TRIBAL SUPREME COURT PROJECT MEMORANDUM

UPDATE OF RECENT CASES

JANUARY 15, 2021

The Tribal Supreme Court Project (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 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).

Since the last update, the Court has granted review in *Alaska Native Vill. Corp. Assoc. v. Confederated Tribes of the Chehalis Reservation* (20-544) and *Mnuchin v. Confederated Tribes of the Chehalis Reservation* (20-543). Both of these cases concern the definition of "Indian tribe" for purposes of the CARES Act and have been consolidated for oral argument. We expect the oral argument to be held during this term, although a date has not been set by the Court. In addition, the United States filed its brief in *United States v. Cooley* (19-1414) (tribal criminal jurisdiction). Oral argument in the case likely will be scheduled for March or April 2021.

Also, the Court denied review in *FMC Corp. v. Shoshone-Bannock* (19-1143) (tribal civil jurisdiction), which preserves an important tribal victory in the lower courts.

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 GRANTED

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

ALASKA NATIVE VILLAGE CORP. ASSOC. V. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION (20-544); MNUCHIN V. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION (20-543)

Petitioners: Alaska Native Corporations and the United States
Petition Filed: October 21 and 23, 2020
Subject Matter: Eligibility of Alaska Native Corporations to receive COVID-19 relief funds
Lower Court Decision: The D.C. Circuit reversed the district court's judgment in favor of the United States and several Alaska Native corporations.
Recent Activity: Cert granted January 8, 2021
Upcoming Activity: Opening brief due February 22, 2021

Several federally-recognized Indian tribes sued the United States after the Department of the Treasury announced that Alaska Native corporations (ANCs) would be eligible to receive funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Several ANCs intervened as defendants. The district court ruled in favor of the United States and the ANCs, holding that the CARES Act defined eligible Indian tribes with reference to the definition of "Indian Tribe" in the Indian Self-Determination and Education Assistance Act (ISDEAA), which, it concluded, encompasses ANCs. In reversing, the D.C. Circuit held that in order to meet the definition of "Indian Tribe," the entity must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The D.C. Circuit concluded that ANCs did not meet this prong of the definition and, thus, were not eligible to receive CARES Act funds.

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: Petitioner's brief filed January 8, 2021
Upcoming Activity: Respondent's brief due February 12, 2021

A non-Indian driver was charged with federal narcotics and firearms 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. During the officer's interaction with the driver, he noted indicia of impairment, saw firearms in the vehicle, and believed that some of the driver's responses to his questions were untruthful. At a certain point, the driver's demeanor changed and the officer believed that the driver was going to use force. The officer drew his pistol and placed the driver in his police vehicle. A subsequent search of the driver's vehicle uncovered 50 grams of methamphetamine and additional

firearms. The trial court granted the driver's motion to suppress evidence obtained by the tribal police officer. 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. The United States' petition for rehearing en banc was denied, and Judge Collins, joined by three other judges, dissented from the denial of rehearing en banc.

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:

CLUB ONE CASINO V. BERNHARDT (20-846)

Petitioner: Club One Casino, a non-Indian gaming enterprise
Petition Filed: December 23, 2020
Subject Matter: Indian Gaming Regulatory Act; Indian Reorganization Act
Lower Court Decision: The Ninth Circuit affirmed the district court's grant of summary judgment in favor of the United States.
Recent Activity: Petition filed
Upcoming Activity: Brief in opposition due January 22, 2021

The United States took a parcel of land into trust for the benefit of the North Fork Rancheria of Mono Indians of California (North Fork Rancheria) pursuant to Section 5108 of the Indian Reorganization Act (IRA). More than 5 years later, the Secretary of the Interior (Secretary) made a determination pursuant to section 2719 of IGRA that gaming on the land would be in the best interest of the North Fork Rancheria and not detrimental to the surrounding community, and the Governor of California concurred. The California legislature approved a class III gaming compact between the state and the North Fork Rancheria for the parcel. However, by referendum, California voters vetoed the compact's approval. Subsequently, pursuant to IGRA, the Secretary prescribed procedures for gaming on the parcel. Cardrooms that operate near the parcel sued the Secretary and the Department of the Interior, asserting that: (1) the Secretarial Procedures were issued in violation of IGRA because North Fork Rancheria never acquired jurisdiction or exercised governmental power over the parcel; and (2) in the alternative, the IRA violates the Tenth Amendment to the Constitution by unilaterally reducing state jurisdiction over land within its territory. The Ninth Circuit held that North Fork Rancheria possessed both jurisdiction, which was conferred by the United States by operation of law when the federal government took the parcel into trust for the benefit of the tribe, and governmental power over the parcel. Moreover, the Ninth Circuit held, acquisition of the parcel in trust by the United States did not require the state's consent because it only reduced, but did not completely oust, state jurisdiction. In addition, the acquisition of the parcel did not violate the Tenth Amendment because the Constitution vests exclusive authority over Indian affairs with the United States.

EGLISE BAPTISTE BETHANIE DE FT. LAUDERDALE V. SEMINOLE TRIBE OF FLORIDA (20-791)

Petitioner: Eglise Baptiste Bethanie De Ft. Lauderdale
Petition Filed: December 9, 2020
Subject Matter: Tribal Sovereign Immunity
Lower Court Decision: The Eleventh Circuit affirmed the district court's dismissal of the lawsuit.

Recent Activity: Petition filed
Upcoming Activity: Brief in opposition due February 8, 2021

Church members filed suit against a pastor's widow, who claimed leadership of the church, and Seminole Tribe of Florida (the "Tribe"), whose police officers escorted her when she took control of the church property. The plaintiffs alleged, among other things, violations of 18 U.S.C. § 248 (relating to interference with First Amendment right of religious exercise at a place of religious worship). The district court granted the Tribe's motion to dismiss based on tribal sovereign immunity. The Eleventh Circuit affirmed, holding that the Tribe did not waive its immunity and Section 248 did not provide the necessary express abrogation of tribal sovereign immunity by Congress.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION V. YAKIMA COUNTY (20-753)

Petitioner: Confederated Tribes and Bands of the Yakama Nation
Petition Filed: November 25, 2020
Subject Matter: Criminal jurisdiction
Lower Court Decision: The Ninth Circuit affirmed district court's denial of injunctive relief.
Recent Activity: Waiver of right to respond filed and response requested by the Court
Upcoming Activity: Brief in opposition due March 1, 2021

The State of Washington retroceded its PL-280 jurisdiction within the Yakama reservation to the United States. Subsequently, divergent interpretations of the retrocession proclamation's wording arose, with the tribe asserting it was a complete retrocession of jurisdiction over crimes involving an Indian, while the state and local police took the position that it retroceded jurisdiction over crimes that involved *only* Indians and retained jurisdiction over crimes with non-Indian perpetrators or victims. After local police arrested an Indian on the reservation, the Yakama Nation sued the local police department and county, seeking a declaration that they did not have jurisdiction over crimes involving Indians on the reservation. In affirming the district court's denial of injunctive relief, the Ninth Circuit held that the proclamation retroceded jurisdiction over crimes involving only Indians but retained its PL-280 criminal jurisdiction where a non-Indian is involved.

YSLETA DEL SUR PUEBLO V. TEXAS (20-493)

Petitioner: Ysleta del Sur Pueblo
Petition Filed: October 9, 2020
Subject Matter: Indian gaming
Lower Court Decision: The Fifth Circuit affirmed the district court's grant of summary judgment in favor of Texas.
Recent Activity: Brief in opposition filed January 11, 2021
Upcoming Activity: Reply brief and scheduling for conference

The State of Texas sued the Ysleta del Sur Pueblo (Pueblo), seeking to enjoin it from operating slot machines in its gaming facility as a violation of Texas law. In 1987, Congress passed an act restoring federal recognition of the Pueblo, which provided that the Pueblo's gaming operations must comply with Texas law. Congress subsequently passed the Indian Gaming Regulatory Act (IGRA), which is more permissive of tribal gaming operations than the Pueblo's restoration act. Texas and the Pueblo have disagreed ever since about whether the restoration act or IGRA controlled the Pueblo's gaming

operations. In 1993, the Fifth Circuit sided with Texas and held that the restoration act controlled. In the instant lawsuit, Texas argued that the Pueblo's slot machines violated Texas law. Relying on its 1993 case, the Fifth Circuit agreed and held that "the Restoration Act 'govern[s] the determination of whether gaming activities proposed by the [ ] Pueblo are allowed under Texas law, which functions as surrogate federal law.'"

PETITIONS FOR A WRIT OF CERTIORARI DENIED

FMC V. SHOSHONE BANNOCK TRIBES (19-1143)

Petitioner: FMC Corporation
Petition Filed: March 18, 2020
Subject Matter: Tribal civil jurisdiction
Lower Court Decision: The Ninth Circuit affirmed district court's judgment in favor of the tribes.
Recent Activity: Petition denied on January 11, 2021

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.

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

Petitioner: Muckleshoot Indian Tribe
Petition filed: August 14, 2020
Subject Matter: Fishing Rights – Usual and Accustomed Fishing Places
Lower Court Decision: The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' claim.
Recent Activity: Petition denied on November 2, 2020

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.

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: Petition denied on October 19, 2020

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 pre-empted 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.

NOBLES V. NORTH CAROLINA (20-87)

Petitioner: George Lee Nobles
Petition Filed: July 27, 2020
Subject Matter: State criminal jurisdiction
Lower Court Decision: The Supreme Court of North Carolina affirmed a lower court decision 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: The California Court of Appeal affirmed a lower court that held Native owned company liable for civil penalties for violating California law.
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 and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, 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).**