# 2018-19 Term
# Supreme Court Cases Related to Indian Law

**Last Updated:** 10/24/18

## CERT GRANTED

Three petitions for certiorari have been granted in Indian law-related cases.

## CERT PENDING

Four petitions for certiorari are pending in Indian law-related cases.

## CERT DENIED

Petition for certiorari has been denied in five Indian law-related cases.

# Cert Granted

**Herrera v. Wyoming**
**Briefs and Pleadings**
**Docket No. 17-532**

**Question Presented:** Whether Wyoming's admission to the Union or the establishment of the Bighorn National Forest abrogated the Crow Tribe of Indians' 1868 federal treaty right to hunt on the "unoccupied lands of the United States," thereby permitting the present-day criminal conviction of a Crow member who engaged in subsistence hunting for his family.

**History:** Petition was filed on 10/5/17. Petition was granted on 6/28/18.

**Related News Stories:** Tribal hunting rights case before U.S. Supreme Court (Indianz) 9/25/18, U.S. Supreme Court to hear Sheridan County poaching case (Jackson Hole News & Guide) 9/1/18. Indian Country awaits busy season at Supreme Court amid big change (Indianz) 8/15/18, Wild ride continues as Supreme Court agrees to hear another treaty case (Indianz) 6/28/18, Tribes see continued challenges as more cases head to highest court (Indianz) 2/21/18

**Washington State Department of Licensing v. Cougar Den**
**Briefs and Pleadings**
**Docket No. 16-1498**

**Questions Presented:** Whether the Yakama Treaty of 1855 creates a right for tribal members to avoid state taxes on offreservation commercial activities that make use of public highways.

**History:** Petition was filed on 6/14/17. Petition was granted on 6/25/18.

**Ruling Below:** *Cougar Den, Inc. v. Washington State Department of Licensing*, Supreme Court of Washington. 392 p.3d 1014. The Supreme Court, Johnson, J., held that tribes were entitled under treaty to import fuel without holding importer's license and without paying state fuel taxes.

**Related News Stories:** U.S. Supreme Court will hear case between Yakama tribal member and state Department of Licensing on gas tax (Yakima Herald) 9/29/18, Indian Country awaits busy season at

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The Nomination of Brett Kavanaugh: An Indian Law U.S. Supreme Court (NARF) 8/30/18. to hear Sheridan County poaching case (Jackson Hole News & Guide) 9/1/18. Wild ride continues as Supreme Court agrees to hear another treaty case (Indianz) 6/28/18.

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Supreme Court amid big change (Indianz) 8/15/18, Supreme Court delivers bad news to tribes as term draws to a close (Indianz) 6/25/18, High Court takes up Native American tax case (Courthouse News Service) 6/25/18, Why a tribal treaty rights case in Washington will likely end up in front of the U.S. Supreme Court (Inlander) 5/24/18

**Carpenter v. Murphy**
**Briefs and Pleadings**
**Docket No. 17-1107**

**Questions Presented:** Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

**History:** Petition was filed on 2/6/18. Petition was granted on 5/21/18.

**Ruling below:** *Murphy v. Royal*, 866 F.3d 1164. The Court of Appeals, Matheson, Circuit Judge, held that: 1) prisoner's claim was governed by clearly established federal law; 2) Oklahoma state appellate court rendered merits decision on prisoner's claim that state court lacked jurisdiction because crime occurred on Indian land; 3) Oklahoma state appellate court's decision was contrary to clearly established federal law; and 4 )Congress did not disestablish Indian reservation, and thus Oklahoma state court lacked jurisdiction to prosecute defendant for murder that occurred on reservation. Reversed and remanded

**Related News Stories:** Supreme Court opens new term with major Indian law cases on docket (Indianz) 10/1/18, Muscogee Nation clashes with state in reservation boundary dispute (Indianz) 5/21/18, Trump administration sides with industry in reservation boundary case (Indianz) 4/3/18, Appeals court won't revist historic decision in Muscogee Nation boundary case (Indianz) 11/9/17.

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# Cert Pending

**Harvey, et al., v. Ute Indian Tribe of the Uintah and Ouray Reservation, et al .**
**Briefs and Pleadings**
**Docket No. 17-1301**

**Questions Presented:** 1. Whether the tribal remedies exhaustion doctrine, which requires federal courts to stay cases challenging tribal jurisdiction until the parties have exhausted parallel tribal court proceedings, applies to state courts as well. 2. Whether the tribal remedies exhaustion doctrine requires that nontribal courts yield to tribal courts when the parties have not invoked the tribal court's jurisdiction.

**History:** Petition was filed on 3/7/18.

**Ruling below:** *Rocks Off Inc. v. Ute Indian Tribe of the Uintah and Ouray Reservation*, 2017 WL 5166885. Supreme Court of Utah.The Supreme Court, Durham, J., held that: 1) tribe did not waive sovereign immunity; 2) tribal officials, in their official capacities, were not entitled to sovereign immunity on claims to enjoin actions that exceeded tribe's jurisdiction; 3) tribal officials were not protected by sovereign immunity when sued for damages in their individual capacities; 4) tribe was not a necessary party to businessman's action against tribal officials; 5) tribal exhaustion doctrine prevented state courts from reviewing businessman's claims against tribal officials; 6) businessman was not entitled to grant of untimely motion to file supplemental pleadings; 7) businessman failed to state claims against companies owned by tribal officials; 8) businessman failed to state claims against oil and gas companies; 9) there is no civil cause of action in Utah for extortion; and 10) state constitutional provision prohibiting "the exchange of black lists" was not self-executing. Affirmed in part, vacated in part, and remanded.

**Related News:** Supreme Court delivers bad news to tribes as term draws to a close (Indianz) 6/25/18

Poarch Band of Creek Indians, et al. v. Wilkes, et al.
Briefs and Pleadings
Docket No. 17-1175
**Questions Presented:** Whether an Indian tribe is immune from civil liability for tort claims asserted by non-members.

**History:** Petition was filed on 2/16/18. Petition was denied on 10/15/18.

*criteria, and timeliness of publication.*

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**Ruling below:** *Wilkes and Russell v. PCI Gaming Authority*, 2017 WL 4385738. The Supreme Court, Murdock, J., held that: 1) it would decline to decide whether casino was properly located on land considered Indian country; and 2) it would decline to decide whether dispute was a matter of internal or tribal relations or, alternatively, was a dispute specially consigned to the regulatory authority of a tribe by Congress. Affirmed.

**Related News Stories:** Supreme Court opens new term with major Indian law cases on docket (Indianz) 10/1/18, Supreme Court takes up Indian law petitions amid major controversy (Indianz) 9/24/18

**Osage Wind, LLC, et al. v. United States**
**Briefs and Pleadings**
**Docket No. 17-1237**

**Questions Presented:** Whether the court of appeals had jurisdiction over the appeal filed by a nonparty when the nonparty did not participate in any capacity in the district court proceedings. Whether the Tenth Circuit improperly invoked the Indian canon of construction to deprive surface estate owners who are members or successors-ininterest to Indian tribe members of important property rights by overriding clear regulatory language for the express purpose of favoring the economic interests of an Indian tribe without examining congressional intent.

**History:** Petition was filed on 3/2/18.

**Ruling below:** United States v. Osage Wind, LLC. 871 F.3d 1078. United States Court of Appeals, Tenth Circuit.
The Court of Appeals, Ebel, Circuit Judge, held that: 1) Indian tribe was entitled to appeal district court's grant of summary judgment to wind company without having intervened in district court; 2) tribe's claim was not precluded under doctrine of res judicata; 3) de minimis exception in regulation requiring mineral leases on indian land did not apply to wind company's excavation; 4) definition of "mining" in regulation requiring mineral leases on Indian land is not limited to commercial extraction of minerals, but also includes acting upon the minerals to exploit the minerals themselves; and 5) wind company's excavation constituted mineral development. Reversed and remanded.

**Related News Stories**: Tenth Circuit takes expansive view of the definition of the term "mining", holding wind farm project needs permit prior to commencement of excavation in tribal mineral estate (Real Estate, Land Use & Environmental Law Blog) 3/1/18. Court holds project construction constitutes 'mining' on tribal lands (JD Supra) 9/27/17. Appeals court reverses judge's decision allowing wind developers to dig on Osage land (Tulsa World) 9/18/17.

**Bearcomesout v. United States**
**Briefs and Pleadings**
**Docket No. 17-6856**

**Questions Presented:** Whether the "separate sovereign" concept actually exists any longer where Congress's plenary power over Indian tribes and the general erosion of any real tribal sovereignty is amplified by the Northern Cheyenne Tribe's Constitution in this case such that Petitioner's prosecutions in both tribal and federal court violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

**History:** Petition was filed on 11/14/17.

**Ruling below:** *United States v. Bearcomesout*, 696 Fed.Appx. 241.

**Related News Stories:** Supreme Court delays action for ninth time in Indian Country violence case (Indianz) 6/5/18

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# Cert Denied

**Citizen Potawatomi Nation v. Oklahoma**
**Briefs and Pleadings**
**Docket No. 17-1624**

**Question Presented:** Whether the Court of Appeals erred in reversing the District Court's confirmation and enforcement of the Arbitrator's Award pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.

**History:** Petition was filed on 5/30/18. Petition for certiorari was denied on 10/15/18.

**Ruling below:** *Citizen Potawatomi Nation v. State of Oklahoma*, 881 F.3d 1226. The Court of Appeals, Murphy, Circuit Judge, held that: 1) de novo review provision of binding arbitration clause in tribal-state gaming compact was legally invalid, and 2) district court erred in failing to sever binding arbitration clause from tribal-state gaming compact. Remanded with instructions to vacate arbitration award.

**Related News Stories:** Citizen Potawatomi Nation hits end of the line at Supreme Court (Indianz) 10/15/18, Supreme Court opens new term with major Indian law cases on docket (Indianz) 10/1/18, Supreme Court takes up Indian law petitions amid major controversy (Indianz) 9/24/18

**Makah Indian Tribe v. Quileute Indian Tribe, et al.**
**Briefs and Pleadings**
**Docket No. 17-1592**

**Questions Presented:** The question presented is whether the Ninth Circuit—in conflict with the decisions of this Court and other courts—properly held the Treaty of Olympia confers this expansive "fishing" right.

**History:** Petition was filed on 5/21/18.

**Ruling below:** *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157. The Court of Appeals, McKeown, Circuit Judge, held that:
1) district court did not clearly err in determining that word "fish," as used in Treaty, encompassed sea mammals;
2) tribes were not required to provide evidence of specific locations that they regularly and customarily hunted whales or seals; and
3) district court incorrectly drew longitudinal boundaries of tribes' U & A fishing grounds.
Affirmed in part, reversed in part, and remanded.

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**County of Amador, CA v. Department of the Interior, et al.**
**Briefs and Pleadings**
**Docket No. 17-1432**

**Questions Presented:** The questions presented are: 1. Whether Congress intended the phrase "under Federal jurisdiction," as used in the 1934 Act, to encompass a tribe that, as of June 18, 1934, had no land held on its behalf by the federal government,services or benefits from the federal government; did not have members enrolled with the Indian Office; and which was not invited to organize under the IRA in 1934 by the Secretary like other recognized tribes in Amador County; but for whom the federal government had unsuccessfully attempted to purchase land pursuant to a generic appropriation authorizing the purchase of land for unspecified "landless Indians" in California? 2. Whether the Secretary's authority to take land into trust for "members of any recognized Indian tribe now under Federal jurisdiction" requires that the tribe have been "recognized" in 1934, in addition to being "under Federal jurisdiction" at that time, or whether such "recognition" can come decades after the statute's enactment? 3. Whether the Secretary, having explicitly concluded that in enacting the Indian Gaming Regulatory Act Congress intended that Indian tribes "restored to Federal recognition" refers only to tribes that are "restored" pursuant to (a) congressional legislation, (b) a judgment or settlement agreement in a federal court case to which the United States is a party, or (c) "through the administrative Federal Acknowledgment Process under [25 C.F.R. § 83.8]," and having embodied that conclusion in a formal regulation, 25 C.F.R. § 292.10, can then act contrary to Congress's intention by "grandfathering in" a preliminary (i.e., non-final) agency action treating Indians who do not meet the regulatory definition as "restored"?

**History:** Petition was filed on 4/11/18.

**Ruling below:** *County of Amador v. United States Department of the Interior*, 872 F.3d 1012. Court of Appeals for the Ninth Circuit. The Court of Appeals, Susan P. Graber, Circuit Judge, held that: 1) as matter of first impression, phrase "recognized Indian tribe now under Federal jurisdiction," in 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's interpretation of phrase "under Federal Jurisdiction" in provision of Indian Reorganization Act (IRA) defining an "Indian" entitled to IRA's benefits was best interpretation; 3) DOI's determination that tribe was "under Federal jurisdiction" when IRA was passed was not arbitrary and capricious; and 4) grandfathering provision in DOI regulation implementing Indian Gaming Regulatory Act's (IGRA) "restored tribe" exception was in accordance with IGRA. Affirmed.

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**Lummi Tribe of the Lummi Reservation, et al., v. United States**
**Briefs and Pleadings**
**Docket No. 17-1419**

**Questions Presented:** Does 28 U.S.C. § 1491 grant the court of federal claims jurisdiction over an action to recover grant-inaid funds unlawfully recouped by the United States or is the action one for specific relief which must be brought under the Administrative Procedure Act, 5 U.S.C. § 702? Does the court of federal claims have jurisdiction to enter a judgment on an illegal exaction claim when the United States had previously awarded money to a recipient under a grant-in-aid statute and then unlawfully recouped the funds? Where a grant-in-aid statute mandates that the United States pay grant funds to a plaintiff, does the court of federal claims have jurisdiction to enter a money judgment for the failure to pay the grant funds even if there are conditions on the use of the grant funds after they are awarded?

**History:** Petition was filed on 4/5/18.

**Ruling below:** : *Lummi Tribe of the Lummi Reservation, Washington v. United States*, 870 F.3d 1313. The Court of Appeals, O'Malley, Circuit Judge, held that: [1] NAHASDA was not money-mandating statute, and [2] HUD's decision not to grant block grants to Tribe did not constitute illegal exaction. Vacated and dismissed.

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**Fort Peck Housing Authority, et al., v. Department of Housing and Urban Development, et al.**
**Briefs and Pleadings**
**Docket No. 17-1353**

**Question Presented:** Whether an action for the restoration of grant in aid funds illegally recouped by the United States constitutes a suit for specific relief such that the United States' sovereign immunity is waived pursuant to the Administrative Procedure Act, 5 U.S.C. § 702, or whether it is a suit for money damages, barring relief in the federal district courts.

**History:** Petition was filed on 3/22/18.

**Ruling below:** *Modoc Lassen Indian Housing Authority v. United States Department of Housing and Urban Development*, 878 F.3d 889. On petition for rehearing, the Court of Appeals, Moritz, Circuit Judge, held that: 1) HUD was not required under NAHASDA to conduct administrative hearings prior to attempting to recapture alleged overpayments; 2) HUD finding that tribes incorrectly received NAHASDA payments did not trigger provision requiring hearings before finding improper expenditures; 3) even assuming incorrect receipt of NAHASDA payments was covered under provision governing improper expenditures, incorrect receipt did not constitute substantial noncompliance; 4) HUD lacked the authority to recapture alleged overpayments via administrative offset; and 5) sovereign immunity precluded an award of money damages payable from NAHASDA grant funds carried over from prior years and funds that would be appropriated in future years. Affirmed in part, reversed in part, and remanded. Matheson, J., filed an opinion concurring in part and dissenting in part. Bacharach, J., filed an opinion concurring in part and dissenting in part.

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