the treaty language as the Yakamas would have understood it in 1855. Reading the treaty in this way, Justice Breyer rejects the argument that the treaty's language guaranteeing travel on highways "in common with citizens of the United States" permits the equal application of general legislation to Yakamas and non-Yakamas alike. Moreover, Justice Breyer found it important that the historical record established below in this case demonstrated that the right to travel includes a right to travel with goods for sale. Therefore, this tax, which burdens the right to travel with goods, must be pre-empted. However, the plurality also held that while the treaty protects the right to travel, it may not protect a right to carry "any and all goods"; and the state still may have the power to regulate certain activities for conservation purposes or "to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights."

There were three additional opinions: Justice Gorsuch wrote a concurring opinion, which was joined by Justice Ginsburg; Chief Justice Roberts wrote a dissenting opinion, which was joined by Justices Thomas, Alito, and Kavanaugh; and Justice Kavanaugh wrote a dissenting opinion, which was joined by Justice Thomas.

In his concurring opinion, Justice Gorsuch agreed with many aspects of the plurality opinion, but took a narrower approach: "Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning." Justice Gorsuch writes that construing "in common with" as merely conferring a right to use roads subject to the same taxes and regulations as everyone else is not consistent with the tribe's understanding of the treaty at the time it was negotiated. He writes that the record demonstrates that the tribe would have understood this provision, at the time it was negotiated, as reserving a "pre-existing right to take goods to and from market freely throughout their traditional trading area." Notably, Justice Gorsuch's opinion does not make the same or similar statements regarding the state's power to regulate for conservation or health and safety reasons.

Chief Justice Roberts' dissent does not view the Washington Supreme Court's opinion as an authoritative construction of the object of the tax. It characterizes the tax much differently than the Justice Breyer and Justice Gorsuch opinions: Chief Justice Roberts views the tax as merely on a product imported into the state, not on highway travel. The opinion also criticizes the plurality's reference to a health and safety exception to reserved treaty rights, pointing out that it is not rooted in precedent and is necessary only because the plurality construed the treaty too expansively.

Justice Kavanaugh's dissent does not utilize the Indian canon to construe the "in common with" language in the treaty, and instead takes a much stricter, textual approach. In his view, the treaty right to travel "in common with" U.S. citizens is a non-discrimination provision – nothing more than "the right for Yakama tribal members to travel on public highways on equal terms with other U.S. citizens" – and this opinion argues that even if the tax at issue is merely a permissible, non-discriminatory highway regulation. He also states his concern that "[t]he Court's newly created right will allow Yakama businesses not to pay state taxes that must be paid by other competing businesses," resulting in a steep loss of tax revenue that will mean decreased services or increased taxes for other tribes and citizens.

The opinions are available at: https://sct.narf.org/documents/washington_v_cougar_den/opinion.pdf

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

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

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:

ALLERGAN, INC. V. TEVA PHARMACEUTICALS USA (18-1289) – On April 10, 2019, the Saint Regis Mohawk Tribe (Tribe) and Allergan, Inc. (Allergan) filed a petition seeking review of a U.S. Court of Appeals for the Federal Circuit decision, which affirmed the district court's conclusion that Allergan and the Tribe were not entitled to relief for patent infringement claims regarding Restasis, a dry eye medication. This case arose from Allergan and Tribe suing other pharmaceutical companies for infringement on the Restasis patent. The district court concluded Allergan and the Tribe were not entitled to renewed patent rights, and that while patent infringement was shown by a preponderance of the evidence, the defendant companies proved that the asserted patent claims were invalid for obviousness. The brief in opposition is due May 10, 2019.

COMANCHE NATION OF OKLAHOMA V. ZINKE (18-1261) – On March 14, 2019, the Comanche Nation filed a petition seeking review of a Tenth Circuit Court of Appeals decision, which affirmed the district court's denial of a preliminary injunction. This case arises out of the Department of the Interior's (DOI) decision to take land into trust for the benefit of the Chickasaw Nation and its determination that the land was eligible for gaming under the Indian Gaming Regulatory Act. The Comanche Nation challenged these agency actions under the Administrative Procedures Act (APA) and the National Environmental Policy Act (NEPA). The Tenth Circuit held that the facial challenge to the regulation applied by DOI was brought outside the APA's six-year statute of limitations. Aside from the statute limitations, the Tenth Circuit held that the agency's interpretation of "former reservation" in the IRA was entitled to *Chevron* deference because defining that term was explicitly delegated to DOI in the statute and the agency's definition is reasonable. On the NEPA claim, the Tenth Circuit held that the Comanche Nation was unlikely to succeed on the merits because the agency took the requisite "hard look" at the environmental impact of the casino project. The brief in opposition is due May 2, 2019.

HAVASUPAI TRIBE V. PROVENCIO (18-1239) – On March 21, 2019, the Havasupai Tribe (Tribe) filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed a district court's entry of summary judgment in favor of the United States. This case arises from the Secretary of the Interior's decision to withdraw, for twenty years, more than one million acres of public lands around Grand Canyon National Park from new mining claims, which did not effect "valid existing rights." The U.S. Forest Service (USFS) determined that several companies had a valid existing right to operate a uranium mine on land within the withdrawal area dating back to 1988 (although the mine was not in continuous operation). The Tribe and several environmental organizations filed suit challenging that determination. One of the grounds for the suit was that the USFS failed to comply with the National Historic Preservation Act (NHPA) in making its determination that there was a valid existing right. On appeal, the Ninth Circuit held that the USFS's recognition of an existing right did not trigger requirements under the NHPA. Rather, those requirements were only triggered by the USFS's 1988 approval of the Plan of Operations for the mining operation. It rejected the Tribe's argument that the NHPA imposes a continuing obligation on federal agencies to address the impact on historic property at any stage of an undertaking, reasoning that recognizing an existing right is not an undertaking under NHPA's meaning. The brief in opposition is due April 24, 2019.

BUCHWALD CAPITAL ADVISORS LLC V. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (18-1218) – On March 18, 2019, Buchwald Capital Advisors filed a petition seeking review of a Sixth Circuit Court of

Appeals decision, which affirmed a district court's dismissal on sovereign immunity grounds of a "strong arm" suit against the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) in bankruptcy court. This case arises out of the May 2008 bankruptcy of Detroit's Greektown Casino, which was owned by the Tribe and its political subdivisions. Under the debtors' plan of reorganization, the Greektown Litigation Trust (Trust) was created to pursue claims belonging to the debtors' estate for the benefit of unsecured creditors. Buchwald Capital Advisors was appointed as the Trust's litigation trustee, and filed this suit seeking avoidance and recovery of allegedly fraudulent transfers made to the Tribe. The Sixth Circuit held that the statutory language used in the Bankruptcy Code did not evidence an "unequivocal expression of congressional intent" to abrogate tribal sovereign immunity. The brief in opposition is due May 20, 2019.

OGLALA SIOUX TRIBE V. FLEMING (18-1245) – On March 4, 2019, the Oglala Sioux Tribe, Rosebud Sioux Tribe, and individual tribal members (Tribal Parties) filed a petition seeking review of an Eighth Circuit Court of Appeals decision, which vacated both the district court's denial of the South Dakota state officials' (State Officials) motion to dismiss, and its entry of summary judgment in favor of the Tribal Parties. The Tribal Parties brought a § 1983 class action suit against the State Officials, alleging procedures utilized during emergency child removal hearings violated the Due Process Clause and the Indian Child Welfare Act (ICWA) by denying Indian parents a meaningful hearing after their children were taken into temporary state custody. On appeal, the Eighth Circuit held that the district court should have abstained from exercising jurisdiction under the *Younger* abstention doctrine because the proposed relief would interfere with ongoing state temporary custody proceedings. Alternatively, the court held that even if the requested relief was purely prospective, abstention still would be warranted because relief was "aimed at controlling or preventing the occurrence of specific events that might take place" in future state court proceedings. The brief in opposition is due April 25, 2019.

TECK METALS LTD V. THE CONFEDERATED TRIBES OF THE COLVILLE RESERVATION (18-1160) – On March 4, 2019, Teck Metals, a Canadian corporation filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court's entry of partial summary judgment against it. In this case, the Confederated Tribes of the Colville Reservation brought suit pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against Teck Metals for dumping several million tons of industrial waste into the Columbia River. After the first phase of a trifurcated bench trial, the district court found Teck Metals was a liable party under CERCLA. In phase two, the district court found the company liable for more than $8.25 million of the Tribe's response costs. On appeal, the Ninth Circuit rejected Teck Metals' arguments that the district court lacked personal jurisdiction over the Canadian corporation because it had not "purposely directed" its activities toward the State of Washington. The brief in opposition is due May 6, 2019.

KING MOUNTAIN TOBACCO COMPANY, INC. V. UNITED STATES (18-984) – On February 18, 2019, a tobacco manufacturer owned by a Yakama Nation tribal member filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which held that the company was not exempt from federal excise taxes. The United States brought this action against the manufacturer, which is located on an allotment, seeking to recover for unpaid federal excise taxes, penalties, and interest. The United States District Court for the Eastern District of Washington entered summary judgment for United States. On appeal, the Ninth Circuit concluded that General Allotment Act does not bar the excise tax because it is not levied on income directly derived from the land. Additionally, the Ninth Circuit concluded that the Yakama Treaty of 1855 does not contain "express exceptive language" that would prevent the imposition of a federal excise tax on tobacco product manufacturing. The petitioner requested that the Court hold this petition pending the its decision in *Washington State Dep't of Licensing v. Cougar Den* (16-1498). The brief in opposition is due May 1, 2019.

MITCHELL V. TULALIP TRIBES OF WASHINGTON (18-970) – On January 28, 2019, non-Indian owners of a parcel of fee land within the Tulalip reservation boundaries filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court's dismissal of a quiet title action against the tribe. The property owners alleged that a tribal ordinance that extends taxing authority over their fee-owned land creates a cloud on title. The district court dismissed the suit, holding that because the tribe has never attempted to assess or collect the property tax on the parcel, the suit was not ripe. On appeal, the Ninth Circuit concluded that the district court failed to address that Washington law recognizes cloud on title as a hardship fit for judicial determination. Nevertheless, the court affirmed on the alternative grounds that the suit was barred by tribal sovereign immunity. The tribe waived its right to respond to the petition but the Court requested a response, which is due May 6, 2019.

CARTER V. SWEENEY (18-923) – On January 14, 2019, a group of Indian children, adoptive parents, and next friends filed a petition seeking review of the Ninth Circuit Court of Appeals decision, which dismissed as moot their challenge to the constitutionality of the Indian Child Welfare Act (ICWA). The suit originally sought only declaratory and injunctive relief and was filed against the Assistant Secretary of Indian Affairs, the Secretary of the Interior, and the Director of the Arizona Department. The Gila River Indian Community and Navajo Nation intervened. The district court concluded that the plaintiffs lacked standing because none of them suffered harm traceable to ICWA. On appeal, the Ninth Circuit held that the action was moot because all of the adoptions at issue in the case became final while their suit was pending at the district court. The Ninth Circuit further concluded that the plaintiffs' amended complaint, which added a claim for nominal damages, did not render the case justiciable because that claim was tacked on solely to rescue the case from mootness. On February 26, 2019, the Director of Arizona Department of Child Safety waived his right to respond. On April 17, 2019, the United States filed it brief in opposition.

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 United States waived it right to respond to the petition, but the Court requested a response, which was filed on April 22, 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 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 Ninth Circuit concluded that the NLRB's determination that a tribal employer was an "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 was filed on April 10, 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 judgment 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

MCNEAL V. NAVAJO NATION (18-894) – On April 22, 2019, the Court denied a petition seeking review of 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) 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.

WILSON V. HORTON'S TOWING (18-1081) – On April 22, 2019, the Court denied a petition filed by a non-Indian truck owner (Wilson) that sought review of a Ninth Circuit Court of Appeals decision, which affirmed a federal district court's dismissal of Wilson's tort suit against a non-Indian owned towing company and the United States. This cases arose from a tribal police officer's traffic stop of Wilson on a state highway running through the Lummi Reservation after he left a tribally-owned casino. The police officer discovered marijuana in Wilson's vehicle. Citing a violation of tribal drug laws, the Lummi Tribe issued a notice of civil forfeiture and took possession of Wilson's vehicle on the following day at an off-reservation, private towing facility. Wilson sued the tribal police officer who served the forfeiture notice and the towing company that released the vehicle to the officer. The district court substituted the United States for the tribal police officer pursuant to the Westfall Act because the Attorney General certified that the tribal police officer was acting within the course and scope of a 638 contract with the tribe for law enforcement and that he acted within the scope of his employment in carrying out the contract. On a motion for summary judgment, the district court dismissed the suit against the towing company for failure to exhaust tribal remedies, and dismissed the suit against the United States for failure to exhaust administrative remedies. The Ninth Circuit affirmed, holding that tribal jurisdiction was colorable with regard to the claim against the towing company and that Wilson failed to rebut the presumptions created by the Attorney General's certification with regard to the tribal police officer.

SAINT REGIS MOHAWK TRIBE V. MYLAN PHARMACEUTICALS (18-899) – On April 15, 2019, the Court denied a petition filed by the Saint Regis Mohawk Tribe (Tribe) and Allergan Pharmaceuticals (Allergan) 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.

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 judgment 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 judgment 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 judgment 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 judgment 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 (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 judgment 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).**