

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

UPDATE OF RECENT CASES

SEPTEMBER 27, 2019

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 October 1, 2019, the justices will return for the opening conference of the October Term 2019, sometimes called the “long conference.” There, the Court will consider approximately two-thousand petitions that were pending when it recessed in June or have been filed since then. One petition involving Tribal parties is scheduled for that conference: *Oglala Sioux Tribe v. Fleming* (18-1245) (*Younger* abstention), which is summarized below.

Looking ahead to the October Term 2019, the Court already has granted 41 petitions – close to half of the cases it will hear. With several significant cases already on the court’s docket involving the Second Amendment, employment discrimination, religious freedom, and immigration, many court watchers have observed that this is likely to be an exciting term. At this time, the Court has not granted any new Indian law petitions, but one case argued during the previous term will be re-argued: *Carpenter v. Murphy* (17-1107) (reservation disestablishment). Besides *Murphy* and *Fleming*, there are only four other petitions in Indian law or Indian law-related cases pending: *Alabama-Coushatta Tribe of Texas v. State of Texas* (19-403) (IGRA); *California Trout v. Hoopa Valley Tribe* (19-257) (Clean Water Act); *Knighton v. Cedarville Rancheria of Northern Paiute Indians* (19-131) (tribal court jurisdiction); and *Buchwald Capital Advisors LLC v. Sault Ste. Marie Tribe of Chippewa Indians* (18-1218) (tribal sovereign immunity). Details on these matters are provided below.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case that has not been decided by the Court:

CARPENTER V. MURPHY (17-1107)

Petitioner: State of Oklahoma

Petition Granted: May 21, 2018

Subject Matter: Reservation Disestablishment

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

Recent Activity: Re-argument Ordered

Upcoming Activity: Re-argument (no date set)

Patrick Murphy, a citizen of the Muscogee (Creek) Nation, was convicted of murder in Oklahoma State court. After exhausting his appeals, he filed a habeas corpus petition in federal district court asserting that, because the crime occurred within the Muscogee (Creek) Nation's reservation boundaries and because he is Indian, the state court had no jurisdiction. The federal district court denied his petition and the Tenth Circuit reversed. The Tenth Circuit utilized the three-factor *Solem* reservation disestablishment analysis and found that Congress did not disestablish the reservation, and that statutes and allotment agreements showed that "Congress recognized the existence of the Creek Nation's borders." Likewise, the court held that the historical evidence indicated neither a Congressional intent to disestablish the reservation, nor a contemporaneous understanding by Congress that it had disestablished the reservation. Accordingly, the court concluded that Mr. Murphy's state conviction and death sentence were invalid because the crime occurred in Indian Country and the accused was Indian.

The Supreme Court heard oral argument on November 27, 2018, and, on December 4, 2018, it ordered supplemental briefing by the parties, the Solicitor General, and the Muscogee (Creek) Nation addressing two questions: (1) whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status, and (2) whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. §1151(a). On June 27, 2019, the Court announced that the case would be scheduled for re-argument in the October Term 2019 but no date has been set.

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:

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

Petitioner: Alabama-Coushatta Tribe of Texas

Petition Filed: September 23, 2019

Subject Matter: IGRA

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

Recent Activity: Petition filed

Upcoming Activity: Brief in opposition due October 25, 2019

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

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

Petitioner: California Trout and other conservation organizations

Petition Filed: August 26, 2019

Subject Matter: Clean Water Act

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

Recent Activity: Siskiyou County waived its response; the Court granted extensions to all other respondents

Upcoming Activity: Briefs in opposition due October 28, 2019

This case involves the relicensing of the Klamath Hydroelectric Project (Project), which is a series of hydroelectric dams on the Klamath River in Oregon and California owned by PacifiCorp. Pursuant to the Clean Water Act, relicensing with the Federal Energy Regulatory Commission (FERC) requires that an applicant submit a certification from relevant states that discharges from the project will comply with state water quality requirements. Such certifications are requested by the applicant directly to state officials, who have "a reasonable period of time (which shall not exceed one year)" to act on the request, or their certification authority is waived – allowing the applicant to move forward in relicensing without the certification. In order to delay relicensing while settlement agreements were being negotiated and

implemented (which likely would result in decommissioning the Project), PacifiCorp routinely submitted their certification requests, withdrew them just before the one-year period passed, and then immediately resubmitted the requests. This occurred with the acquiescence of the states, believing this would delay certification (and relicensing) without triggering a waiver. The Hoopa Valley Tribe (Tribe) petitioned FERC for an order declaring the withdrawal and resubmission process did not trigger new periods of review, and that the states had waived their certification authority. FERC denied the petition, and the Tribe appealed to the D.C. Circuit. In ruling in the Tribe's favor, the D.C. Circuit concluded that, in substance, PacifiCorp was not submitting new requests – each one was the same as the last – and was done by agreement of PacifiCorp and the states. The court observed: “Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.”

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

Petitioner: Duanna Knighton

Petition Filed: July 23, 2019

Subject Matter: Tribal court jurisdiction

Lower Court: The Ninth Circuit affirmed tribal court jurisdiction

Recent Activity: The Court granted an extension of time to respond

Upcoming Activity: Brief in opposition due October 10, 2019

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

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

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

Petition Filed: March 18, 2019

Subject Matter: Tribal sovereign immunity, bankruptcy

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

Recent Activity: The Court has granted repeated extensions of time to respond, pending settlement discussions

Upcoming Activity: Brief in opposition due October 18, 2019

This case arises out of the May 2008 bankruptcy of Detroit's Greektown Casino, which was owned by the Sault Ste. Marie Tribe of Chippewa Indians (Tribe) and its political subdivisions. Under the debtors' plan of reorganization, the Greektown Litigation Trust was created to pursue claims belonging to the debtors' estate for the benefit of unsecured creditors. Buchwald Capital Advisors was appointed as the Trust's litigation trustee, and filed this suit seeking avoidance and recovery of allegedly fraudulent transfers made to the Tribe. The Sixth Circuit concluded that the statutory language used in the Bankruptcy Code did not evidence an “unequivocal expression of congressional intent” to abrogate tribal sovereign immunity.

OGLALA SIOUX TRIBE V. FLEMING (18-1245)

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

Petition Filed: March 4, 2019

Subject Matter: *Younger* abstention

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

Recent Activity: Conference scheduled

Upcoming Activity: Petition scheduled for the October 1, 2019, conference.

This case arises from a § 1983 class action suit brought by the Tribal Parties against South Dakota state officials, alleging that emergency child removal hearings violated the Due Process Clause and the Indian Child Welfare Act (ICWA) by denying Indian parents a meaningful hearing after their children were taken into temporary state custody. On appeal, the Eighth Circuit held that the district court should have abstained from exercising jurisdiction under the *Younger* abstention doctrine because the proposed relief would interfere with ongoing state temporary custody proceedings. Alternatively, the court held that even if the requested relief was purely prospective, abstention still would be warranted because relief was “aimed at controlling or preventing the occurrence of specific events that might take place” in future state court proceedings.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, 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).**