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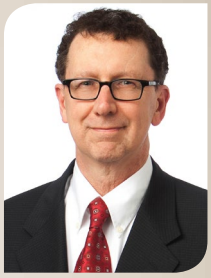

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Supreme Court hears oral arguments in two Indian law cases

The Court heard arguments in *Washington State v. Cougar Den* on Oct. 30. Article III of the treaty of 1855 between the United States and the Yakama Nation provided: "If necessary for the public convenience, roads may be run through the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways." Cougar Den, a corporation owned by Ramsey, a member of the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation), contracted with KAG West, a trucking company, to transport fuel from Oregon to the Yakama Indian Reservation, where he sold it. The Washington Department of Licensing (Department) sought to assess Cougar Den $3.6 million in unpaid importation taxes, penalties and licensing fees under state law for hauling the fuel across state lines. The State trial court held that the state tax violated the tribe's right to travel. The Washington Supreme Court, affirmed, holding that "[b]ased on the historical interpretation of the Tribe's essential need to travel extensively for trade purposes, this right is protected by the treaty." Before the Supreme Court, the parties argued over whether the Washington tax should be viewed as a tax on fuel or a tax on travel and whether the phrase "in common with citizens" should be understood to give tribes and their members greater rights than other citizens, as interpreted in fishing rights cases, or merely to give tribes the same rights as others.

The Court heard arguments in *Carpenter v. Murphy* on Nov. 27. Murphy, a member of the Muscogee Creek Tribe of Oklahoma, challenged his state court murder conviction on that ground that the Creek Reservation was not terminated by congressional acts at the turn of the 20th century and that jurisdiction over his crime, murder of another Creek Indian, lay exclusively in the federal court under the Major Crimes Act. The Tenth Circuit agreed. The United States supported the position of the State of Oklahoma that the Creek Reservation had long ago been disestablished and that a decision in Murphy's favor would overturn long-held assumptions regarding state and federal jurisdiction and cause the state to lose tax revenue. The justices focused to a large degree on the potential adverse consequences, or lack thereof, if the Tenth Circuit's decision were affirmed, suggesting that, on purely legal grounds, they believe the Tribe to have the stronger case.

Decisions in both cases are likely by spring, 2019.

Selected court decisions

In *Wilson v. Horton's Towing*, 2018 WL 4868025 (9th Cir. 2018), Gates, a Lummi Tribal police officer, arrested Wilson, a non-Indian, on a state highway within the Lummi Reservation. After finding marijuana in Wilson's auto, Gates alerted the State Highway Patrol, whose officers arrested Wilson for driving while intoxicated. At the direction of the State patrol, Horton's Towing towed Wilson's Dodge Ram

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off the Reservation. The next day, the Lummi Tribal Court issued a "Notice of Seizure and Intent to Institute Forfeiture," citing a Lummi Nation law that prohibits the possession of marijuana over one ounce and provides civil forfeiture as a penalty. After Gates presented Horton's Towing with the forfeiture notice, Horton's Towing released the truck to Gates. Wilson sued Horton's Towing and Gates. After the filing of a certification by the Attorney General, the district court substituted the United States as a party for Officer Gates pursuant to the Westfall Act, which provides that the United States shall be named as the defendant in any tort action covered by the Federal Tort Claims Act (FTCA). The district court then granted the defendants summary judgment on the ground that Wilson had failed to exhaust his tribal remedies against Horton's Towing and had failed to exhaust his administrative remedies against the United States under the FTCA. The Ninth Circuit Court of Appeals affirmed the grant of summary judgement but vacated with instructions to dismiss the action without prejudice to refiling after the plaintiff exhausted his appropriate remedies: The Court rejected Wilson's argument that **exhaustion of tribal remedies** was unnecessary because the Tribe's lack of jurisdiction was plain: "Immediately after leaving the casino, Wilson was found with several containers of marijuana in his truck. Lummi law prohibits the possession of over one ounce of marijuana, and makes the vehicle used to transport this contraband the target of civil forfeiture. Although Wilson was stopped on the state road, one could logically conclude that the forfeiture was a response to his unlawful possession of marijuana while on tribal land. So interpreted, the events giving rise to the conversion claim reveal a 'direct connection to tribal lands,' … and provide at least a colorable basis for the tribe's civil jurisdiction over the dispute."

In *Narragansett Indian Tribe v. Rhode Island Department of Transportation*, 903 F.3d 26 (1st Cir. 2018), the Narragansett Indian Tribe foresaw that a proposed I-95 bridge replacement project in Providence, Rhode Island, would adversely affect the Providence Covelands Archaeological District, a historic property under the **National Historic Preservation Act** (NHPA) and a site of importance to the Tribe. The Tribe, the Federal Highway Administration (FHA), the Rhode Island Department of Transportation (RIDOT), and two historic preservation agencies (the federal Advisory Council on Historic Preservation and the Rhode Island Historical Preservation and Heritage Commission) reached an agreement providing that, as mitigation for the expected negative impact of the bridge renovation, RIDOT would give the Tribe three parcels of land. The state later insisted that the Tribe waive any claim of sovereign immunity on those lands and agree that Rhode Island civil and criminal laws apply. The Tribe refused. The FHA and RIDOT then terminated the agreement in its entirety, leaving FHA free to follow the standard NHPA process to meet its statutory obligation. The Tribe sued, alleging breach of contract and seeking both a declaration that the agreement remains in effect and a court order directing RIDOT to transfer the properties to the Tribe in accordance with the Tribe's interpretation of the agreement. The District Court granted defendants' motion to dismiss for lack of subject matter jurisdiction, and the First Circuit affirmed, holding that (1) the NHPA did not expressly or implicitly waive federal government's sovereign immunity, and (2) The Tribe's breach of contract claim did not have any substantive basis in NHPA and thus the federal court lacked federal question jurisdiction over the breach of contract claim against state agencies.

In *Mitchell v. Tulalip Tribes of Washington*, --- Fed.Appx. --- 2018 WL 5307748 (9th Cir. 2018), the Mitchells, a married couple, and two other married couples were non-tribal property owners in fee simple of residences within the historical boundaries of the Tulalip Indian Reservation in Snohomish County, Washington. They sued in federal court for declaratory and injunctive relief seeking to quiet title against the Tulalip Tribes of Washington regarding tribal ordinances that they alleged create a cloud on their title. The district court dismissed the claims as unripe. The Ninth Circuit affirmed instead on the ground of **sovereign immunity**: "Indian tribes possess 'the common-law immunity from suit traditionally enjoyed by sovereign powers.' … This common-law immunity from suit applies to actions for injunctive and declaratory relief. Congress must 'unequivocally express' its intent to abrogate immunity. … 'The tribe's immunity is not defeated by an allegation that it acted beyond its powers.' … The claims here are not brought under any federal law that abrogates tribal immunity and the Tribes have not waived their immunity." (Citations omitted.)

In *Pueblo of Jemez v. United States*, 2018 WL 5298746 (D. N.M. 2018), the Pueblo of Jemez sued under the federal common law and the Quiet Title Act, 28 U.S.C. § 2409a (QTA), seeking a judgment that Jemez Pueblo "has the exclusive right to use, occupy, and possess the lands of the Valles Caldera National Preserve pursuant to its continuing **aboriginal title** to such lands." The district court denied the Tribe's motion in limine to exclude evidence that it did not occupy the disputed lands to the exclusion of other tribes: "[T]he United States Court of Appeals for the Tenth Circuit has expressly instructed the Court to consider such evidence. See *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1165 (10th Cir. 2015)('Whether the Jemez Pueblo can establish that it exercised its right of aboriginal occupancy to these lands in 1860 and thereafter is a fact question to be established on remand, where it will have the opportunity to present evidence to support its claim.'). Specifically, the Tenth Circuit has instructed the Court to consider evidence necessary to determine whether Jemez Pueblo's use of the Valles Caldera was exclusive as to other Indian Tribes."

In *Northern Natural Gas Company v. 80 Acres*, 2018 WL 5264275 (D. Neb. 2018), Northern Natural Gas Company (Northern) sought to condemn a **right-of-way** through an allotment. Solomon, an allottee holding a minority interest, objected. The court had previously rejected Solomon's argument that the Omaha Tribe's acquisition of a fractional interest barred the condemnation, pointing out that the Tribe had separately agreed to the right-of-way. Solomon then moved to dismiss on the ground that the Tribe was a necessary party to Northern's condemnation action. Northern moved for summary judgment. The court denied Solomon's motion and granted Northern's motion: "Northern is only seeking to condemn non-tribal interests in Allotments No. 742-2 and No. 742-4. And because the Tribe has consented to the rights-of-ways across tribal land within its reservation boundaries…, the absence of the Tribe from the underlying action does not, and cannot, 'impair or impede' the Tribe's ability to protect its interest in those Allotments. … Solomon takes issue with the fact that the Bureau of Indian Affairs (BIA) failed to 'determine the valuation' of the rights-of-ways. … That is, Solomon claims the BIA must perform or approve the appraisal being used. But Solomon has not provided the Court with any authority suggesting that the BIA is required to approve the valuation of a condemnation action involving non-tribal interests. And even assuming such a requirement exists, Solomon's argument still fails. Indeed, in August 2015, the BIA did undertake a valuation analysis for the rights-of-way. … Specifically, BIA staff appraiser Pat McGlamery inspected the property and opined that 'there is no loss of Market Value that can be attributed to this pipeline Right of Way'."

In *Wilhite v. Awe Kualawaache Care Center*, 2018 WL 5255181 (D. Mont. 2018), the Crow Tribe had enacted an ordinance establishing the Awe Kualawaache Care Center (Care Center), a 40-bed long-term nursing facility located in Crow Agency, Montana, that provides 24-hour medical services exclusively to members of the Crow and Northern Cheyenne Tribes. The ordinance stated that "[a]s an instrumentality of the Tribe, the Care Center, its officers, employees, agents and attorneys shall be clothed by federal and tribal law with all the privileges and immunities of the Tribe ... including **sovereign immunity** from suit in any state, federal, or tribal court" and sovereign immunity could be waived only in accordance with the specific procedure provided in the ordinance. The Care Center was funded under a contract with the federal government under the Indian Self-Determination and Education Assistance Act. Wilhite, an employee of the Care Center, sued Care Center and its board and administrator in federal court, contending that they harassed and ultimately terminated her after she reported an incident of misconduct by Care Center personnel. Wilhite alleged claims under the Racketeer Influenced and Corrupt Organizations. The court dismissed on grounds of sovereign immunity and rejected the arguments that the defendants had failed to timely raise that defense and that sovereign immunity does not apply to claims seeking recovery from an insurer: "Courts should entertain a sovereign immunity defense so long as the defendant provides 'fair warning ... before the parties and the court have invested substantial resources in the case'. … Wilhite argues Cook does not apply because she seeks recovery from the tribe's insurance policy, not tribal assets. Wilhite cites no authority for the proposition that she may circumvent sovereign immunity by limiting her claim to policy limits and the Court is aware of none. … The purchase of insurance hardly constitutes a 'clear waiver' of immunity, as noted by other courts

faced with similar arguments."

In *Titus v. Zestfinance, Inc.*, 2018 WL 5084844 (W.D. Wash. 2018), Titus, a non-Indian resident of Washington, borrowed money in a series of **internet transactions** from BlueChip Financial, allegedly a tribal corporation incorporated under the laws of the Turtle Mountain Band of Chippewa Indians (Tribe). Each time Titus received a loan from BlueChip, she electronically signed a document entitled "Loan Agreement" providing that any disputes would be resolved by arbitration and that the Tribe's laws would govern the agreement. Titus filed a class action lawsuit in federal court against BlueChip, Zestfinance and Zestfinance's principal, Merrill, alleging that BlueChip's triple digit interest rates violated state usury laws, the Washington Consumer Protection Act and the Racketeer Influenced Corrupt Organizations Act. The defendants moved to compel arbitration, but the court denied the motion, holding that the arbitration clause conflicted with the Federal Arbitration Act (FAA) and was invalid: "The arbitration agreement is invalid here because [it] creates a conflict between the FAA's requirement that contracts to arbitrate are to be enforced on their terms and the enforcement provisions of federal statutes that Plaintiff could not now, under the contract, pursue - like her RICO claim. Plaintiff's core arguments in her Response go to the delegation clause of the arbitration agreement and the arbitration agreement itself. These facts are sufficient in the Ninth Circuit to justify the Court deciding the question of arbitrability. This Court should determine whether the arbitration clause here is valid, not an arbitrator. … The offending provisions of this arbitration agreement in this case go to the essence of the contract and are intended to achieve through arbitration what Congress has expressly forbidden." (Internal quotations and citations omitted.)

In *JW Gaming Development LLC v. James*, 2018 WL 4853222 (N.D. Cal. 2018), JW Gaming, LLC had invested $5,380,000 in the Pinoleville Pomo Nation's (Tribe) casino project, believing that it was matching an investment in the same amount from the Canales Group, LLC (Canales Group). When JW Gaming learned that there was no matching investment, it sued the Tribe, several tribal entities (the Pinoleville Gaming Commission, the Pinoleville Business Board, and Pinoleville Economic Development, LLC) (Tribal Entities), eleven tribal leaders and members (Tribal Defendants), the Canales Group, and five Canales Group leaders and members, asserting a breach of contract claim against the Tribe and Tribal Entity Defendants and alleging that the remaining defendants engaged in a scheme to fraudulently solicit a $5,380,000.00 investment in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO). The Tribal Entities moved to dismiss on the ground of sovereign immunity, but the court denied the motion, holding that they were not entitled to **sovereign immunity**: "As sovereigns, Indian Tribes are generally immune from suit. *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017). Tribal officers sued in an official capacity share that immunity, but it does not always extend to tribal employees sued in their individual capacities. … Even when a tribal employee is sued for actions taken within the scope of her employment, a personal suit can proceed unless the court determines that 'the sovereign is the real party in interest.' … Applying *Lewis* to the facts alleged here, I conclude that this suit is against the Tribal Defendants in their individual capacities and that the Tribe is not the real party in interest. JW Gaming alleges that the individuals themselves engaged in fraud and that it suffered damages as a result. … In the event of an adverse judgment, the individual defendants—not the Tribe—will be bound." The court denied JW Gaming's request that it certify as "frivolous" the Tribe's expected appeal from the court's decision rejecting the Tribe's sovereign immunity-based jurisdictional defense.

In *Tulalip Tribes v. State of Washington*, 2018 WL 4811893 (W.D. Wash. 2018), The Tulalip Tribes had developed a 2,100-acre section of tribal land into the Quil Ceda Village (QCV) commercial center, consisting of dozens of commercial and retail businesses. Several of these businesses, including the Tulalip Casino and the Tulalip Resort Hotel, are owned by the Tribes. Most, including Wal-Mart, Home Depot, Cabela's, and the 100+ retail stores located in the Seattle Premium Outlets Mall, including Calvin Klein, a Levi's Outlet Store, a NIKE Factory Store, and The North Face, are non-Indian businesses operating under leases from the Tribes and selling non-Reservation source goods to non-Indians. The Tribes sued to prevent the state and county from collecting tens of millions of dollars in taxes annually from the non-Indian owned businesses at QCV, contending that Defendants' collection of taxes, including the combined 8.9% sales

tax, precluded Tulalip from collecting its own taxes from these businesses, that federal law preempts Defendants' administration and enforcement of state and county taxes and that state and county taxation interfered with Tulalip's sovereign right to make and be governed by its own laws. Applying the analytical framework established by the Supreme Court in *White Mountain Apache v. Bracker*, the court rejected the Tribe's argument and found the challenged taxes to be permissible: "[F]ederal regulation over the activities that are subject to the taxes at issue in this case is far from the sort of 'extensive' or 'pervasive' regulation courts have found in those *Bracker* cases in which state and/or local taxation was preempted by federal law. The federal involvement that does exist related to Quil Ceda Village—largely related to leasing and one-time contributions to infrastructure projects—can hardly be said to 'leave no room' for state and local taxation of the retail and commercial activity by non-Indians in the Village. The Court finds the minimal extent of such regulation does not weigh in favor of preemption in this case. … At bottom, the Tribes' sole interest in the collection of taxes at QCV is financial. This is a valid, important interest; but it is not one courts have found tip the balance under *Bracker* in favor of preemption."

In *Demetria H. v. State*, 2018 WL 4844074 (Alaska 2018), Demetria H, the mother of a two-year old Indian child, challenged the termination of her parental rights by an Alaska court, contending that the State Office of Children's Services (OCS) violated the **Indian Child Welfare Act** by failing to make active efforts to reunify the family and by failing to support with qualified expert testimony its finding that her continued custody of her son was likely to result in serious emotional or physical damage to him. The Alaska Supreme Court rejected these arguments and affirmed the termination of Demetria's parental rights: "During the four years that OCS worked with Demetria's family, it created numerous case plans and tried to engage Demetria in following them. It provided referrals for parenting classes, substance abuse and mental health assessments and services, and housing. Demetria elected not to attend meetings and not to follow through on the referrals. … The court found that Demetria's substance abuse and mental health issues were linked to her neglect of Dion. And the court specifically connected its finding of neglect to Demetria's exposing Dion to sex offenders, failing to adequately supervise him, and failing to take parental responsibility for him, including not feeding or bathing him. … The trial court did not err in finding that there was evidence beyond a reasonable doubt that Demetria's continued custody of Dion was likely to result in serious harm to Dion."

In *Fernandez v. Marston*, 2018 WL 5307805 (Cal. App. 2018), Fernandez and Auchenbach, each a military veteran with a background in law enforcement, had been hired as police officers for a purportedly newly formed police department of the Tribe of the Picayune Rancheria of Chukchansi Indians. Shortly thereafter, the new ostensible tribal police department planned an operation to take possession of the casino offices, which were being occupied by alleged trespassers, who were representatives of a rival faction of the Tribe. Attorneys Marston and Levitan, partners in the law firm of Rapport & Marston, advised the group that the planned operation was legal and authorized by all pertinent governmental agencies and assured the police force that they had been deputized by "Special Law Enforcement Commission, Bureau of Indian Affairs, Office of Justice Services" as tribal police officers. Fernandez and Auchenbach then participated in the takeover operation, which included drawn weapons and the detention of various casino security personnel. The Madera County Sheriff's Department intervened, freed the casino employees and arrested and charged Fernandez and Auchenbach. Fernandez and Auchenbach sued Marston, Levitan and the Rapport & Marston firm for malpractice, negligence and fraud. Levitan and Marston moved to strike the complaint on the ground that their communications were made in connection with an issue, the Tribe's legitimate leadership, under review by both a judicial and an executive body and that the leadership dispute was an issue of public interest with California's statute intended to protect the exercise of First Amendment Rights of persons of limited means from "Strategic Lawsuits Against Public Participation" (also know as SLAPP suits). The court denied the motion: "The 'principal thrust or gravamen' of this lawsuit … is defendants' alleged false assurances that plaintiffs had no risk of facing arrest or criminal prosecution as a result of participating in the armed casino raid. Those alleged assurances were not shown to have any connection to a substantive issue involved in any pending

administrative or judicial proceeding. … The two proceedings defendants pointed to in the trial court concerned totally different issues. The BIA proceeding concerned the renewal of the tribe's contract with the federal government, and well before the events at issue here the BIA regional director expressly declined to decide the tribe's internal leadership dispute. And the New York state case brought by Wells Fargo Bank involved casino financing that was in turmoil, and again prior to the events at issue here the court expressly declined to wade into the leadership dispute. … . As far as we can tell, these plaintiffs were utterly indifferent to the outcome of either the BIA proceedings or the New York casino financing case. … Assuming for argument's sake that attorneys for a federally recognized tribe may invoke tribal **immunity**, defendants have not shown that the faction of people they represented were ever recognized as an Indian tribe by the federal government or under federal law. On the contrary, as discussed, the record shows the BIA declined to decide which competing faction was the lawful governing body for the tribe and instead, for purposes of conducting business, had recognized (on an interim basis) the members of the last duly elected tribal council."

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