

The Biggest Native American Law Rulings Of 2017

By **Andrew Westney**

Law360, New York (December 7, 2017, 10:57 AM EST) -- The U.S. Supreme Court's ruling that a Mohegan Tribe limousine driver didn't share the tribe's sovereign immunity to a tort suit caught the attention of Native American law practitioners in 2017, but major decisions also came in on offensive trademarks, water rights in the West, and Oklahoma tribal jurisdiction.

Here, Law360 reviews some of the highest-profile decisions in Native American law in 2017.

Lewis v. Clarke

The U.S. Supreme Court ruled in April that a limousine driver working for the Mohegan Tribe wasn't protected by the tribe's sovereign immunity from claims over an off-reservation car accident, potentially inviting more suits against tribal employees as a way to skirt tribal immunity.

The justices in their April 25 ruling unanimously reversed a Connecticut Supreme Court decision that Mohegan Tribal Gaming Authority employee William Clarke was immune to claims over injuries a Connecticut couple sustained after his limo pushed their car into a concrete highway median, saying a Mohegan tribal code provision indemnifying tribal gaming employees against negligence suits didn't confer the tribe's immunity onto Clarke.

The ruling was a "troubling one" for tribes as the high court "jumped through hoops to conclude that tribal sovereign immunity does not apply here," according to Pipestem Law Firm PC partner Mary Kathryn Nagle, an enrolled citizen of the Cherokee Nation.

While the ruling was relatively narrow in its focus on the indemnity issue, it's still important because it "once again signals there are areas of sovereign immunity that are not fully settled" and that "where we get to the edges the courts are willing to assess what they believe is the best rule of decision," said Kilpatrick Townsend & Stockton LLP partner Keith M. Harper.

The case is *Brian Lewis et al. v. William Clarke*, case number 15-1500, in the Supreme Court of the United States.

Coachella Valley Water District et al. v. Agua Caliente Band of Cahuilla Indians et al.

The Supreme Court recently rejected a petition from two California water agencies in a water rights dispute with the Agua Caliente Band of Cahuilla Indians, leaving in place a Ninth Circuit ruling that established tribes' right to groundwater on their reservations.

A circuit court panel had ruled in March that the federal government established the tribe's federal right to groundwater when it created the tribe's reservation in the 1870s. The high court denied petitions by the Coachella Valley Water District and the Desert Valley Water Agency to overturn that ruling on Nov. 27.

The courts' decisions emphasize the "continuing vitality" of the so-called reserved-rights doctrine, according to Hogen Adams PLLC member Jessica Intermill.

The doctrine, which holds that tribes' treaties with the federal government reserved rights the tribes held instead of granting tribes new rights, "will be an important tool as tribes look toward protection of sacred spaces and cultural properties, regulations to combat climate change and other contemporary issues that are critical to use and protection of a tribal homeland — even though they weren't spelled out in treaties creating reservations," Intermill said.

The case is *Coachella Valley Water District et al. v. Agua Caliente Band of Cahuilla Indians et al.*, case number 16A958, in the Supreme Court of the United States.

Murphy v. Royal

A Tenth Circuit decision in August tossing the Oklahoma state murder conviction and death sentence of Muscogee Creek Nation member Dwayne Patrick Murphy could have an impact on tribal jurisdiction far beyond the circumstances of that case.

Oklahoma has said it plans to ask the Supreme Court to review a circuit panel's ruling that found that the Creek reservation hadn't been reduced or eliminated and that the location of Murphy's alleged crime was therefore still part of the reservation and subject to federal jurisdiction. The Tenth Circuit in November rejected a bid by Oklahoma and the federal government to rehear that ruling.

If the Tenth Circuit's decision stands, it could have an impact on the criminal and civil jurisdiction of the so-called Five Civilized Tribes in Oklahoma — the Cherokee, Chickasaw, Choctaw and Seminole tribes alongside the Creek — in its determination that Congress didn't show a clear intent to disestablish the Creek reservation through a series of eight late 19th century and early 20th century statutes.

"There have long been discussions in legal circles regarding whether or not these set of laws passed vis-à-vis the five tribes have diminished their reservations, and we have now the most significant case that answers that definitively as a no," Harper said.

And the Cherokee Nation has already told an Oklahoma federal court that the *Murphy v. Royal* ruling backs the jurisdiction of the Cherokee courts over the tribe's suit against CVS, Walgreens, McKesson and other companies seeking to hold them financially responsible for the tribe's opioid crisis.

Still, while the *Murphy* decision has "a certain amount of persuasive value," it remains to be seen how far the ruling on tribal jurisdiction in a criminal context may extend into questions of civil jurisdiction, said Dorsey & Whitney LLP senior attorney James Nichols.

Matal v. Tam

The U.S. Supreme Court's decision striking down a federal ban on registering offensive trademarks secured the right of Washington, D.C.'s NFL team to use the term "Redskins" as a trademark, turning the focus of those who consider the term a racial slur to the public arena.

In June, the high court ruled in *Matal v. Tam*, a separate case brought by a rock band called The Slants, that the Lanham Act's ban on offensive trademark registrations ran afoul of the First Amendment, allowing the football team to prevail in a battle over its marks with Native American

activists that had been stayed in the Fourth Circuit.

"Morally, what the Supreme Court is saying is we are going to uphold a framework of laws that protects the property rights of a white business owner to make money off and commodify a racial slur that harms Native Americans," Nagle said.

But there is a reluctance on the part of the courts to act with respect to such issues, according to Harper.

"I think the right way to seek a change is really political in nature," he said. "One thing the Slants decision does is make clear that that's going to be the best route, and now Indian Country should focus on that route."

The case is *Matal v. Tam*, case number 15-1293, in the Supreme Court of the United States.

--Editing by Christine Chun and Rebecca Flanagan.