

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

UPDATE OF RECENT CASES

JANUARY 17, 2020

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

We are now approximately one-third of the way through the Court's October 2019 Term, and at about the halfway point on the Court's argument calendar. So far, there have been fewer petitions for review filed in Indian law cases than we have seen in several years. Currently, there are only three Indian law petitions pending, and so far this term the Court has denied review in eight Indian law cases.

In an unusual twist, the two Indian law cases in which the Court has granted review present the same question: whether the Muscogee (Creek) Nation's reservation was disestablished. The question first reached the Court last term in *Sharp v. Murphy* (17-1107). After oral argument, the Court requested supplemental briefing, then announced during its last sitting of the term that the case would be scheduled for re-argument in the October 2019 Term. Argument had not been scheduled when, on December 13, 2019, the Court granted review in *McGirt v. Oklahoma* (18-9526), which presents the same reservation disestablishment question as *Murphy*. Presumably, the Court took this second case because it had yet to reach a majority position in *Murphy* and the difference in procedural posture made reaching a majority position in *McGirt* more likely. This is because Justice Gorsuch is recused in *Murphy* due to his service as a Tenth Circuit Court of Appeals judge while the case was pending before that court. By contrast, *McGirt* reaches the Supreme Court on appeal from an Oklahoma state court and, therefore, Justice Gorsuch is not recused.

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:

MCGIRT V. OKLAHOMA (18-9526)

Petitioner: Jimcy McGirt

Petition Granted: December 13, 2019

Subject Matter: Reservation Disestablishment

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

Recent Activity: Petition granted

Upcoming Activity: Petitioner's brief due February 4, 2020

Petitioner Jimcy McGirt, a citizen of Seminole Nation and Muscogee (Creek) Nation, was convicted of several felony sex crimes in Oklahoma state court. He sought post-conviction relief in state court, asserting that the crimes occurred within the boundaries of the Muscogee (Creek) Reservation and, therefore, the State had no jurisdiction over him for the offenses. The state district court denied his petition, and the Oklahoma Court of Criminal Appeals affirmed.

SHARP V. MURPHY (17-1107)

Petitioner: State of Oklahoma

Petition Granted: May 21, 2018

Subject Matter: Reservation Disestablishment

Lower Court Decision: On a petition challenging his detention by the State of Oklahoma as improper, 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: Argument held November 27, 2018. Re-argument was ordered in June 2019.

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 used 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:

MCMAHON V. CHEMEHUEVI INDIAN TRIBE (19-820)

Petitioner: John McMahon, in his official capacity as Sheriff of San Bernardino County

Petition Filed: January 3, 2020

Subject Matter: Reservation status

Lower Court Decision: The Ninth Circuit Court of Appeals, reversing in part and affirming in part, held that the location where county sheriff's deputies issued citations to tribal members was within an Indian reservation, and, therefore, the deputies lacked jurisdiction to enforce state regulatory traffic laws.

Recent Activity: Cert petition filed

Upcoming Activity: Brief in Opposition due January 30, 2020

The Chemehuevi Indian Tribe and four tribal members (Tribal Parties) filed § 1983 action against county sheriff and deputies, claiming they illegally detained and issued citations to tribal members for violating California regulatory traffic laws. The Tribal Parties asserted that the location where the citations were issued was within the Tribe's reservation boundaries, and therefore the sheriff's deputies lacked jurisdiction. The District Court concluded that the area was not within the Tribe's reservation boundaries because the United States deeded the tract in question to California prior to the reservation's creation. The Ninth Circuit reversed, concluding that who held title to the land was irrelevant to the question of the Tribe's reservation boundary.

TERRY V. OKLAHOMA (18-8801)

Petitioner: Patrick Terry

Petition Filed: April 4, 2019

Subject Matter: Reservation disestablishment

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

Recent Activity: Scheduled for the October 1, 2019, conference. Subsequently relisted 8 times.

Upcoming Activity: Presumably being held by the Court pending decisions in *Sharp v. Murphy* and *McGirt v. Oklahoma*.

Petitioner, a citizen of the Cherokee Nation, was convicted of several drug-related offenses in Oklahoma state court. He asserts that the location in which the crime occurred was "Indian Country," and therefore the state court was without authority to convict him of the offenses.

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 Decision: 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 February 18, 2020

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.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

SPURR V. POPE (19-598)

Petitioner: Joy Spurr

Petition Filed: November 7, 2019

Subject Matter: Tribal Court Jurisdiction

Lower Court Decision: The Sixth Circuit Court of Appeals, affirming the district court, held that a tribal court had jurisdiction under federal law to issue a civil personal protection order against a non-Indian in a matter arising in the Indian country of the tribe.

Recent Activity: Cert denied on January 13, 2020

A tribal citizen sought an ex parte personal protection order (PPO) from the Nottawaseppi Huron Band of the Potawatomi tribal court, alleging that his step-mother (Spurr), a non-Indian, was harassing him. The court granted the PPO and, after a later hearing, made the order permanent. Spurr appealed to the tribe’s Supreme Court, which affirmed. Spurr filed suit in federal court against the trial judge, the Tribe’s Supreme Court, and the Tribe itself, seeking declaratory and injunctive relief. The federal district court dismissed the complaint, concluding that 18 U.S.C. § 2265 conferred jurisdiction on the tribal court to issue the protective order. On appeal, the Sixth Circuit held that sovereign immunity barred the suit against the Tribe and the Tribe’s Supreme Court (the tribal trial court judge waived immunity on appeal). It also affirmed the trial court’s holding that the Tribal court had jurisdiction to issue the order.

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

Petitioner: Alabama-Coushatta Tribe of Texas

Petition Filed: September 23, 2019

Subject Matter: Indian Gaming Regulatory Act (IGRA)

Lower Court Decision: 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 (NIGC).

Recent Activity: Cert denied on January 13, 2020

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 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 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.

KUROWSKI V. ESTATE OF KENNETH H. KUROWSKI (19-477)

Petitioner: Arletta Kurowski

Petition Filed: October 10, 2019

Subject Matter: Federal court jurisdiction

Lower Court Decision: The Seventh Circuit Court of Appeals, affirming the district court, held that the district court lacked jurisdiction to hear an appeal from a tribal court filed with a federal district court.

Recent Activity: Cert denied on December 16, 2020

Petitioner sued the estate of her ex-husband in Oneida Nation tribal court in an attempt to collect child support arrears. The court ruled against her and Tribe's supreme court affirmed. She then filed a "notice of appeal" in the District Court for the Eastern District of Wisconsin. The district court determined that it lacked jurisdiction to review the decision of the Oneida judiciary and dismissed the case. The Seventh Circuit Court of Appeals affirmed.

COTTIER V. U.S. (18-9261)

Petitioner: Calmer Cottier

Petition Filed: May 15, 2019

Subject Matter: Criminal procedure

Lower Court Decision: The Eighth Circuit held that admission of factual-basis statement of another defendant was not reversible plain error under the circumstances of this case.

Recent Activity: Cert denied on December 9, 2019.

Petitioner is an Indian convicted of murder in Indian Country. Two other participants in the crime accepted plea deals and signed factual-basis statements that implicated Mr. Cottier. A federal prosecutor also signed those statements to vouch for their veracity and later offered those incriminating statements as evidence at Cottier's trial. The defense did not object to their admission and later relied on them as part of their defense case. On appeal, the Eighth Circuit stated that allowing unredacted factual-basis statements into the jury room is disfavored, but concluded that under the circumstances of this case was not reversible error due to the defense's failure to object and the other overwhelming evidence of guilt. Justice Sotomayor issued a statement respecting the denial of certiorari, which reiterated that admission of factual-basis statements are disfavored, but did not merit the Court's review under the circumstances 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 Decision: The Court of Appeals for the D.C. Circuit held that the States of Oregon and California waived their authority under the Clean Water Act to issue water quality certifications within one year of initial application

Recent Activity: Petition denied on December 9, 2019.

This case involves the relicensing of the Klamath Hydroelectric Project (Klamath 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 Klamath 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 Klamath 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 Decision: The Ninth Circuit affirmed tribal court jurisdiction

Recent Activity: Petition denied on November 12, 2019.

Duanna Knighton, a non-member, was employed by the Cedarville Rancheria of Northern Paiute Indians (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.

SMITH V. UNITED STATES (19-5744)

Petitioner: Johnny Smith

Petition Filed: August 26, 2019

Subject Matter: Federal criminal jurisdiction

Lower Court Decision: The Ninth Circuit, affirming the district court, held that the federal government had criminal jurisdiction over a victimless crime committed by an Indian in Indian Country.

Recent Activity: Petition denied October 15, 2019

Petitioner, Johnny Smith, a citizen of Confederated Tribes of Warm Springs, fled in his vehicle from Warm Springs police officers when they tried to initiate a traffic stop and was convicted in the district court of fleeing or attempting to elude a police officer under Assimilative Crimes Act (ACA) and Indian Country Crimes Act (ICCA). On appeal, the Ninth Circuit held that the ACA conferred jurisdiction on the United States for prosecution of the offense, and that the ICCA, although limiting some aspects of jurisdiction conferred by the ACA, does not exclude the prosecution of Indians for victimless crimes committed in Indian Country.

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 Decision: 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: Petition denied October 7, 2019

This cases arose from a class action suit brought by the Tribal Parties against South Dakota state officials under 42 U.S.C. § 1983, 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, the NCAI Fund and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to the NCAI Fund, 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).**