

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

DECEMBER 12, 2018

UPDATE OF RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy, and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (<http://sct.narf.org>).

On November 27, 2018, the Court heard argument in *Carpenter v. Murphy* (17-1107), which involves the alleged disestablishment of the Muscogee (Creek) Reservation. A summary of the case background and the Tenth Circuit's decision are included below. Justice Gorsuch was recused in this case. The remaining eight justices appeared split between those squarely committed to following the *Solem* framework to resolve this case, and those more concerned about the practical consequences of affirming the Tenth Circuit's ruling that the Tribe's reservation was not disestablished.

At oral argument, attorney Lisa Blatt for the State of Oklahoma asserted this case could be distinguished from *Solem* because in addition to divesting the Tribe's land title through allotment, Congress drastically curtailed tribal authority – a circumstance she claimed was not present in *Solem* or its progeny. Moreover, she argued that “affirmance would immediately trigger a seismic shift in criminal and civil jurisdiction.” Yet, Justices Sotomayor and Kagan were highly skeptical of this line of argument. At one point, Justice Kagan remarked: “I mean, in some ways, the Creek was unusual because it had had a good deal more tribal sovereignty than many tribes had.” Further, she pointed out that the restriction on tribal authority was present in “every single one of our *Solem* cases,” and later added, “We have never thought that the U.S. Government stripping a tribe of governmental powers was relevant to the question of whether a reservation existed.” However, the State's argument drew no questions from Chief Justice Roberts, Justice Ginsburg, or Justice Kavanaugh.

Edwin Kneedler, Deputy Solicitor General, argued on behalf of the United States as an amicus in support of Oklahoma. Similar to Oklahoma's primary line of argument, he asserted that what Congress did in this instance was fundamentally different from what it did in the “cases involving *Solem*.” He argued that here Congress was transforming a territory into a state, and in order to do that it broke up the “national domain” of tribes and vested governing authority in the state. During Mr. Kneedler's argument there were a lot of questions regarding practical consequences of affirming the Tenth Circuit – primarily from Justices Alito, Breyer, Kavanaugh, and Ginsburg as well as the Chief Justice – and this theme remained prominent throughout the balance of arguments from all the parties.

Arguing on behalf of Mr. Murphy, Ian Gershengorn urged the Court to adhere to its textualist approach from past cases: “*Parker* confirmed that the text is what governs, and the text here is particularly clear.” He argued that Congress considered legislative language that would have disestablished this reservation,

but rejected it in favor of language that prevented the land from entering the public domain. He drew a sharp distinction between what Congress mandated and the hostility that was “happening on the ground” at the behest of the federal executive branch, which he said embarked on a campaign of “bureaucratic imperialism” aimed at undermining tribal authority rather than following Congress’s directives. In response to the United States’ argument that elimination of the tribe’s reservation was necessary for statehood, Mr. Gershengorn pointed out that in 1790 three-quarters of the Tennessee was reservation land, that upon South Dakota statehood 47% of the state was reservation land, and that Arizona was comprised of 24% reservation land upon statehood.

Arguing on behalf of Muscogee (Creek) Nation, Riyaz Kanji emphasized that significant disruption would result not from affirming the Tenth Circuit, but from reversal. He stressed that other large metropolitan areas, such as Tacoma, Washington, exist within reservation boundaries without the dire consequences that Oklahoma suggests. If the Court affirms, he said, the state would retain significant authority over non-Indians and over non-Indian fee lands within the reservation, and that existing cooperative agreements would continue allocating tribal, state, and local governmental activities within the reservation boundaries. Much like Mr. Murphy’s attorney, Mr. Kanji distinguished between the disestablishment question before the Court and the framework for remedying any problematic consequences.

Finally, there was another significant development in the case after oral argument. On December 4, 2018, the Court ordered supplemental briefing by the parties, the Solicitor General, and the Muscogee (Creek) Nation on 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). This supplemental briefing will be completed by early January 2019. An argument transcript and audio recording as well as the Court’s supplemental order is available at: https://sct.narf.org/caseindexes/royal_v_murphy.html.

The next Indian law case that the Court will hear is *Herrera v. Wyoming*, which will be argued on January 8, 2019. The petition in *Stand Up for California! v. U.S. Dep’t of the Interior* (18-61) is scheduled for the January 4, 2019, conference. We also anticipate that two more Indian law petitions will be scheduled for conference in January 2019: *Harvey v. Ute Indian Tribe of the Uintah and Ouray Reservation* (17-1301) and *Osage Wind v. United States* (17-1237).

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

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

WASHINGTON STATE DEPARTMENT OF LICENSING V. COUGAR DEN (16-1498) – On June 25, 2018, the Court granted a petition filed by the Washington Department of Licensing seeking review of a decision by the Supreme Court of Washington, which held that the right-to-travel provision of the Yakama Nation Treaty of 1855 preempts the imposition of taxes and licensing requirements by the Department on a tribally chartered corporation that transports motor fuel across state lines for sale on the Reservation. The Department filed its merits brief on August 9, 2018, and the United States was among those that filed an amicus brief supporting the Department. Cougar Den filed its merits brief on September 17, 2018, and amicus brief supporting Cougar Den will be filed on or before September 24, 2018. The case was argued on October 30, 2018.

HERRERA V. WYOMING (17-532) – On June 28, 2018, the Court granted a petition for review filed by a member of the Crow Tribe that challenges a Wyoming state court conviction for unlawfully hunting elk in the Bighorn National Forest. The Crow Tribe’s 1868 treaty with the United States reserves hunting rights in ceded lands, which includes what is now the Bighorn National Forest, so long as those lands remain “unoccupied.” However, the state court did not allow Petitioner to assert the Tribe’s treaty hunting right as a bar to prosecution, instead holding that Wyoming’s admission to the Union abrogated the Tribe’s treaty hunting rights, and in the alternative that the creation of the Bighorn National Forest constituted an “occupation” of those lands. A state appellate court affirmed, and the Wyoming Supreme Court denied review. On January 8, 2018, the Court called for the views of the Solicitor General, and on May 22, 2018, the United States filed its brief recommending that the Court grant the petition. Mr. Herrera filed his brief on September 4, 2018, and 10 amicus briefs were filed supporting him, including one by the United States. The case will be argued on January 8, 2019.

CARPENTER V. MURPHY (17-1107) – On May 21, 2018, the Court granted a petition filed by the State of Oklahoma seeking review of a U.S. Tenth Circuit Court of Appeals decision in a habeas corpus action, which reversed the District Court and held that the State of Oklahoma was without jurisdiction to prosecute and convict a member of the Muscogee (Creek) Nation because the crime for which he was convicted occurred in Indian country, within the boundaries of the Muscogee (Creek) Reservation. After Mr. Murphy was convicted of murder in Oklahoma State court and exhausted his appeals, he filed a habeas corpus petition in federal district court asserting that because the crime occurred within the Muscogee (Creek) Nation’s reservation boundaries, and because he is Indian, the state court had no jurisdiction. The federal district court denied his petition, holding that Oklahoma possessed jurisdiction because the Muscogee (Creek) Reservation was disestablished. On appeal, the Tenth Circuit Court of Appeals utilized the three-factor *Solem* reservation disestablishment analysis and not only found that Congress did not disestablish the Muscogee (Creek) Reservation, but also that statutes and allotment agreements showed that “Congress recognized the existence of the Creek Nation’s borders.” Likewise, the court held that the historical evidence indicated neither a Congressional intent to disestablish the Muscogee (Creek) reservation, nor a contemporaneous understanding by Congress that it had disestablished the reservation. Accordingly, the court concluded that (1) Mr. Murphy’s state conviction and death sentence were invalid because the crime occurred in Indian Country and the accused was Indian, (2) the Oklahoma Court of Criminal Appeals (OCCA) erred by concluding the state courts had jurisdiction, and (3) the federal district court erred by concluding the OCCA’s decision was not contrary to clearly established federal law.

The Court heard oral argument on November 27, 2018, and, on December 4, 2018, the Court ordered supplemental briefing by the parties, the Solicitor General, and the Muscogee (Creek) Nation addressing two questions: (1) whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area’s reservation status, and (2) whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).

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:

STAND UP FOR CALIFORNIA! V. U.S. DEP'T OF THE INTERIOR (18-61) – On July 9, 2018, Stand Up for California! and several individuals (collectively “Stand Up”) filed a petition seeking review of a D.C. Circuit Court of Appeals decision, which affirmed a district court’s entry of summary judgement against them. Stand Up brought suit against the Department of the Interior (DOI) and the North Fork Rancheria Band of Mono Indians (North Fork), challenging DOI’s decisions to take land into trust for the benefit of North Fork and to authorize it to operate a casino on that land. Among other things, Stand Up claimed that DOI’s decision to allow gaming on North Fork’s newly acquired land was erroneous because it would have detrimental impacts on the surrounding community. Stand Up also asserted that North Fork is not a “Tribe” under the Indian Reorganization Act, and therefore that DOI was not authorized to take the parcel into trust. The district court granted partial summary judgement to DOI and North Fork, and the D.C. Circuit affirmed. After filing of the petition at the Supreme Court, North Fork and the United States waived their right to respond; however, the Court requested responses. The petition is scheduled for the January 4, 2019, conference.

HARVEY V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (17-1301) – On March 7, 2018, a petition was filed seeking review of a Utah Supreme Court decision, which affirmed the state trial court’s conclusion that the plaintiffs must first exhaust tribal court remedies before proceeding in state court. The dispute arose from the Ute Tribe Employment Rights Office’s revocation of the plaintiff companies’ licenses to operate on Tribal lands for failure to comply with a tribal ordinance. An individual and two corporations brought an action against the Tribe, tribal officials, companies owned by the tribal officials, and other private companies, alleging state law causes of action as well as federal claims that the tribe and tribal officials exceeded their jurisdiction. The plaintiffs did not file an action in tribal court, but went directly to Utah state court. The state trial court dismissed the case against the tribe and tribal officials on several bases, and stated that the plaintiffs’ claim that the tribal officials exceeded their jurisdiction or acted outside the scope of their authority under tribal law must be addressed by the tribe’s courts. The Utah Supreme Court affirmed the trial court’s holding of tribal court exhaustion and remanded to the trial court to determine whether the case should be dismissed or stayed pending tribal adjudication. On June 25, 2018, the Court called for the views of the Solicitor General, and on December 4, 2018, the United States filed a brief recommending that the Court deny the petition.

OSAGE WIND V. UNITED STATES (17-1237) – On March 2, 2018, a petition was filed seeking review of a Tenth Circuit Court of Appeals decision, which reversed the district court and held that (1) the Osage Minerals Council was entitled to appeal district court’s grant of summary judgment to a wind energy company, even though it had not intervened in the district court; and (2) the activity of Osage Wind (a private company not affiliated with the Tribe) constituted “mining” under the Osage Act and the Department of the Interior’s implementing regulations, thus requiring them to obtain a federally approved lease. The United States, as trustee for the Osage Nation, filed suit to enjoin excavation work being done by Osage Wind as part of the construction of a wind farm and on land where the Tribe owned the subsurface oil, gas, and mineral rights. The district court, in granting summary judgement for Osage Wind, concluded that the company’s activities were not “mining” under applicable regulations and, therefore, no federally approved mineral lease was required. The United States did not appeal, but the Osage Minerals Council moved to intervene after summary judgement and filed an appeal. In reversing

the trial court, the Tenth Circuit found ambiguities in the relevant regulatory definition of “mining” and, utilizing the Indian canon of construction, construed the term in the Tribe’s favor. On May 14, 2018, the Court called for the views of the Solicitor General, and on December 4, 2018, the United States filed a brief recommending that the Court deny the petition.

POARCH BAND OF CREEK INDIANS, ET AL. V. WILKES, ET AL. (17-1175) – On February 16, 2018, the Poarch Band of Creek Indians (Tribe) filed a petition seeking review of an Alabama Supreme Court decision, which reversed a state lower court and held that the Tribe was not entitled to sovereign immunity from a tort claim brought by a non-member in state court. Two non-members of the Tribe sued the Tribe in Alabama state court seeking compensation for injuries they received in an automobile accident that occurred off tribal land and was caused by an employee of the Tribe’s casino. The state trial court granted the Tribe’s motion for summary judgement based on the Tribe’s sovereign immunity. The Supreme Court of Alabama reversed, holding that “the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members.” The Respondents waived their right to respond, and the petition was scheduled for the Court’s April 13, 2018, conference; however, the Court requested a response, which was filed on June 8, 2018. On October 1, 2018, the Court called for the views of the Solicitor General.

BEARCOMESOUT V. UNITED STATES (16-30276) – On November 14, 2017, a Native American defendant in a criminal case filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court and held that the Double Jeopardy Clause of the Fifth Amendment does not bar federal court prosecution subsequent to a conviction for the same offense in tribal court. The Petitioner was charged with homicide in tribal court for the killing of another Indian on the Northern Cheyenne Reservation. She reached a plea agreement and served two consecutive one-year sentences in tribal custody. Near the end of her sentence, she was indicted on federal homicide charges. She moved to dismiss the federal indictment on Double Jeopardy grounds, which was denied by the federal district court, and the Ninth Circuit affirmed. The United States waived its right to respond to the petition, and it was scheduled for the January 5, 2018, conference, but was held over 10 times. On June 27, 2018, the Court requested a response from the United States. The United States filed a memorandum recommending the Court hold this petition pending the disposition of *Gamble v. United States* (17-646), a case challenging the constitutionality of successive state and federal prosecutions, on which the Court heard argument on December 6, 2018.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

WHITE, ET AL. V. UNDERWOOD, ET AL. (18-297) – On October 29, 2018, the Court denied a petition filed by a tribal retailer located on the Seneca Nation’s reservation that sought review of a New York State Court of Appeals decision. That court held that a New York State law requiring the retailer to prepay a cigarette sales tax levied on non-member customers is not a direct tax on the tribal retailer and, therefore, violates neither a state law prohibiting imposition of state taxes upon Indians living on-reservation nor a similar provision in the Tribe’s 1842 treaty with the United States.

CITIZEN POTAWATOMI NATION V. OKLAHOMA (17-1624) – On October 15, 2018, the Court denied a petition filed by the Citizen Potawatomi Nation (the Tribe) seeking review of a Tenth Circuit Court of Appeals decision, which reversed and remanded to the district court with instructions to vacate an arbitration award. The dispute arose over the sale and taxation of liquor at one of the Tribe’s casinos. When the state’s Alcoholic Beverage Laws Enforcement Commission and the Oklahoma Tax Commission initiated administrative proceedings, the Tribe invoked the arbitration provision of the tribal-

state gaming compact and prevailed in the arbitration proceedings. At the Tribe's request, a federal district court entered an order enforcing the arbitration award. On appeal, the Tenth Circuit agreed with the district court that the *de novo* review provision of the compact's binding arbitration clause was legally invalid, but found that provision to be a material aspect of the arbitration clause and, accordingly, held that the entire arbitration clause must be severed from the compact.

MAKAH INDIAN TRIBE V. QUILEUTE INDIAN TRIBE, ET AL. (17-1592) – On October 1, 2018, the Court denied a petition filed by the Makah Indian Tribe seeking review of the Ninth Circuit Court of Appeals decision regarding a subproceeding of *U.S. v. Washington*. The subproceeding was initiated by the Makah Indian Tribe and sought a court determination of the usual and accustomed fishing grounds of two other tribes. The Ninth Circuit described “the crux of this appeal” as “whether the term ‘fish’ in the [Treaty of Olympia] includes whales and seals,” and held that the district court did not clearly err when it determined that the word “fish” as used in that treaty included sea mammals.

COUNTY OF AMADOR, CALIFORNIA V. U.S. DEP'T OF THE INTERIOR (17- 1432) – On October 1, 2018, the Court denied a petition filed by a California county government seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court's summary judgement in favor of the Department of the Interior (DOI) and Intervenor Ione Band of Miwok Indians (Ione). Amador County sued DOI, challenging a record of decision announcing its intention to take land into trust for benefit of Ione pursuant to the Indian Reorganization Act (“IRA”) and allowing Ione to build a casino on that land. Ione intervened as a defendant. On appeal, the Ninth Circuit held that: (1) the phrase “recognized Indian tribe now under Federal jurisdiction” in the IRA includes all tribes that are “recognized” at the time of the relevant decision and that were “under Federal jurisdiction” at the time the IRA was passed; (2) DOI set forth the best interpretation of the phrase “under Federal Jurisdiction” in the IRA, which defines an “Indian” entitled to IRA's benefits; (3) DOI's determination that tribe was “under Federal jurisdiction” when IRA was passed was not arbitrary and capricious; and (4) a grandfathering provision in the DOI regulation implementing the “restored tribe” exception in the Indian Gaming Regulatory Act (“IGRA”) was in accordance with IGRA.

LUMMI TRIBE OF THE LUMMI RESERVATION, ET AL., V. UNITED STATES (17-1419) – On October 1, 2018, the Court denied a petition filed by an Indian Tribe and three Tribal housing entities seeking review of a United States Court of Appeals for the Federal Circuit decision, which held that the Native American Housing Assistance and Self Determination Act (NAHASDA) was not a money-mandating statute and, therefore, that the Federal Court of Claims was without subject matter jurisdiction over a suit seeking damages for grant funds withheld by the Department of Housing and Urban Development (HUD). The Tribe and Tribal housing entities sued HUD under the Tucker Act and Indian Tucker Act, claiming that HUD illegally reduced their NAHASDA grant funds in order to recapture allegedly improper payments previously paid by the agency.

FORT PECK HOUSING AUTHORITY, ET AL., V. DEP'T OF HOUSING AND URBAN DEVELOPMENT, ET AL. (17-1353) – On October 1, 2018, the Court denied a petition filed by several Indian Tribes seeking review of a Tenth Circuit Court of Appeals decision, which affirmed in part and reversed in part the District Court. The dispute arose out of the Department of Housing and Urban Development (HUD) attempting to recapture alleged overpayments made to the Tribes under an affordable housing program. The Tenth Circuit affirmed the District Court's holding that HUD lacked the authority to recapture alleged overpayments via administrative offset. However, it reversed the District Court's order to repay the Tribes, holding that it was in the nature of money damages, which is precluded by sovereign immunity.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Kurt Sodee, 1516 P Street, NW, Washington, DC 20005. **Please contact us if you have any questions or if we can be of assistance: Derrick Beetso, NCAI General Counsel, 202-630-0318 (dbeetso@ncai.org), or Joel West Williams, NARF Senior Staff Attorney, 202-785-4166 (williams@narf.org).**