Native American Rights Fund

1514 P Street, NW (Rear), Suite D, Washington, D.C. 20005
(202) 785-4166 • FAX (202) 822-0068
www.narf.org

March 16, 2017

MEMORANDUM

TO: Tribal Leaders and Tribal Attorneys
National Congress of American Indians – Project on the Judiciary

FROM: Richard Guest, Staff Attorney, Native American Rights Fund

RE: Gorsuch: Summary of Indian Law Cases

The total number of case summaries is 39, but 11 have been identified as not directly raising an Indian law issue (*numbers inside (parens) are cases with no Indian Law question*):

Subject	**Total Cases**	**Win**	**Loss**	**Draw**	**Written Opinions**
Tribal Sovereign Immunity	6	5	1	-	1
Indian Country Diminishment/Disestablishment	4	2	2	-	4
Religious Freedom	1	1	-	-	1
Federal Trust Responsibility	4	1	2	1	1
Exhaustion	2	2	-	-	1
Civil Rights	3	1	-	2	1
Tax	3 (1)	-	2	-	-
Employment/Labor Law	1 (1)	-	-	-	1(1)
Criminal Conviction	11 (6)	3	2	-	5(4)
Miscellaneous	4 (3)	1	-	-	2(2)
TOTAL Indian Law Cases:	39 (11) 28	16	9	3	17(7) 10

Tribal Sovereign Immunity:

(6 cases; 1 written opinion; 5 wins; 1 loss)[1]

In ***Somerlott v. Cherokee Nation Distributors, Inc.***, 686 F.3d 1144, 1154 (10th Cir. 2012), a unanimous panel held that a tribal corporation incorporated under state law is not entitled to the Tribe's sovereign immunity. **Judge Gorsuch wrote a separate concurring opinion** to address what he viewed as "considerable confusion" exhibited by the parties. Under *Kiowa*, he recognized that Indian tribes are entitled to sovereign immunity from suit regardless of the type of activity (*i.e.*, commercial) or its location (*i.e.*, off-reservation). But in relation to the arguments made by Cherokee Nation Distributor (CND), he expressed skepticism, using the terms "no surreptitious sovereign" and "some sort of secret sovereign" to describe CND's claim for immunity from suit.

Judge Gorsuch clarified the legal principle that "no matter how broadly conceived, sovereign immunity has never extended to a for-profit business owned by one sovereign but formed under the laws of a second sovereign when the laws of the incorporating second sovereign expressly allow the business to be sued." This principle applies regardless of whether the sovereign owning the business is the federal government, a foreign sovereign, a state, or an Indian tribe. Next, he opined that "CND's claim to immunity is inconsistent with [a] foundational principle of corporate law," since CND seeks to exercise the privileges of incorporating under Oklahoma law while refusing to accept the responsibilities attending those privileges. He then found CND's claim to immunity to be inconsistent with the Supreme Court's reason for recognizing tribal sovereign immunity—tribal self-determination and self-sufficiency. According to Judge Gorsuch, "the Nation made a free choice to incorporate a business under Oklahoma's law, and respect for its sovereignty and autonomy should lead us to give effect to that choice."

In ***Sanders v. Anoatubby***, 631 F. App'x 618 (10th Cir. 2015), Judge Gorsuch joined an unanimous panel decision which affirmed the district court's dismissal of a tribal member's claims of wrongful discharge and retaliation against the Chickasaw Nations based on the doctrine of tribal sovereign immunity. The opinion recognized that although the *Ex Parte Young* doctrine is an exception to tribal sovereign immunity, it only applies to ongoing violations of federal law (not past violations of tribal policy) and is only available for declaratory and injunctive relief (not money damages).

---

[1] Although a unanimous panel held that the issue of tribal sovereign immunity had not been preserved by the plaintiff on appeal, *Somerlott* is listed as a loss for Indian tribes based on the court's view of the immunity of tribal-owned corporations, especially the extensive discussion on this question in Gorsuch's concurrence.

In ***Bonnet v. Harvest Holdings, Inc.***, 741 F.3d 1155 (10th Cir. 2014), Judge Gorsuch joined an unanimous panel decision which reversed the district court's denial of the Ute Indian Tribe's motion to quash a subpoena based on tribal sovereign immunity. The Tenth Circuit held that a subpoena duces tecum served on a non-party Tribe seeking documents relevant to a civil suit in federal court is itself a "suit" against the Tribe triggering tribal sovereign immunity.

In ***Santana v. Muscogee (Creek) Nation, ex rel. River Spirit Casino***, 508 F. App'x 821 (10th Cir. 2013), Judge Gorsuch joined a unanimous panel decision which affirmed the district court's dismissal of a gambling addict's suit against the Muscogee (Creek) Nation based on tribal sovereign immunity. The gambling addict had originally filed a state court action pursuant to the tribal-state gaming compact alleging that the Tribe improperly induced him to gamble at its casino, resulting in the Tribe's unjust enrichment. The Tenth Circuit found that nothing under the Indian Gaming Regulatory Act or the gaming compact has "clearly and unambiguously" waived tribal immunity to extend jurisdiction over individual tort suits against the Tribe to Oklahoma state courts.

In ***Nanomantube v. Kickapoo Tribe in Kansas***, 631 F.3d 1150 (10th Cir. 2011), Judge Gorsuch joined a unanimous panel decision which affirmed the district court's dismissal of a Title VII employment discrimination action brought by a former tribal employee. The Tenth Circuit held that the Tribe's sovereign immunity from Title VII suits was not abrogated by Congress or waived by the Tribe in its employee handbook.

In ***Native American Distributing v. Seneca-Cayuga Tobacco Company***, 546 F.3d 1288 (10th Cir. 2008), Judge Gorsuch joined a unanimous panel decision which affirmed the district court's dismissal of the breach of contracts and civil conspiracy claims against a tribal enterprise and its officers based on tribal sovereign immunity.

Indian Country: Diminishment/Disestablishment:

(4 cases; 4 written opinions; 2 wins; 2 losses)[2]

In ***Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton***, 835 F.3d 1255 (10th Cir. 2016), cert pending *City of Myton v. Ute Indian Tribe* (No. 16-868), the Ute Indian Tribe filed suit against cities, counties and state officials seeking injunctive relief to halt criminal prosecution of tribal members for offenses on land judicially recognized as Indian country. **Judge Gorsuch wrote an unanimous panel decision** reversing the district court's order granting the city's motion to dismiss. In his opinion, Judge Gorsuch compares the role of the court over the past 40 years of this case with the fate of Sisyphus in rolling the rock up the hill. In 1985, the Tenth Circuit, sitting en banc, issued its first ruling against the State of Utah, and in favor of the Tribe, holding that all lands encompassed within the original Ute reservation boundaries established in the 1860s—including lands that were transferred to non-Indians between 1905-1945 (the "disputed lands")—remained Indian country. *Ute Indian Tribe v. Utah* (*Ute III*), 773 F.2d 1087 (10th Cir. 1985). However, unsatisfied with the result in *Ute III*, state and local officials sought a "friendlier forum" in which to "relitigate the boundary dispute." As a vehicle for these efforts, state court prosecutions were initiated against tribal members for crimes committed on the disputed lands, which in turn led to a favorable ruling in favor of state and local jurisdictions in both the Utah Supreme Court and the U.S. Supreme Court. *See Hagan v. Utah*, 510 U.S. 399 (1994). To address the conflict between *Ute III* and *Hagen*, and to ensure uniform allocation of jurisdiction between the state and the Tribe, the Tenth Circuit recalled and modified the 10-year old mandate of *Ute III* to recognize that "lands that passed from [tribal] trust to fee status pursuant to non-Indian settlement between 1905 and 1945 do *not* qualify as Indian country." *Ute Indian Tribe v. Utah* (*Ute V*), 114 F.3d 1513 (10th Cir. 1997). However, *Ute V* specifically held that lands within the disputed area that could have been but were not allotted to non-Indians were restored to tribal status in 1945 and are Indian country. And in 2015, "the rock returned for this court to push up the hill one more time." *See Ute Indian Tribe v. Utah (Ute VI)*, 790 F.3d 1000 (10th Cir. 2015) (summarized below). While *Ute VI* was pending before the court, the town of Myton filed a motion to dismiss the Tribe's complaint which, in turn, the district court granted and the Tenth Circuit reversed. Judge Gorsuch reiterated the finding in *Ute V* that the lands restored to tribal jurisdiction in 1945 remain Indian country and are not subject to state criminal jurisdiction. Finally, in granting the Tribe's motion seeking reassignment of these cases to a different district court judge on remand, Judge Gorsuch recognized the "extreme circumstances" present in this case based on the 20-year old ruling in *Ute V* which finally resolved all boundary disputes at issue in this case.

---

[2] *Yellowbear* is counted as a loss because it left the Wyoming Supreme Court's decision finding reservation diminishment intact.

Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah (Ute VI), 790 F.3d 1000 (10th Cir. 2015), cert. denied sub nom. *Wasatch Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 136 S. Ct. 1451, 194 L. Ed. 2d 575 (2016), and cert. denied sub nom. *Uintah Cty., Utah v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 136 S. Ct. 1451, 194 L. Ed. 2d 550 (2016). **Judge Gorsuch wrote an unanimous panel decision** and reversed the district court's denial of the Tribe's motion for a preliminary injunction to halt the state court prosecution of a tribal member for an alleged criminal offense on tribal land based on its determination that the Tribe had failed to demonstrate that it would suffer irreparable harm. In no uncertain terms, Judge Gorsuch clearly recognized that the state's prosecution of a tribal member here and its harm to tribal sovereignty are "as serious as any to come our way in a long time" and are "an invasion of tribal sovereignty [that] can constitute irreparable injury." In reversing the district court and instructing it to issue a preliminary injunction, the Tenth Circuit held that: (1) county's prosecution of tribal member constituted irreparable injury to tribal sovereignty; (2) Anti-Injunction Act did not bar federal court from issuing preliminary injunction; (3) *Younger* abstention was not warranted. And in disposing of the remaining questions of sovereign immunity, the Tenth Circuit held that: (1) mutual assistance agreement between state and Tribe did not waive Tribe's sovereign immunity from suit in state court; (2) doctrine of equitable recoupment did not apply to permit state and county to assert counterclaims; and (3) county attorneys were not entitled to sovereign immunity.

In ***Yellowbear v. Atty. Gen. of Wyoming***, 380 F. App'x 740 (10th Cir. 2010), Mr. Yellowbear sought habeas relief under 28 U.S.C. § 2254 from his state court conviction for the murder of his daughter. The Wyoming Supreme Court rejected his arguments that the state does not have jurisdiction over him because the crime was committed within the boundaries of the Wind River Reservation. The state court held that a 1905 Act diminished the boundaries of the Reservation and the town of Riverton, Wyoming, where the crime occurred, is not within Indian country. **Judge Gorsuch wrote an unanimous panel decision** and affirmed the district court's denial of the petition under § 2254's deferential standard of review that a federal court may only grant habeas relief if the state court's decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court." In response to Mr. Yellowbear's argument that, under the Supremacy Clause of the Constitution, "state court's cannot rule on the extent of federal jurisdiction (*i.e.*, what constitutes "Indian country')," Judge Gorsuch opines :

> Indeed, the Supremacy Clause contemplates that state courts *will* decide question of federal law, and concurrent jurisdiction has been the norm, not the exception, in our constitutional history. *See* U.S. Const. art. VI, cl. 2 (mandating that the "judges of every State shall be bound" by federal law); *see also* The Federalist No. 82, at 493 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he national and State systems are to be regarded as ONE WHOLE.

> The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union."); William H. Rehnquist, Seen in a Glass Darkly: The Future of the Federal Courts, 1993 Wis. L. Rev. 1, 7. For his part, Mr. Yellowbear advances no persuasive argument or authority before this court suggesting that the Wyoming state courts' concurrent jurisdiction doesn't include the power to decide whether federal statutes divest them of criminal jurisdiction over the land in question.

In ***Hydro Resources, Inc. v. EPA*****,** 608 F.3d 1131 (10th Cir. 2010) (en banc), **Judge Gorsuch wrote the majority opinion for a sharply divided en banc panel (6-5) of the Tenth Circuit** to address an intra-circuit conflict and held that the Supreme Court's decision in *Venetie* had supplanted its *Watchman* "community of reference" test (the first of a two-part inquiry). Thus, certain non-Indian fee lands in New Mexico outside the Navajo Reservation do not qualify as a "dependent Indian community" and "Indian country" under 25 U.S.C. § 1151(b). At issue was whether Hydro Resources, Inc. (HRI) was required to obtain various regulatory permits under the Safe Water Drinking Act (SDWA) from the State of New Mexico or from the U.S. Environmental Protection Agency (EPA) to conduct its uranium mine operations. Under the Tenth Circuit's *Watchman* community of reference test, three factors were weighed to determine a "dependent Indian community": (1) the geographic definition of the community; (2) the status of the area in question as a community; and (3) the community in context of the surrounding area. In *Venetie*, the Supreme Court established a two-part test for determining whether certain lands qualify as a "dependent Indian community": (1) consists only of lands explicitly set aside for Indian use by Congress (or its designee); and (2) the federal government superintends the lands.

In dissent, Judge Ebel (joined by four other judges) found that the Supreme Court in *Venetie* did not "address a separate, antecedent question: to what area of land should this two-part test be applied?" In other words, the question that the *Watchman* "community of reference" test was intended to answer is the relevant "community" to be considered before determining whether that community is both "dependent" and "Indian." The dissent agreed with the EPA and the Navajo Nation that the appropriate community of reference is the entire Church Rock Chapter of the Navajo Nation, not just the parcel owned by HRI. In conclusion, the dissent underscores its major concerns and warns that the consequences of the majority opinion "are likely to be enormous, reintroducing checkerboard jurisdiction into the southwest on a grand scale and disrupting a field of law that had been settled for decades."

Religious Freedoms:

(1 case; 1 written opinion; 1 win)

In ***Yellowbear v. Lampert***, 741 F.3d 48 (10th Cir. 2014), **Judge Gorsuch wrote a unanimous panel decision** and vacated the district court's grant of summary judgment in favor of the state on Mr. Yellowbear's Religious Land Use and Institutionalized Persons Act (RLUIPA) claim seeking prospective injunctive relief against state prison officials under *Ex Parte Young*. Mr. Yellowbear, an enrolled member of the Northern Arapahoe Tribe and imprisoned for the murder of his daughter, sued state prison officials under the RLUIPA because they denied him access to the prison's sweat lodge based on his placement within a special protective unit of the prison. The case was remanded to the district court based on the finding that a factual issue existed regarding whether preventing Mr. Yellowbear from using the sweat lodge served a compelling governmental interest and was the least restrictive means of furthering that interest.

In his opinion, Judge Gorsuch favorably addressed some historically problematic areas for religious liberty cases brought by Native American prisoners. First, he recognized that some courts have accepted broad claims by prison officials that restricting a Native American's religious practice furthers a prison's compelling interest in "safety and security," "hygiene" and "controlling cost". Judge Gorsuch observed that these types of generalized, abstract government assertions often make the claimant's interests appear less significant. Based on the text of RLUIPA, prison officials are required to prove a compelling governmental interest in the context of the burden placed on the individual claimant. Judge Gorsuch clarified: "Just because other prisons may have had a compelling interest in denying access to a sweat lodge in other circumstances doesn't necessarily prove, without more, that all prisons have a compelling interest in denying access to sweat lodges in all circumstances." Second, some courts have taken a rubber-stamp approach to the Supreme Court's instructions in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), that lower courts are to give "due deference" to the judgment of prison officials when denying or restricting religious practices as necessary for prison operations. In response, Judge Gorsuch wrote: "the deference this court must extend to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling government interest by fiat." In Judge Gorsuch's view, "due deference" still requires the government to substantiate its claims of cost and safety concerns with evidence.

Federal Trust Responsibility:

(4 cases; 1 written opinion; 1 win; 3 losses)[3]

In ***Fletcher v. United States***, 730 F.3d 1206 (10th Cir. 2013), **Judge Gorsuch wrote an unanimous panel decision** and reversed the district court's dismissal of a suit brought by Osage tribal member headright holders seeking an accounting to determine whether the federal government had fulfilled its fiduciary obligations as trustee to oversee the collection and distribution of royalty income from oil and gas reserves. Relying on the plain language of the American Indian Trust Fund Management Reform Act, specifically 25 U.S.C. § 4011 – *Responsibility of the Secretary to account for the daily and annual balances of Indian trust funds* – Judge Gorsuch easily reached the answer that there is a "specific, applicable, trust-creating statute" imposing a duty on the federal government to provide the requested accounting. Citing to *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011). In addition to the text of the statute, Judge Gorsuch points to other evidence, including surrounding statutes, legislative history, and traditional trust principles. And if any residual doubt remains, or if any ambiguity regarding its meaning exists, Judge Gorsuch noted that "within the narrow field of Native American trust relations statutory ambiguities must be 'resolved in favor of the Indians.'" [citations omitted]. Finally, on the remanded question of *how* the accounting must be conducted, Judge Gorsuch observes:

> A green eye-shade march through every line of every account over the last one hundred years isn't inevitable: the trial court may focus the inquiry in ways designed to get the plaintiffs what they need most without imposing gratuitous costs on the government. While the necessities of each case seeking to do equity must seek to balance the often warring (and admittedly incommensurate) considerations of completeness and transparency, on the one hand, and speed, practicality, and cost on the other.

In ***Gilmore v. Weatherford***, 694 F.3d 1160 (2012), members of the Quapaw Tribe brought suit against the Secretary of the Interior seeking an accounting for removal of mine tailings ("chat") by private owners of "commingled" (restricted and unrestricted ownership) chat piles in Oklahoma. Judge Gorsuch joined a panel decision which affirmed the dismissal of the claims for failure to exhaust administrative remedies under the APA.

---

[3] The single win is *Fletcher; Miami Tribe* is counted as a loss for the Tribe who was the real party in interest (though other Tribes opposed the acquisition); and *Gilmore* is considered a draw based on its dismissal for failure to exhaust administrative remedies.

In ***Muscogee (Creek) Nation Div. of Housing v. HUD***, 698 F.3d 1276 (10th Cir. 2012), the Tribe challenged a regulation placing a two-year limit on the investment of block grant funds received under NAHASDA and a requirement that any interest accrued after the expiration of the two-year period be returned to HUD. Judge Gorsuch joined the panel decision which affirmed the district court and held that HUD did not exceed its statutory authority in promulgating the regulation and was required to demand remittance of interest earned in violation of the regulation.

In ***Miami Tribe of Oklahoma v. United States***, 656 F.3d 1129 (10th Cir. 2011), the Tribe sued the BIA under the APA for its denial of a tribal member's application to "gift" his fractionated ownership interest in an allotment outside Kansas City (180 miles from reservation). The district court found the BIA's decision was arbitrary and capricious, and remanded the question to the BIA with instructions to approve the application. The BIA approved the application, but denied the Tribe's request for the land to be held in trust (versus its restricted fee status). Returning to federal court, the Tribe challenged the BIA's decision to require a fee-to-trust application, arguing the decision violates the Indian Land Consolidation Act and is a breach of trust. The district court affirmed the BIA's order and dismissed the Tribe's breach of trust claim. Judge Gorsuch joined the panel decision which, after a lengthy analysis to determine whether the BIA could still challenge the earlier decision requiring it to approve the application, vacated the earlier decision finding it was not arbitrary, capricious or contrary to law, and remanded the case to the district court.

Exhaustion of Tribal Court Remedies:

(2 cases; 1 written opinion; 2 wins)

United Planners Financial Services v. Sac and Fox Nation**,** 654 F. App'x 376, 377 (10th Cir. 2016), involved a suit in Tribal court brought by the Tribe against United Planners alleging breach of contract. Initially, the Tribal court dismissed the suit based on the arbitration provision in the contract, but the arbitrators dismissed the case based on the statute of limitations and the Tribe renewed its suit in Tribal Court. United Planners filed suit in federal district court to enjoin the proceedings in Tribal court. **Judge Gorsuch wrote an unanimous panel decision** to affirm the district court's holding that United Planners must first exhaust available tribal court remedies. In pointing out that there are exceptions to the exhaustion doctrine (*e.g.*, unnecessary delay, bad faith), Judge Gorsuch writes: "we do not mean to suggest that United Planners might not eventually succeed in showing bad faith, only to suggest it hasn't established it yet."

In ***Valenzuela v. Silversmith***, 699 F.3d 1199 (2012), Judge Gorsuch joined a panel decision which held that an enrolled member of the Tohono O'odham Nation, convicted in Tribal court, but incarcerated in a detention facility in New Mexico, must exhaust tribal court remedies, including habeas corpus relief under the Indian Civil Rights Act, before seeking relief in the federal courts.

Civil Rights: Indian Civil Rights Act; *Bivens* Claims:

(3 cases; 1 written opinion; 1 win; 2 draws)[4]

In ***Gardner v. Arrowichis***, 543 F. App'x 891 (10th Cir. 2013), **Judge Gorsuch wrote a short, unpublished opinion** affirming the district court's dismissal of a petition seeking habeas relief against Ute tribal officials for allegedly limiting petitioners' ability to practice as lay advocates in the Tribe's court. The district court dismissed the habeas petition based on the failure of the petitioners to follow the court's instructions to state essential facts to clarify whether they were actually in tribal custody.

In ***Greene v. Impson***, 530 Fed.Appx. 777 (2013), a descendant of a Choctaw Indian Freedman filed a *Bivens* action against BIA officials, alleging denial of due process based on their refusal to provide him with an application form to obtain a Certificate of Degree of Indian Blood in order for him to receive government assistance as a federally recognized Native American. Judge Gorsuch joined the panel decision which affirmed the district court's dismissal of the complaint. On appeal, the Tenth Circuit found that since there is no application form which allows an individual to seek federal recognition as an Indian without proof of Indian blood, and any distinction between blood and non-blood Choctaws is a political—not racial—classification, there is no constitutional violation.

In ***Romero v. Goodrich***, 480 Fed.Appx. 489 (10th Cir. 2012), Mr. Romero, an enrolled member of the Pueblo of Nambe filed a writ of habeas corpus under the Indian Civil Rights Act alleging the Nambe Tribal Court violated his constitutional rights and imposed an excessive sentence. A magistrate judge recommended that his petition be granted, but then withdrew his recommendation after the Tribal court *sua sponte* commuted his sentence. On appeal, Judge Gorsuch joined a panel decision which affirmed the district court's dismissal of the habeas petition as moot.

---

[4] *Gardner* is the win, with *Romero* and *Greene* deemed to be draws.

Taxation:

(3 cases; 2 losses; 1 no Indian law question)

In ***Muscogee (Creek) Nation v. Pruitt***, 669 F.3d 1159 (2012), the Tribe sued the Oklahoma Tax Commission and the Oklahoma Attorney General seeking to enjoin certain state tax laws that regulate the sale of cigarettes, making six claims that the statutes: (1) violate the Tribes' due process rights; (2) violate the Tribe's equal protection rights; (3) are preempted by the Indian Trader Statutes; (4) violate the Indian Commerce and Supremacy Clauses; (5) violate Tribe's right to self-government; and (6) violate, as parens patriae claim, the Tribe's right of equal protection and right to be free from discrimination. Judge Gorsuch joined the panel decision which reversed the district court's dismissal of the case based on the State's Eleventh Amendment immunity, but affirmed the dismissal based on the Tribe's failure to state a claim upon which relief can be granted. On appeal, the Tribe had only raised two issues: preemption under the Indian Trader Statutes and infringement of tribal self-government. The opinion recognized that in the area of state taxation: "Application of the preemption and the infringement barriers depends on the factors of 'who'—Indians or non-Indians—and 'where'—in or outside the tribe's Indian country." Ultimately, based on Supreme Court precedent, the panel held that the state's interest in collecting its valid tax outweighs the Tribe's interest from being free of state regulation.

Prather v. Hedgecoth, 378 F. App'x 805 (10th Cir. 2010), **does not involve a question of federal Indian law.** An Osage tribal member and homeowner, proceeding pro se and in forma pauperis, brought an action against the State of Oklahoma, the Tax Commission, and the Osage County Assessor, challenging an increase in his property taxes and the county's tax procedures, and alleging claims under § 1983 for violation of his equal protection and due process rights and conspiracy to violate his civil rights. Judge Gorsuch joined a panel decision which affirmed the district court's holding that: (1) State and Tax Commission had Eleventh Amendment immunity, and (2) Tax Injunction Act deprived federal court of subject matter jurisdiction over the action.

In ***Muscogee (Creek) Nation v. Oklahoma Tax Commission***, 611 F.3d 1222 (10th Cir. 2010), the Tribe brought an action under § 1983 against the Oklahoma Tax Commission (OTC) and its commissioners in their official capacities, alleging OTC and the Commissioners deprived the Tribe of due process of law and violated its Fourth Amendment rights in stopping its vehicles outside Indian country, searching them for cigarettes failing to bear a tax stamp, and seizing unstamped cigarettes. Judge Gorsuch joined a panel decision which affirmed the district court's (1) dismissal of OTC for lack of subject matter jurisdiction based on its Eleventh Amendment immunity; (2) recognition of

jurisdiction over Commissioners under *Ex parte Young*, at least to the extent the complaint sought prospective relief (*e.g.*, not money damages); and (3) dismissal of complaint based on the Supreme Court's holding in *Inyo County* that a Tribe seeking to vindicate its status as a "sovereign" and is not a "person" under § 1983.

Employment and Labor Law:

(1 case; 1 written opinion; 1 no Indian law question)

Swimmer v. Sebelius, 364 Fed.Appx. 441 (10th Cir. 2010), **does not involve a question of federal Indian law.** Ms. Swimmer, a Native American woman who worked as a supervisory medical technologist in the laboratory at Hastings Indian Medical Center, brought a Title VII and age discrimination suit against her employer when she was demoted and replaced by a younger white male. **Judge Gorsuch wrote the opinion** affirming the district court's grant of summary judgment in favor of the federal government on the basis that her claims were time-barred based on her failure to file the complaint within 90-days of the final agency decision.

Criminal Conviction Appeals:

(11 cases; 5(4) written opinions; 3 wins; 2 losses; 6 no Indian law question)[5]

United States v. Rentz, 777 F.3d 1105 (10th Cir. 2015) (en banc), **does not involve a question of federal Indian law. Judge Gorsuch wrote the majority opinion for an en banc** panel in a case involving a defendant charged with murder, assault and use of a firearm while within Indian country. 18 U.S.C. § 1111. This case involves the interpretation of a federal criminal statute, 18 U.S.C. § 924(c), and whether it "authorizes multiple charges [for use of a firearm] when everyone admits there's only a single use, carry, or possession."

In ***Nowlin v. United States***, 581 Fed.Appx. 722 (2014), Judge Gorsuch wrote a short, unpublished opinion affirming the district court's dismissal of Mr. Nowlin's petition seeking to set aside his federal assault convictions under the Major Crimes Act. In responding to his allegation of insufficient evidence of his "Indian" status, Judge Gorsuch applied the two-part test adopted by the Tenth Circuit to determine who is "Indian" under 25 U.S.C. § 1153, and found the facts disclosed, including that his

[5] Of the 11 Criminal Conviction Appeals cases, 6 have been identified as having no Indian law issue or interest. The 5 remaining cases are identified as involving tribal interests: *Nowlin* (status of Indian), *Reber* (tribal hunting claim), and *Yellowbear* (Indian country status) are counted as wins, at least at that stage of the criminal proceedings preserving the question of tribal interest; and *Benally* (racist jury foreman) and *Taylor* ("end cycle of violence" statement by prosecutor) are counted as losses based on the tribal interest for a "fair trial" in prosecution of Native American criminal defendants.

mother is an enrolled member of the Eastern Shoshone Tribe of the Wind River Reservation, a federally recognized Indian tribe, are sufficient evidence.

United States v. Dolan, 571 F.3d 1022 (10th Cir. 2009), **does not involve a question of federal Indian law.** Although Mr. Dolan and his victim were enrolled tribal members, and the crime occurred on the Mescalero Indian Reservation, this case involves the interpretation of the Mandatory Victim's Restitution Act and the meaning of the provision imposing a 90-day deadline for courts to enter a restitution order. 18 U.S.C. § 3664(d)(5). **Judge Gorsuch wrote the opinion** which held that since the district court had made several statements about plans to order restitution before the 90-day deadline had passed, the restitution order was still valid. On appeal, the Supreme Court of the United States affirmed the ruling. *Dolan v. United States*, 560 U.S. 605 (2010).

In ***United States v. Benally***, 560 F.3d 1151 (10th Cir. 2009), in response to a petition for rehearing en banc, four judges dissented from the majority of active judges who voted to deny the petition involving the conviction of a Native American by a jury whose foreman and another juror knowingly concealed racist views and stereotypes of Native American during voir dire, then later openly espoused those views during jury deliberations. The dissent would have the Tenth Circuit determine en banc whether a defendant can rely on testimony from other jurors in order to establish a violation of his Sixth Amendment right to an impartial jury and a right to a new trial. Judge Gorsuch voted with the majority to deny rehearing en banc.

United States v. Island, 316 Fed.Appx. 804 (10th Cir. 2009), **does not involve a question of federal Indian law.** Judge Gorsuch joined a panel decision which affirmed the conviction of the secretary for members of the business committee of the Cheyenne and Arapaho Indian Tribe of Oklahoma for conspiracy and embezzlement of net tribal gaming revenues, rejecting her arguments that the evidence was insufficient to support the verdict.

In ***Reber v. Steele***, 570 F.3d 1206 (2009), a 13-year old descendant of the Uintah Band of Indians who was convicted in Utah state juvenile court of felony wanton destruction of wildlife filed a federal habeas petition challenging state jurisdiction based on the fact that the hunting offense occurred on tribal land. Judge Gorsuch joined a panel decision which vacated the district court's denial of the petition on the merits, concluding that the habeas petition made the requisite "substantial showing of the denial of a constitutional right." However, the panel determined that the petition was premature since it was filed prior to his sentencing, and remanded the case to the district court with instructions to dismiss the petition without prejudice.

United States v. Lamy, 521 F.3d 1257 (10th Cir. 2008), **does not involve a question of federal Indian law.** Judge Gorsuch joined a panel decision which affirmed the conviction of an 18-year old member of the Zuni Tribe for aggravated sexual abuse in Indian country, rejecting his arguments that: (1) the

district court erred in denying the motion to suppress his written and oral statements based on his limited education and intelligence; (2) law enforcement officers violated his *Miranda* rights based on his inability to waive his Fifth Amendment Rights due to his low intelligence; and (3) the United States did not prove beyond a reasonable doubt that his crimes occurred in Indian country.

In ***Yellowbear v. Wyoming Atty. General***, 525 F.3d 921 (2008), Judge Gorsuch joined a panel decision reversing the district court's denial of Mr. Yellowbear's habeas corpus petition. The district court dismissed the petition filed under 28 U.S.C. § 2241 based on the *Younger* abstention doctrine and directed him to refile a petition under 28 U.S.C. § 2254 following his direct appeal to the Wyoming Supreme Court. In reversing, the panel re-characterized his § 2241 petition as a § 2254 petition and remanded to the district court to address the issue in the first instance. Mr. Yellowbear challenged state jurisdiction based on his contention that the crime occurred within Indian country.

In ***United States v. Taylor*****,** 514 F.3d 1092 (10th Cir. 2008), **Judge Gorsuch wrote a concurring opinion** in a case involving an assault resulting in serious bodily injury in a fight between two Indians on the Southern Ute Reservation in Colorado. During opening statements, the federal prosecutor urged the jury to convict Mr. Taylor in order to "end the cycle of violence" on the reservation. Mr. Taylor objected and the district court promptly issued a curative order, instructing the jury to "remember that what the lawyers tell you is not evidence, and the evidence in the case is what you must decide." The jury found Mr. Taylor guilty of the charges. For the first time on appeal, Mr. Taylor argued that the statement constituted prosecutorial misconduct imperiling his right to a fair trial. Although all three judges rejected Mr. Taylor's arguments on appeal and affirmed his conviction, the majority applied a "plain error" standard of review – a highly deferential standard of review. In contrast, Judge Gorsuch would have reframed the issue presented on appeal and, guided by existing precedent, applied a *de novo* standard of review.

United States v. Poole, 545 F.3d 916 (10th Cir. 2008), **does not involve a question of federal Indian law.** Rather, it involved a question of whether the verdict was impermissibly ambiguous when the jury, contrary to the court's instructions, found him guilty of both the greater offense (assault resulting in serious bodily injury) and the lesser offense (simple assault). **Judge Gorsuch wrote the opinion** and affirmed the conviction, finding that the district court took measures sufficient to render the verdict free of any reasonable claim of ambiguity.

United States v. Tucson, 248 Fed.Appx. 959 (10th Cir. 2007), **does not involve a question of federal Indian law.** Rather, it involved an allegation of prosecutorial misconduct for statements made during closing arguments regarding the ability of the defense to call a witness the federal government declines to call. **Judge Gorsuch wrote the opinion** and affirmed the conviction of the defendant for possession of controlled substances with intent to distribute which occurred within the Southern Ute Reservation.

Miscellaneous Cases:

(4 cases; 2(2) written opinions; 1 win; 3 no Indian law question)

(Environmental) ***WildEarth Guardians v. U.S. Environmental Protection Agency***, 759 F.3d 1196 (2014), **does not involve a question of federal Indian law.** An environmental group filed a petition pursuant to the Clean Air Act for review of a federal implementation plan promulgated by the EPA to reduce regional haze by regulating emissions from a privately owned coal-fired power plant located on the Navajo Reservation. Judge Gorsuch joined the panel decision which denied the petition.

(Property dispute) In ***Nahno-Lopez v. Houser***, 625 F.3d 1279 (10th Cir. 2010), individual tribal members of the Comanche Tribe who owned interests in an allotment, entered into a lease with the Fort Sill Apache Tribe of Oklahoma for a casino. After construction of a parking lot, a dispute arose and the tribal members brought claims, including a violation of 25 U.S.C. § 345 (exclusion from allotment) and common-law trespass. Judge Gorsuch joined a panel decision which construed the claims as one claim for *federal* common-law trespass, found that the tribal members' consent formed a complete defense to trespass, and affirmed the district court's grant of summary judgment to the Tribe.

(Antitrust) ***Four Corners Nephrology Associates PC v. Mercy Medical Center of Durango***, 582 F.3d 1216 (10th Cir. 2009), **does not involve a question of federal Indian law**. A non-profit hospital in Durango, CO, and the Southern Ute Indian Tribe reached an agreement to underwrite up to $2.5 million in anticipated losses for a start-up nephrology practice (which includes kidney dialysis) and to make that practice the exclusive provider of such services at the hospital. In response, Four Corners, a nephrology practice located in Farmington, NM, sued alleging monopolization and attempted monopolization of the market for nephrology services in violation of the Sherman Act and the Colorado Antitrust Act. **Judge Gorsuch wrote the opinion** and affirmed the district court's grant of summary judgment to the hospital, holding that "Mercy's failure to share its facilities is evidence of competitive-not anticompetitive-conduct, and whatever injury [Four Corners] may have suffered for [its] exclusion from the hospital's staff, it is not one that the antitrust laws were designed to remedy."

(Tort) ***Pino v. United States***, 507 F.3d 1233 (10th Cir. 2007), **does not involve a question of federal Indian law**. In response to the district court's grant of summary judgment to the federal government and a motion by the parents to certify the question, or alternatively appeal, **Judge Gorsuch wrote the opinion** certifying the question to the Oklahoma Supreme Court of whether a wrongful death action against an Indian health care facility for a nonviable stillborn fetus existed, under Oklahoma law, on the date of delivery of the fetus.