

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

UPDATE OF RECENT CASES

JULY 24, 2020

The Tribal Supreme Court Project (Project) is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians Fund (NCAI Fund) 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 when considering a 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 July 9, 2020, the U.S. Supreme Court issued its long-awaited opinion in *McGirt v. Oklahoma* (18-9526) and ruled in favor of Jimcy McGirt, a citizen of the Seminole Nation. The issue in this case was whether Muscogee (Creek) Nation's ("MCN") reservation was disestablished, and the Court held that it was not. Justice Gorsuch wrote for the Court's majority, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. First, addressing the question of whether the land set aside for MCN in the Indian Territory was a reservation, Justice Gorsuch wrote that "the Creek were promised not only a 'permanent home' that would be 'forever set apart'; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation." The Court insisted that disestablishment could only be accomplished by a clear expression of Congressional intent to do so, which was not present in this case. More broadly, the Court explicitly rejected an often-repeated argument that allotments alone can diminish a reservation. The majority likewise rejected Oklahoma's argument that, under *Solem v. Bartlett*, disestablishment could be found by looking at events contemporaneous with Oklahoma statehood and later events and demographics. It said that these later *Solem* "steps" are necessary only where there is some statutory ambiguity.

Chief Justice Roberts wrote the principal dissent, joined by Justices Alito and Kavanaugh, and by Justice Thomas (except for a footnote concerning habeas petitions in Oklahoma courts). Chief Justice Roberts accepted, for the sake of argument, that MCN once had a reservation; but he would have held that the reservation was "unsettled" by the Tribe's alliance with the Confederacy in the Civil War, and ultimately was disestablished by the turn-of-the-century statutes that allotted the Tribe's lands and limited its governing authority. He closely aligned reservation status with status of land, writing that "Congress destroyed the very foundation of sovereignty by stripping the Creek Nation of its territory," and emphasized statutes that extended U.S. citizenship to Creek tribal members and applied all laws uniformly to persons in Oklahoma. Finally, the Chief Justice expressed concerns about the practical implications of this decision, which he worried "may destabilize the governance of vast swathes of Oklahoma."

Justice Thomas wrote a separate dissent on procedural grounds. Where a state court rejects a habeas petition on two grounds, one of which is independent of federal law and adequate to support the

judgment, the Supreme Court generally will refuse to decide the case out of deference to the state law basis for judgment. Justice Thomas would have found such independent and adequate state grounds in the Oklahoma Court of Criminal Appeals' holding that McGirt's habeas petition was prohibited under state law because the arguments were not made on direct appeal.

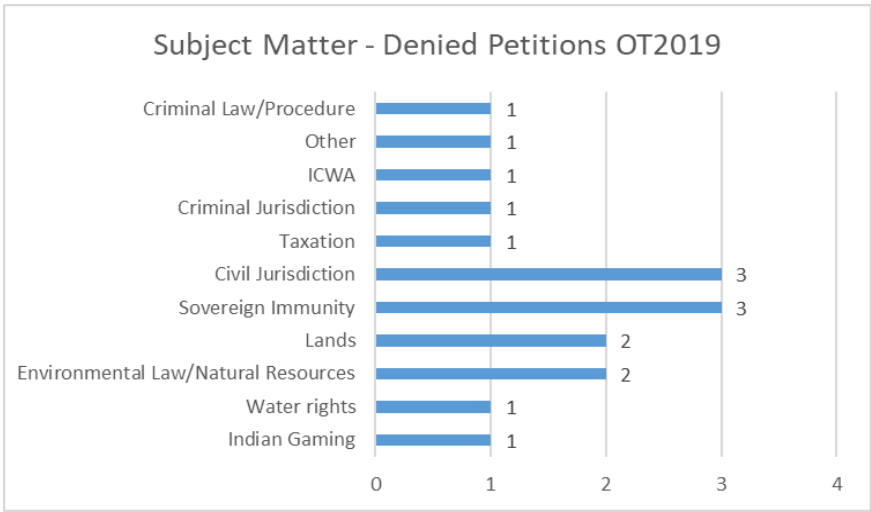
Another case, *Sharp v. Murphy* (17-1107), which was granted and argued last term (under the name *Carpenter v. Murphy*) but was left undecided at the end of the term, presented the same issue. On the same day it issued the *McGirt* opinion, the Court summarily affirmed *Murphy* based on its decision in *McGirt*. In four other cases with pending cert petitions—*Johnson v. Oklahoma* (18-6098), *Terry v. Oklahoma* (18-8801), *Bentley v. Oklahoma* (19-5417), and *Davis v. Oklahoma* (19-6428)—the Court vacated and remanded to the Oklahoma Court of Criminal Appeals for further consideration in light of *McGirt*.

The full opinion, oral argument recording, briefs and other materials for *McGirt* and *Murphy* are available at: <https://sct.narf.org/termindexes/october2019.html>

In addition to this decision, there were two notable developments in Indian law cases since the last update. The Court called for the view of the Solicitor General (“CVSG”) in *FMC v. Shoshone Bannock Tribes* (19-1143) (Tribal jurisdiction over non-Indian corporation), and a new petition was filed in *United States v. Cooley* (19-1414) (Tribal law enforcement authority).

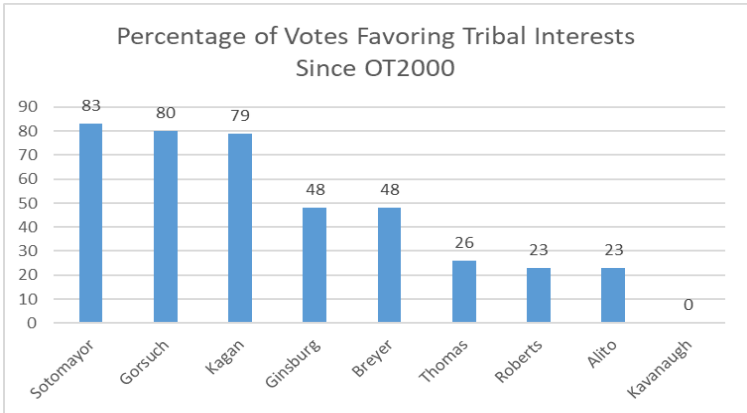
The close of OT19 provides us with an opportunity to review the docket of the Tribal Supreme Court Project and the type of Indian cases coming before the Court. During this term, twenty petitions for review in Indian law cases were filed, and seven petitions were held over from previous terms. Of those twenty-seven petitions, seventeen were denied by the Court; one case was decided with an opinion; one case was decided with a per curium remand order; four were granted, vacated, and remanded (“GVR”); and four will be carried forward to the October Term 2020. Tribal interests prevailed in eleven of the lower court decisions in which the Supreme Court denied review.

The subject matter of the cases in which review was denied was wide-ranging. Of the seventeen petitions denied, three involved sovereign immunity; three involved civil jurisdiction; two involved lands; two involved environmental and natural resources issues; and there was one petition each involving Indian gaming, water rights, taxation, criminal jurisdiction, ICWA, criminal law/criminal procedure, and abstention. Each of the granted petitions (both granted in this term and grants carried over from the last term) were habeas corpus petitions by Indian inmates that raised a question about whether an eastern Oklahoma Indian reservation was disestablished.



Tribal interests prevailed in all of the cases decided by the Court during this term. While these are significant wins for Tribal interests, as noted above, they all involved substantially similar questions about eastern Oklahoma reservation disestablishment. The three Indian law opinions over the past two terms – all of which involved treaty rights and treaty interpretation – shed light on differing approaches to Indian law among the justices and the influence of Justice Gorsuch on these important Tribal victories. The justices aligned identically in all of these cases: Justices Ginsburg, Breyer, Sotomayor, Kagan, and Gorsuch in the majority; the Chief Justice and Justices Thomas, Alito, and Kavanaugh in the dissent.

During his three terms on the Court, Justice Gorsuch has voted in favor of tribal interests 80% of the time (four out of five cases), which places him between Justices Sotomayor and Kagan in his pro-tribal voting record. By contrast, Justice Kavanaugh’s record is very troubling so far. During his two terms on the Court, he has voted against tribal interests in 100% of the time. By way of perspective, Chief Justice Roberts and Justice Alito have voted against Tribal interests 77% of the time since OT 2000.



The Court will return from its summer recess and hold its “Long Conference” on September 29, 2020, where it will consider some 2,000 petitions. So far, one Indian law petition is scheduled for that conference: *Native Wholesale Supply Company v. California* (19-985) (state civil jurisdiction). On October 5, 2020, the Court will begin its October Term 2020.

INDIAN LAW CASES DECIDED BY THE SUPREME COURT

The Court has decided six Indian law cases in the October 2019 Term:

McGIRT V. OKLAHOMA (18-9526)

Petitioner: Jimcy McGirt

Petition Granted: December 13, 2019

Subject Matter: Reservation Disestablishment

Lower Court Decision: The Oklahoma Court of Criminal Appeals affirmed a lower court's denial of Mr. McGirt's post-conviction relief petition.

Decided: July 9, 2020

Result: Reversed

Petitioner Jimcy McGirt, a citizen of Seminole Nation was convicted of several felony sex crimes in Oklahoma state court. He sought post-conviction relief in state court, asserting that the crimes occurred within the boundaries of the Muscogee (Creek) Reservation and, therefore, the State had no jurisdiction over him for the offenses. The state district court denied his petition, and the Oklahoma Court of Criminal Appeals affirmed.

The U.S. Supreme Court reversed. Justice Gorsuch authored the opinion, which was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan. The Court held that a treaty with the United States created the Tribe's reservation and that no subsequent Act of Congress disestablished the reservation. The Court rejected argument that allotment alone evidences sufficient Congressional intent to diminish or disestablish an Indian reservation. The Court, likewise, rejected Oklahoma's argument that disestablishment could be found by looking at events contemporaneous with Oklahoma statehood and later events and demographics. Chief Justice Roberts authored a dissenting opinion, which was joined by Justices Thomas, Alito, and Kavanaugh. Justice Thomas also authored a separate dissent, which was not joined by any other justices.

SHARP V. MURPHY (17-1107)

Petitioner: State of Oklahoma

Petition Granted: May 21, 2018

Subject Matter: Reservation Disestablishment

Lower Court Decision: On a petition challenging his detention by the State of Oklahoma as improper, the Tenth Circuit Court of Appeals held that the Muscogee (Creek) Nation reservation was not disestablished and, consequently, that the State of Oklahoma lacked jurisdiction to prosecute and convict Mr. Murphy, an Indian, for a crime that occurred in Indian country.

Decided: July 9, 2020

Result: Affirmed *per curiam* for reasons stated in *McGirt v. Oklahoma*

Patrick Murphy, a citizen of the Muscogee (Creek) Nation, was convicted of murder in Oklahoma State court. After exhausting 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 and the Tenth Circuit reversed. The Tenth Circuit used the three-factor *Solem* reservation disestablishment analysis and found that Congress did not disestablish the reservation, and 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 reservation, nor a contemporaneous understanding by Congress that it had disestablished the reservation. Accordingly, the court concluded that Mr. Murphy’s state conviction and death sentence were invalid because the crime occurred in Indian Country and the accused was Indian.

The Supreme Court heard oral argument on November 27, 2018, and, on December 4, 2018, it 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). On June 27, 2019, the Court announced that the case would be scheduled for re-argument in the October Term 2019, but no argument was ever scheduled. Instead, the Court granted *McGirt v. Oklahoma* (18-9526), which came to the Court from the Oklahoma Court of Criminal Appeals and Justice Gorsuch was not recused in that case. The Court then held *Murphy* pending its decision in *McGirt*.

On the same day that the Supreme Court decided *McGirt*, it issued a per curiam opinion in *Murphy*, stating that the Tenth Circuit’s decision was affirmed for the reasons stated in the *McGirt* opinion.

BENTLEY V. OKLAHOMA (19-5417)

Petitioner: Travis Wayne Bentley

Petition Granted: July 9, 2020

Subject Matter: Reservation disestablishment

Lower Court Decision: Oklahoma Court of Criminal Appeals affirmed a lower court’s denial of post-conviction relief petition.

Decided: July 9, 2020

Result: Grant, vacate, and remand based on *McGirt v. Oklahoma*.

Petitioner is an Indian convicted of first degree manslaughter, driving under the influence of drugs, and unlawful possession of drug paraphernalia. He asserted that the location where the crime occurred was “Indian Country,” and therefore the state court was without authority to convict him of the offenses. The Supreme Court summarily granted the petition, vacated the lower court’s decision, and remanded for further consideration in light of *McGirt v. Oklahoma*.

DAVIS V. OKLAHOMA (19-6428)

Petitioner: Keith Elmo Davis

Petition Granted: July 9, 2020

Subject Matter: Reservation disestablishment

Lower Court Decision: Oklahoma Court of Criminal Appeals affirmed a lower court's denial of post-conviction relief petition.

Decided: July 9, 2020

Result: Grant, vacate, and remand based on *McGirt v. Oklahoma*.

Petitioner is an Indian who was convicted of sex crimes committed within the historical boundaries of the Choctaw Nation and Chickasaw Nation reservations. He asserted that the location where the crime occurred was "Indian Country," and therefore the state court was without authority to convict him of the offenses. The Supreme Court summarily granted the petition, vacated the lower court's decision, and remanded for further consideration in light of *McGirt v. Oklahoma*.

TERRY V. OKLAHOMA (18-8801)

Petitioner: Patrick Terry

Petition Granted: July 9, 2020

Subject Matter: Reservation disestablishment

Lower Court Decision: Oklahoma Court of Criminal Appeals affirmed a lower court's denial of post-conviction relief petition.

Decided: July 9, 2020

Result: Grant, vacate, and remand based on *McGirt v. Oklahoma*.

Petitioner is an Indian who was convicted of several drug-related offenses in Oklahoma state court. He asserted that the location where the crime occurred was "Indian Country," and therefore the state court was without authority to convict him of the offenses. The Supreme Court summarily granted the petition, vacated the lower court's decision, and remanded for further consideration in light of *McGirt v. Oklahoma*.

JOHNSON V. OKLAHOMA (18-6098)

Petitioner: Joe Johnson, Jr.

Petition Granted: July 9, 2020

Subject Matter: Reservation disestablishment

Lower Court Decision: Oklahoma Court of Criminal Appeals affirmed a lower court's denial of post-conviction relief petition.

Decided: July 9, 2020

Result: Grant, vacate, and remand based on *McGirt v. Oklahoma*.

Petitioner is an Indian who was convicted of murder in Oklahoma state court. He asserted that the location where the crime occurred was "Indian Country," and therefore the state court was without authority to convict him of the offenses. The Supreme Court summarily granted the petition, vacated the lower court's decision, and remanded for further consideration in light of *McGirt v. Oklahoma*.

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:

UNITED STATES V. COOLEY (19-1414)

Petitioner: United States

Subject Matter: Criminal Procedure; Indian Civil Rights Act

Lower Court Decision: The Ninth Circuit Court of Appeals held that a seizure and search of a non-Indian and his vehicle by a Tribal police officer violated the Indian Civil Rights Act and that evidence obtained was subject to the exclusionary rule.

Recent Activity: Petition filed; Amicus brief in support of the petition filed by the Crow Tribe, the National Congress of American Indians, and others Tribes and Tribal organizations

Upcoming Activity: Brief in opposition due August 24, 2020

A non-Indian motorist was charged with federal narcotics offenses as result of evidence discovered by Crow Tribe police officer after conducting a safety check of the vehicle parked on the side of a state roadway crossing the reservation. The trial court granted his motion to suppress evidence obtained by the Tribal police officer. The Ninth Circuit held that the non-Indian was held by the Tribal police officer in violation of the Indian Civil Rights Act where he formed the opinion that the person was non-Indian and subsequently determined that it was “apparent” that a federal crime was being committed. A Ninth Circuit panel held that the non-Indian was seized and searched in violation of the Indian Civil Rights Act and evidence obtained as a result was inadmissible in a federal court prosecution.

ROGERS COUNTY BOARD OF TAX ROLL CORRECTIONS, ET AL. V. VIDEO GAMING TECHNOLOGIES, INC. (19-1298)

Petitioner: Rogers County Board of Tax Roll Corrections

Petition Filed: May 14, 2020

Subject Matter: State taxation; IGRA

Lower Court Decision: Supreme Court of Oklahoma held that state ad valorem tax on casino machine owned by non-Indian company and leased to tribal casino was preempted by the Indian Gaming Regulatory Act.

Recent Activity: Brief in opposition filed July 20, 2020

Upcoming Activity: Reply brief to be filed and conference scheduled

Video Gaming Technologies, Inc. (“VGT”), a non-Indian company, filed a complaint with a local tax board challenging the assessment of ad valorem tax on electronic gaming machines it owned and leased to Cherokee Nation’s gaming enterprise. The Board denied VGT’s claim, and it appealed to the state trial court, which issued summary judgment in favor of the Board. In reversing the trial court, the Oklahoma Supreme Court held that the ad valorem taxation of the equipment was preempted by the Indian Gaming Regulatory Act (“IGRA”) because of IGRA’s comprehensive regulation of gaming, the federal policies that would be threatened by allowing the state tax, and the failure of the county to justify the tax beyond a generalized interest in raising revenue.

FMC V. SHOSHONE BANNOCK TRIBES (19- 1143)

Petitioner: FMC Corporation

Petition Filed: March 18, 2020

Subject Matter: Tribal civil jurisdiction

Lower Court Decision: Ninth Circuit affirmed district court’s judgment in favor of the Tribes

Recent Activity: On June 25, 2020, the Court called for the views of the Solicitor General (CVSG)

Upcoming Activity: CVSG brief to be filed

This case arises from FMC Corporation’s (“FMC”) operation of an elemental phosphorus plant on fee land within the Shoshone-Bannock Fort Hall Reservation. FMC’s operations produced enormous amounts of hazardous waste that is stored on the reservation. In 1990, the U.S. Environmental Protection Agency (“EPA”) declared FMC’s plant and storage area a Superfund site. A subsequent consent decree settling an EPA suit against FMC required the company to obtain permits from the Shoshone-Bannock Tribes. FMC agreed to pay \$1.5 million per year for a tribal use permit allowing storage of hazardous waste and paid the fee from 1998 to 2001. FMC refused to continue paying in 2002 when it ceased plant operations, but it nevertheless still stores hazardous waste on the reservation. During federal court proceedings initiated by the Tribes to enforce the consent decree, FMC applied for tribal permits and eventually challenged the Tribes’ regulatory jurisdiction in tribal court. The Tribal Appellate Court held that the Tribes possessed adjudicatory and regulatory jurisdiction over FMC pursuant to the second *Montana* exception. FMC then challenged the tribal court’s jurisdiction in federal court, which ruled in favor of the Tribes. On appeal, the Ninth Circuit concluded that tribal jurisdiction existed under both *Montana* exceptions.

NATIVE WHOLESALE SUPPLY COMPANY V. CALIFORNIA, EX REL. XAVIER BECERRA (19-985)

Petitioner: Native Wholesale Supply Company

Petition Filed: February 3, 2020

Subject Matter: State civil jurisdiction

Lower Court Decision: California Court of Appeal affirmed a lower court decision

Recent Activity: Reply brief filed June 24, 2020

Upcoming Activity: Scheduled for September 29, 2020, conference

The State of California (the “State”) filed a civil enforcement suit against Native Wholesale Supply Company (“NWS”), a company owned by an individual Indian, chartered under the laws of the Sac and Fox Nation of Oklahoma, and headquartered on the Seneca Nation’s reservation. NWS purchased cigarettes in Canada, stored them at various locations outside California, and then sold them to another Indian tribe in California, which sold them to the public from its reservation. The trial court issued summary judgment in favor of the State, holding NWS liable for civil penalties for violating California state laws related to cigarette distribution and business competition. The trial court entered a permanent injunction precluding NWS from making future sales, and awarded fees and expenses to the State. The California Court of Appeal held that the lower court had personal jurisdiction over NWS and rejected NWS’s argument that the Indian Commerce Clause preempted the application of state law to NWS.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

DINÉ CITIZENS AGAINST RUINING OUR ENVIRONMENT V. BUREAU OF INDIAN AFFAIRS (19-1166)

Petitioner: Coalition of Indian and non-Indian environmental organizations

Petition Filed: March 24, 2020

Subject Matter: Federal Rules of Civil Procedure; tribal sovereign immunity

Lower Court Decision: Ninth Circuit affirmed district court's dismissal because tribally-owned corporation was an indispensable party and was entitled to sovereign immunity.

Recent Activity: Cert petition denied June 29, 2020

A coalition of Indian and non-Indian environmental organizations sued the Department of the Interior and several of its bureaus, challenging the reauthorization of coal mining on Navajo Nation land. The Tribal corporation that owns the mine intervened for the limited purpose of moving to dismiss based on sovereign immunity and the corporation's status as an indispensable party. The district court dismissed the suit, and the Ninth Circuit affirmed, holding that the corporation was an arm of the Tribe and that no other party could adequately represent its interests.

CHEROKEE NATION V. BERNHARDT (19-937)

Petitioner: Cherokee Nation

Petition Filed: January 27, 2020

Subject Matter: Land-Into-Trust

Lower Court Decision: The Tenth Circuit Court of Appeals, reversing the lower court, concluded that the Department of the Interior lawfully took tribe's land into trust.

Recent Activity: Cert petition denied June 22, 2020

The United Keetoowah Band of Cherokee Indians in Oklahoma ("UKB") acquired a parcel of land that sits entirely within the boundaries of the Cherokee Nation's "former" reservation. The Department of the Interior ("DOI") took the land into trust for the benefit of the UKB, and the Cherokee Nation sued DOI, alleging that the agency's decision violated the Administrative Procedures Act. The district court concluded that the agency's trust acquisition neither complied with the Indian Reorganization Act – specifically, whether the UKB met the act's definition of "Indian" – nor with agency regulations that would have required the Cherokee Nation's consent. The Tenth Circuit reversed, holding that: (1) the Secretary of the Interior had authority to take the property into trust under the Oklahoma Indian Welfare Act, and, therefore, was not required to consider whether the UKB meets the IRA's definition of "Indian"; (2) the BIA was not required to obtain the Nation's consent before taking the land into trust; and (3) the agency was not arbitrary and capricious in applying its regulations.

BALEY V. UNITED STATES (19-1134)

Petitioner: Individual and corporate non-Indian water users

Petition Filed: March 13, 2020

Subject Matter: Federal takings; tribal water rights

Lower Court Decision: Federal Circuit affirmed Court of Federal Claims entered judgment in favor of the United States.

Recent Activity: Cert petition denied on June 22, 2020

Water users in the Klamath River basin sued the United States, claiming that its temporary shut-off of water to the Klamath River Basin Restoration Project constituted a taking of their property without just compensation. The United States cited its obligations under the Endangered Species Act and trust obligations to Indian tribes as its reasons for the shut-off. The Federal Circuit affirmed the Court of Federal Claims judgment in favor of the United States, holding that there was not a taking because the retained waters were within the scope of federal reserved water rights for tribal fishing and were senior in priority.

NOEM V. FLANDREAU SANTEE SIOUX TRIBE (19-1056)

Petitioner: Kristi Noem, Governor of South Dakota

Petition Filed: February 21, 2020

Subject Matter: Taxation

Lower Court Decision: The Eighth Circuit affirmed a district court's ruling that state tax on non-members was preempted by federal law and reversed the district court's ruling that renewal of state alcoholic beverage license may be withheld pending remittance of other taxes lawfully imposed on non-members.

Recent Activity: Cert petition denied on May 26, 2020

The Flandreau Santee Sioux Tribe ("Tribe") sued the governor of South Dakota and state officials over the state's requirement that the tribe collect from non-members, and remit to the state, a use tax on non-gaming purchases of amenities at the Tribe's casino and associated hotel and store. In addition, the Tribe challenged the State's refusal to renew its alcoholic beverage license for failure to remit the taxes. The Tribe alleged that the imposition of the tax on non-members is preempted by the Indian Gaming Regulatory Act ("IGRA"), that the remittance requirement violates federal common law, and that conditioning the license renewal on the tax remittance violated 18 U.S.C. §1161 (application of certain federal liquor laws in Indian Country). The Eighth Circuit rejected the district court's conclusion that IGRA expressly preempts the tax at the casino's store and hotel, but instead utilized the *Bracker* test to conclude that the State's interests in imposing the tax do not outweigh the relevant federal and Tribal interests. The court also affirmed that the state could validly impose its tax on non-members at the store and concluded that the "Tribe has failed to meet its burden to demonstrate that the State alcohol license requirement is not reasonably necessary to further its interest in collecting valid state taxes."

BUCHWALD CAPITAL ADVISORS LLC V. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (18-1218)

Petitioner: Buchwald Capital Advisors, on behalf of the Greektown Litigation Trust

Petition Filed: March 18, 2019

Subject Matter: Tribal sovereign immunity, bankruptcy

Lower Court Decision: The Sixth Circuit held that tribal sovereign immunity barred a “strong arm” suit against the Sault Ste. Marie Tribe of Chippewa Indians in bankruptcy court

Recent Activity: Petition voluntarily dismissed on April 2, 2020

This case arises out of the May 2008 bankruptcy of Detroit’s Greektown Casino, which was owned by the Sault Ste. Marie Tribe of Chippewa Indians (“Tribe”) and its political subdivisions. Under the debtors’ plan of reorganization, the Greektown Litigation 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 concluded that the statutory language used in the Bankruptcy Code did not evidence an “unequivocal expression of congressional intent” to abrogate tribal sovereign immunity.

NEFF V. UNITED STATES (19-1127)

Petitioner: Wheeler Neff

Petition Filed: March 13, 2020

Subject Matter: Tribal Sovereign Immunity

Lower Court Decision: Third Circuit affirmed district court’s evidentiary ruling

Recent Activity: Cert petition denied on April 20, 2020. Petition for rehearing denied.

Wheeler Neff is an attorney convicted in federal court of violating the Racketeer Influenced and Corrupt Organizations Act (“RICO”), fraud, and other crimes in connection with a tribally-owned payday lending enterprise. He appealed his conviction asserting, among other things, that the trial court deprived him of an opportunity to prove that the debts the company attempted to collect were lawful based on the doctrine of tribal sovereign immunity. The Third Circuit affirmed the district court, holding that the district court’s exclusion of evidence on this point was justified by the risk that it would confuse or mislead the jury about the law.

JAMES V. JW GAMING DEVELOPMENT (19-971)

Petitioner: JW Gaming Development, LLC

Petition Filed: February 3, 2020

Subject Matter: Sovereign immunity

Lower Court Decision: The Ninth Circuit Court of Appeals affirmed district court’s denial of motion to dismiss based on sovereign immunity

Recent Activity: Cert petition denied on March 9, 2020

JW Gaming Development, LLC (“JW Gaming”), sued members of the Pinoleville Pomo Nation tribal council in their individual capacities, alleging breach of contract, fraud, and violations of the Racketeering Influenced and Corrupt Organizations Act (“RICO”) in connection with investments in a casino project.

The district court denied the tribal councilors' motion to dismiss based on tribal sovereign immunity. The Ninth Circuit affirmed, concluding that "if JW Gaming prevails on its claims against the tribal defendants, only they personally – and not the Tribe – will be bound by the judgment."

MCMAHON V. CHEMEHUEVI INDIAN TRIBE (19-820)

Petitioner: John McMahon, in his official capacity as Sheriff of San Bernardino County

Petition Filed: January 3, 2020

Subject Matter: Reservation status

Lower Court Decision: The Ninth Circuit Court of Appeals, reversing in part and affirming in part, held that the location where county sheriff's deputies issued citations to tribal members was within an Indian reservation, and, therefore, the deputies lacked jurisdiction to enforce state regulatory traffic laws.

Recent Activity: Cert petition denied on March 9, 2020

The Chemehuevi Indian Tribe and four tribal members ("Tribal Parties") filed § 1983 action against county sheriff and deputies, claiming they illegally detained and issued citations to tribal members for violating California regulatory traffic laws. The Tribal Parties asserted that the location where the citations were issued was within the Tribe's reservation boundaries, and therefore the sheriff's deputies lacked jurisdiction. The District Court concluded that the area was not within the Tribe's reservation boundaries because the United States deeded the tract in question to California prior to the reservation's creation. The Ninth Circuit reversed, concluding that who held title to the land was irrelevant to the question of the Tribe's reservation boundary.

WATSO V. HARPSTEAD (19-550)

Petitioners: Kimberly Watso and Kaleen Dietrich

Petition Filed: October 28, 2019

Subject Matter: Indian Child Welfare Act

Lower Court Decision: The Eighth Circuit Court of Appeals, affirming the district court, held that the Indian Child Welfare Act does not require Indian child custody proceedings to begin in state court.

Recent Activity: Cert petition denied on March 2, 2020

Non-Indian mother and non-Indian grandmother of Indian children brought suit against the Commissioner of the Minnesota Department of Human Services, Scott County, the Tribal Court of the Shakopee Mdewakanton Sioux Community, Tribal Court of the Red Lake Band of Chippewa Indians ("Red Lake Band"), and individual tribal court judges and state officials, alleging that ICWA vests jurisdiction over child custody with states in the first instance, that Indian child custody proceedings must begin in state, not tribal, court, and that their due process rights were violated. The district court granted motions to dismiss in favor of all defendants, and the Eighth Circuit affirmed.

SPURR V. POPE (19-598)

Petitioner: Joy Spurr

Petition Filed: November 7, 2019

Subject Matter: Tribal Court Jurisdiction

Lower Court Decision: The Sixth Circuit Court of Appeals, affirming the district court, held that a tribal court had jurisdiction under federal law to issue a civil personal protection order against a non-Indian in a matter arising in the Indian country of the tribe.

Recent Activity: Cert petition denied on January 13, 2020

A tribal citizen sought an ex parte personal protection order (“PPO”) from the Nottawaseppi Huron Band of the Potawatomi tribal court, alleging that his step-mother (“Spurr”), a non-Indian, was harassing him. The court granted the PPO and, after a later hearing, made the order permanent. Spurr appealed to the tribe’s Supreme Court, which affirmed. Spurr filed suit in federal court against the trial judge, the Tribe’s Supreme Court, and the Tribe itself, seeking declaratory and injunctive relief. The federal district court dismissed the complaint, concluding that 18 U.S.C. § 2265 conferred jurisdiction on the tribal court to issue the protective order. On appeal, the Sixth Circuit held that sovereign immunity barred the suit against the Tribe and the Tribe’s Supreme Court (the tribal trial court judge waived immunity on appeal). It also affirmed the trial court’s holding that the Tribal court had jurisdiction to issue the order.

ALABAMA-COUSHATTA TRIBE OF TEXAS V. STATE OF TEXAS (19-403)

Petitioner: Alabama-Coushatta Tribe of Texas

Petition Filed: September 23, 2019

Subject Matter: Indian Gaming Regulatory Act (“IGRA”)

Lower Court Decision: The Fifth Circuit Court of Appeals, affirming the district court, held that the Tribe’s Restoration Act, not IGRA, governs gaming on the Tribe’s lands, despite a contrary finding by the National Indian Gaming Commission (“NIGC”).

Recent Activity: Cert petition denied on January 13, 2020

The Tribe’s Restoration Act, which prohibited gaming on tribal lands to the same extent it was prohibited by Texas law, was enacted in 1987. The following year, Congress passed IGRA. In 2003, the Fifth Circuit concluded that the Restoration Act, not IGRA, governed gaming operations on the Tribe’s lands. However, in 2015, the NIGC came to the opposite conclusion and authorized the Tribe’s Class II gaming operations. Based on an injunction from the 2003 case, Texas sought a contempt order from the district court after gaming operations began. In affirming the district court, the Fifth Circuit concluded that, because of its 2003 ruling and a 1994 decision concerning substantially identical provisions in the Ysleta del Sur Pueblo’s Restoration Act found no ambiguity in the statutes, NIGC’s determination was foreclosed by the court’s previous holdings that the Restoration Act controls the outcome of this case.

KUROWSKI V. ESTATE OF KENNETH H. KUROWSKI (19-477)

Petitioner: Arletta Kurowski

Petition Filed: October 10, 2019

Subject Matter: Federal court jurisdiction

Lower Court Decision: The Seventh Circuit Court of Appeals, affirming the district court, held that the district court lacked jurisdiction to hear an appeal from a tribal court filed with a federal district court.

Recent Activity: Cert petition denied on December 16, 2020

Petitioner sued the estate of her ex-husband in Oneida Nation tribal court in an attempt to collect child support arrears. The court ruled against her and Tribe's supreme court affirmed. She then filed a "notice of appeal" in the District Court for the Eastern District of Wisconsin. The district court determined that it lacked jurisdiction to review the decision of the Oneida judiciary and dismissed the case. The Seventh Circuit Court of Appeals affirmed.

COTTIER V. UNITED STATES (18-9261)

Petitioner: Calmer Cottier

Petition Filed: May 15, 2019

Subject Matter: Criminal procedure

Lower Court Decision: The Eighth Circuit held that admission of factual-basis statement of another defendant was not reversible plain error under the circumstances of this case.

Recent Activity: Cert petition denied on December 9, 2019.

Petitioner is an Indian convicted of murder in Indian Country. Two other participants in the crime accepted plea deals and signed factual-basis statements that implicated Mr. Cottier. A federal prosecutor also signed those statements to vouch for their veracity and later offered those incriminating statements as evidence at Cottier's trial. The defense did not object to their admission and later relied on them as part of their defense case. On appeal, the Eighth Circuit stated that allowing unredacted factual-basis statements into the jury room is disfavored, but concluded that under the circumstances of this case was not reversible error due to the defense's failure to object and the other overwhelming evidence of guilt. Justice Sotomayor issued a statement respecting the denial of certiorari, which reiterated that admission of factual-basis statements are disfavored, but did not merit the Court's review under the circumstances of this case.

CALIFORNIA TROUT V. HOOPA VALLEY TRIBE (19-257)

Petitioner: California Trout and other conservation organizations

Petition Filed: August 26, 2019

Subject Matter: Clean Water Act

Lower Court Decision: The Court of Appeals for the D.C. Circuit held that the States of Oregon and California waived their authority under the Clean Water Act to issue water quality certifications within one year of initial application

Recent Activity: Cert petition denied on December 9, 2019.

This case involves the relicensing of the Klamath Hydroelectric Project (“Klamath Project”), which is a series of hydroelectric dams on the Klamath River in Oregon and California owned by PacifiCorp. Pursuant to the Clean Water Act, relicensing with the Federal Energy Regulatory Commission (“FERC”) requires that an applicant submit a certification from relevant states that discharges from the Klamath Project will comply with state water quality requirements. Such certifications are requested by the applicant directly to state officials, who have “a reasonable period of time (which shall not exceed one year)” to act on the request, or their certification authority is waived – allowing the applicant to move forward in relicensing without the certification. In order to delay relicensing while settlement agreements were being negotiated and implemented (which likely would result in decommissioning the Klamath Project), PacifiCorp routinely submitted their certification requests, withdrew them just before the one-year period passed, and then immediately resubmitted the requests. This occurred with the acquiescence of the states, believing this would delay certification (and relicensing) without triggering a waiver. The Hoopa Valley Tribe (“Tribe”) petitioned FERC for an order declaring the withdrawal and resubmission process did not trigger new periods of review, and that the states had waived their certification authority. FERC denied the petition, and the Tribe appealed to the D.C. Circuit. In ruling in the Tribe’s favor, the D.C. Circuit concluded that, in substance, PacifiCorp was not submitting new requests – each one was the same as the last – and was done by agreement of PacifiCorp and the states. The court observed: “Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”

KNIGHTON V. CEDARVILLE RANCHERIA OF NORTHERN PAIUTE INDIANS (19-131)

Petitioner: Duanna Knighton

Petition Filed: July 23, 2019

Subject Matter: Tribal court jurisdiction

Lower Court Decision: The Ninth Circuit affirmed tribal court jurisdiction

Recent Activity: Cert petition denied on November 12, 2019.

Duanna Knighton, a non-member, was employed by the Cedarville Rancheria of Northern Paiute Indians (Rancheria) as Tribal Administrator. Based on a forensic audit conducted after her resignation, the Rancheria sued her in tribal court alleging, among other things, fraud, deceit, and breach of fiduciary duty. The tribal court denied her motion to dismiss, and she challenged its jurisdiction in federal court. In affirming the lower court, the Ninth Circuit held that jurisdiction was proper in the tribal court based on the consensual employment relationship and because most of the conduct giving rise to the complaint in tribal court occurred on tribal lands.

SMITH V. UNITED STATES (19-5744)

Petitioner: Johnny Smith

Petition Filed: August 26, 2019

Subject Matter: Federal criminal jurisdiction

Lower Court Decision: The Ninth Circuit, affirming the district court, held that the federal government had criminal jurisdiction over a victimless crime committed by an Indian in Indian Country.

Recent Activity: Cert petition denied October 15, 2019

Petitioner, Johnny Smith, a citizen of Confederated Tribes of Warm Springs, fled in his vehicle from Warm Springs police officers when they tried to initiate a traffic stop and was convicted in the district court of fleeing or attempting to elude a police officer under Assimilative Crimes Act (“ACA”) and Indian Country Crimes Act (“ICCA”). On appeal, the Ninth Circuit held that the ACA conferred jurisdiction on the United States for prosecution of the offense, and that the ICCA, although limiting some aspects of jurisdiction conferred by the ACA, does not exclude the prosecution of Indians for victimless crimes committed in Indian Country.

OGLALA SIOUX TRIBE V. FLEMING (18-1245)

Petitioner: Oglala Sioux Tribe, Rosebud Sioux Tribe, and individual tribal members

Petition Filed: March 4, 2019

Subject Matter: *Younger* abstention

Lower Court Decision: The Eighth Circuit, reversing the district court, held that the district court should have abstained, based on *Younger* abstention, from adjudicating claims against South Dakota state officials

Recent Activity: Cert petition denied October 7, 2019

This cases arose from a class action suit brought by the Tribal Parties against South Dakota state officials under 42 U.S.C. § 1983, alleging that 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.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, the NCAI Fund and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to the NCAI Fund, attn: Christian Weaver, 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).**