

# TRIBAL SUPREME COURT PROJECT

## MEMORANDUM

### UPDATE OF RECENT CASES

OCTOBER 7, 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 October 5, 2020, the U.S. Supreme Court began its October Term 2020. On the opening day of the term, the Court issued an order list from its “long conference,” which was held on September 29, 2020. Among the more 1,000 petitions for review that were denied were three Indian law matters: *Nobles v. North Carolina* (20-87) (challenging state court conclusion that defendant was not Indian for purposes of the Major Crimes Act); *In re: Scott Louis Youngbear* (20-78) (habeas corpus petition by Native American inmate); and *Native Wholesale Supply Company v. California* (19-985) (state regulation of Indian-owned business). In addition, in a case involving an Indian’s challenge to his Oklahoma state court conviction on the grounds that the crime occurred in Indian country, the Court granted, vacated, and remanded for reconsideration in light of its decision in *McGirt v. Oklahoma*. One case, *Rogers County Board of Tax Roll Corrections, et al. v. Video Gaming Technologies, Inc.* (19-1298) (state taxation of non-Indian lessor of gaming machines) was relisted for the October 9, 2020, conference.

President Trump has nominated Judge Amy Coney Barrett of the Seventh Circuit Court of Appeals to the seat on the U.S. Supreme Court opened by the death of Justice Ruth Bader Ginsburg in September 2020. Senate Judiciary Committee hearings on her confirmation are scheduled to begin on October 12, 2020. The Native American Rights Fund has prepared a memorandum examining her Indian law background and experience, which is available [here](#). NARF and NCAI will be monitoring Judge Barrett’s confirmation hearing for any Indian law issues that might arise.

## INDIAN LAW CASES DECIDED BY THE SUPREME COURT

The Court has decided one Indian law case in the October 2020 term:

### WILSON V. OKLAHOMA (19-8126)

**Petitioner:** Garry Wilson

**Petition Granted:** October 5, 2020

**Subject Matter:** Reservation disestablishment; Criminal jurisdiction

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

**Decided:** October 5, 2020

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

Petitioner is an Indian convicted of first degree 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 offense. 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:

### MUCKLESHOOT INDIAN TRIBE V. TULALIP TRIBES (20-195)

**Petitioner:** Muckleshoot Indian Tribe

**Subject Matter:** Fishing Rights – Usual and Accustomed Fishing Places

**Lower Court Decision:** The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the plaintiffs' claim

**Recent Activity:** Waiver of right to respond filed by one respondent, and brief in opposition file by another respondent on September 18, 2020

**Upcoming Activity:** Reply brief and scheduling of conference

Two tribes brought action in a subproceeding of *United States v. Washington* seeking additional usual-and-accustomed fishing grounds and stations (U&A) in saltwater of Puget Sound. The Ninth Circuit Court of Appeals affirmed dismissal of the case because a previous court order had determined the scope of the plaintiff Tribes' U&A.

### 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:** Response requested by the Court

**Upcoming Activity:** Brief in opposition due October 15, 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 that 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:** Relisted for October 9, 2020, conference

**Upcoming Activity:** Conference (second listing)

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.

## **PETITIONS FOR A WRIT OF CERTIORARI DENIED**

### **NOBLES V. NORTH CAROLINA (20-87)**

**Petitioner:** George Lee Nobles

**Petition Filed:** July 27, 2020

**Subject Matter:** State criminal jurisdiction

**Lower Court Decision:** Supreme Court of North Carolina affirmed a lower court decision holding that a criminal defendant was not an Indian for purposes of the Major Crimes Act

**Recent Activity:** Petition denied on October 5, 2020

Petitioner was convicted in North Carolina state court of armed robbery, first-degree felony murder, and firearm possession by a felon. On appeal, he claimed that because he is Indian and the crime occurred on the Eastern Band of Cherokee Indians' (EBCI) reservation, the state lacked jurisdiction over the crime. The North Carolina Supreme Court held that although he was a descendant of EBCI, applying the test from *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988), he was not "Indian" for purposes of the Major Crimes Act.

### **IN RE: SCOTT LOUIS YOUNGBEAR (20-78)**

**Petitioner:** Scott Louis Youngbear

**Petition Filed:** June 17, 2020

**Subject Matter:** Habeas corpus petition

**Lower Court Decision:** None

**Recent Activity:** Petition denied on October 5, 2020

An Indian inmate sought release from Tier III incarceration and exclusion from the state sex offender registry.

### **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:** Petition denied on October 5, 2020

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.

### **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).**