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Native American Cases To Watch In 2016

By **Andrew Westney**

Law360, New York (December 24, 2015, 8:37 PM ET) -- Native American law practitioners will be monitoring a surprising abundance of U.S. Supreme Court cases tackling tribal concerns in 2016, with a case testing the use of tribal court convictions in a federal domestic violence prosecution being the latest to join Dollar General's high-profile challenge to tribal court jurisdiction on the justices' docket.

Elsewhere, the Tenth Circuit is expected to issue its decision on a U.S. Environmental Protection Agency ruling that a federal law didn't shrink a Wyoming reservation, while the Ninth Circuit will consider a California water agency suit that could threaten a circuit split around tribal leasing regulations.

Here, Law360 looks at the Native American law cases attorneys will be watching closely in 2016.

Dollar General Corp. et al. v. Mississippi Band of Choctaw Indians et al.

During oral arguments on Dec. 7, the high court appeared split on how much control tribal courts can exert over nontribe members, with several justices, including potential swing vote Anthony Kennedy, expressing concern that tribal courts may lack due process.

Dollar General aims to overturn a Fifth Circuit ruling that the company was subject to the jurisdiction of the Mississippi Band of Choctaw Indians' courts in a tort case brought by a former intern and member of the tribe over an alleged sexual assault.

Any case before the court of Chief Justice John Roberts raises concerns for attorneys who represent tribes, as tribes have a generally "dismal" record in the Supreme Court of late, according to Holland & Knight LLP partner James T. Meggesto.

"It's easy to see four votes against tribal interests, no matter what," Meggesto said.

The tenor of the justices' questions — particularly the resistance of Justice Kennedy to tribal courts potentially awarding millions of dollars in punitive damages against U.S. citizens without constitutional due process protections — may indicate trouble for the tribe, experts say.

But Robins Kaplan LLP partner Brendan Johnson says Dollar General is presenting a skewed picture of tribal courts, which are often well-respected by federal and state authorities, and tribal court rulings are also subject to evaluation by other courts.

“If a tribal court does fail to afford due process, that failure will likely prevent the plaintiff from having the judgment recognized in a federal or state court,” Johnson said. “In addition, companies entering into a business relationship with a tribe can always negotiate choice-of-law clauses.”

While the case may lead tribes and nontribal companies to hash out in contracts what types of claims can and can’t be heard in tribal courts, the extent to which a tribe is willing to relinquish such authority will vary, according to Skip Durocher, co-chair of Dorsey & Whitney LLP's Native American practice.

“A lot of times it depends on who has the negotiating power, and who needs the deal more badly,” Durocher said.

The Mississippi Band of Choctaw Indians is represented by Neal Kumar Katyal of Hogan Lovells.

Dollar General and Dolgencorp are represented by Thomas C. Goldstein of Goldstein & Russell PC.

The federal government is represented by Edwin S. Kneedler of the U.S. Department of Justice.

The case is Dollar General Corp. et al. v. Mississippi Band of Choctaw Indians et al., case number 13-1496, in the Supreme Court of the United States.

Nebraska et al. v. Parker et al.

The Supreme Court will also ponder the state of Nebraska’s bid to overturn a ruling that a Nebraska town must comply with a Native American tribe’s liquor license and taxing regulations.

The high court in October took up the petition of Nebraska and the village of Pender, which argue that the Eighth Circuit misapplied the so-called Solem test to determine that the Omaha Tribe of Nebraska’s reservation hadn’t been diminished by an 1882 federal law in, allowing the tribe to collect taxes in the village.

The case will produce another significant development in assessing reservation boundaries that could be important to a number of tribes, according to Brian Pierson of Godfrey & Kahn SC.

“There are lot of reservations that were significantly reduced in size during the allotment era, and the question of whether or not exterior boundaries from the 19th century are still intact is something that really gets decided under this diminishment jurisprudence,” Pierson said.

While the Nebraska and Dollar General cases both deal with tribal jurisdiction, the Nebraska litigation may present a more difficult set of facts from a tribal perspective, a factor that’s always in attorneys’ minds, Meggesto said.

“It’s been a part of the strategy with the Supreme Court in Indian law cases, to say, 'OK, if we’re going to have a difficulty in this case, if we’re going to lose, we need to have it limited to these facts,'” he said.

Tribes typically have a tough time asserting taxation authority in particular, as the Supreme Court often shows a lot of sympathy for nontribal powers, Durocher said.

“It seems the court is willing to ignore some of the technical legal arguments and positions in order to reach the conclusion that the state or local township can exercise its taxing authority,” Durocher said.

Nebraska is represented by Douglas J. Peterson, James D. Smith, Ryan S. Post and David A. Lopez of the Nebraska Attorney General's Office.

The village of Pender is represented by Gene Summerlin, Marnie Jensen and Mark Davis Hill of Husch Blackwell LLP.

The respondents are represented by Donald B. Verrilli Jr., John C. Cruden, William B. Lazarus and Katherine J. Barton of the U.S. Department of Justice.

The case is Nebraska et al. v. Mitch Parker et al., case number 14-1406, in the Supreme Court of the United States.

U.S. v. Bryant

The Supreme Court's newest case addressing tribal authority centers on a challenge to a Ninth Circuit decision that threatens to undermine federal prosecutions of repeat domestic violence offenders based on uncounseled tribal court convictions.

The high court agreed Dec. 14 to hear the federal government's claims that the Ninth Circuit wrongly tossed an indictment against Michael Bryant Jr., who was charged with two counts of domestic assault by a habitual offender under the Violence Against Women Act after two previous abuse convictions in Northern Cheyenne Indian Reservation courts, where he did not have counsel.

A Ninth Circuit panel ruled in September 2014 that predicating repeat-offender status on tribal court proceedings in which Bryant lacked counsel violated his Sixth Amendment rights.

The high court's grant of certiorari is "great news for those committed to improving public safety in Indian Country," said Robins Kaplan LLP partner Timothy Q. Purdon.

The case will afford the court the chance to make the Eighth Circuit's 2011 ruling in U.S. v. Cavanaugh — which allows all tribal court domestic violence convictions to be used to establish habitual offender status and enhance sentencing in federal court — to apply nationwide, Purdon said.

"Expansion of the Cavanaugh rule to all of Indian Country is vitally important to enhance DOJ's ability to protect American Indian women from repeat domestic violence," he said.

The U.S. is represented by Donald B. Verrilli Jr., Leslie R. Caldwell, Michael R. Dreeben, Elizabeth B. Prelogar and Demetra Lambros of the U.S. Department of Justice.

Bryant is represented by Anthony R. Gallagher, Steven C. Babcock and Joslyn Hunt of the Office of the Federal Defenders of Montana.

The case is U.S. v. Michael Bryant Jr., case number 15-420, in the Supreme Court of the United States.

Sturgeon v. Masica et al. & Menominee Indian Tribe of Wisconsin v. U.S. et al.

The high court will round out its Native American caseload with a bid by Alaska moose hunter John Sturgeon to overturn a Ninth Circuit decision allowing the National Park Service to apply federal laws to

nonfederal lands inside parks and the Menominee Indian Tribe of Wisconsin's suit to recover contract support costs for tribal health services from the federal government.

In the Sturgeon case, several Alaska Native corporations have joined the state of Alaska in urging the U.S. Supreme Court to reverse the circuit court decision, saying the lower court misread the Alaska National Interest Lands Conservation Act, which they said is meant to shield their lands from federal intrusion.

In the Menominee case, the Supreme Court heard oral arguments on Dec. 1 that seemed to indicate the tribe faces an uphill battle, as the justices questioned why the tribe should be entitled to equitable tolling of its claims to recover the contract support costs when it delayed filing its claims for years.

"The court certainly didn't sound like it was at all willing to give the tribe any kind of benefit of the doubt in terms of tolling and the statute of limitations," Meggesto said.

A win for the Menominee tribe wouldn't affect more recent claims falling within the current six-year limitations period that many tribes are failing to pursue, even though the federal government has generally shown its willingness to pay for contract support costs, according to Dorsey & Whitney associate James Nichols.

"it seems like there are a lot of tribes sitting on them, and that's a shame," Nichols said. "With the federal government's position of being willing to settle these claims, it's really money sitting on the table."

Sturgeon is represented by Matthew T. Findley and Eva R. Gardner of Ashburn & Mason PC, William S. Consovoy and Michael H. Park of Consovoy McCarthy Park PLLC and Douglas Pope of Pope & Katcher.

The National Park Service is represented by Dean Keith Dunsmore, Elizabeth Ann Peterson and Vivian Wang of the U.S. Department of Justice.

The state of Alaska is represented by Attorney General Craig W. Richards and Assistant Attorneys General Ruth Botstein and Janell Hafner.

Arctic Slope Regional Corp., Cook Inlet Region Inc. and Salamatof Native Association Inc. are represented by Jahna M. Lindemuth, Timothy Droske and Katherine Demarest of Dorsey & Whitney LLP.

The lawmakers are represented by Jonathan W. Katchen and Kyle W. Parker of Crowell & Moring LLP.

The Sturgeon case is John Sturgeon v. Sue Masica et al., case number 14-1209, in the Supreme Court of the United States.

The Menominee Indian Tribe of Wisconsin is represented by Geoffrey D. Strommer of Hobbs Straus Dean & Walker LLP.

The federal government is represented by Ilana H. Eisenstein of the US. Department of Justice.

The case is Menominee Indian Tribe of Wisconsin v. U.S. et al., case number 14-510, in the Supreme Court of the United States.

Desert Water Agency v. U.S. Department of the Interior et al.

A California water agency's fight in the Ninth Circuit against a Bureau of Indian Affairs rule blocking taxation on certain nontribal facilities built on tribal lands could lead to a split with the Eleventh Circuit over the rule.

The Desert Water Agency argued in a Nov. 16 brief that a district judge erred in finding the agency lacks constitutional standing to challenge the BIA rule, which the agency argues unlawfully preempts charges on leased lands within the reservation of the Agua Caliente Band of Cahuilla Indians.

While the Eleventh Circuit ruled in August that federal law prohibits the collection of a Florida sales tax on rents charged by the Seminole Tribe of Florida to nontribal entities, the Ninth Circuit could rule against the Agua Caliente tribe as states continue to fight the BIA leasing regulations, Durocher said.

"Those regulations are pretty important in Indian Country, because for tribes with a decent land base, where it's viewed by a non-Indian retailer as something beneficial to come in and locate there, to be able to avoid state taxation is crucial for economic development," Durocher said.

The Desert Water Agency is represented by Roderick E. Walston and Steven G. Martin of Best Best & Krieger LLP.

The DOI and BIA are represented by Matthew Littleton of the U.S. Department of Justice.

The case is Desert Water Agency v. U.S. Department of the Interior et al., case number 14-55461, in the U.S. Court of Appeals for the Ninth Circuit.

Wyoming et al. v. U.S. Environmental Protection Agency et al.

In the early months of 2016, the Tenth Circuit will likely render its decision on the state of Wyoming's suit disputing a U.S. Environmental Protection Agency determination of the boundaries of a reservation shared by two tribes.

Wyoming and other states have asked the Tenth Circuit to review the EPA's 2013 ruling that a 1905 federal law didn't diminish the boundaries of the Wind River Indian Reservation. The EPA made the decision in the course of approving an application by the Northern Arapaho Tribe and Eastern Shoshone Tribe for treatment-as-state status under the Clean Air Act.

Wyoming has challenged the diminishment issue, while the other states have argued that the EPA isn't owed any deference in how it applies federal common law principles on diminishment to the history of the disputed area of the reservation because that's outside its expertise.

Wyoming is represented by Peter K. Michael, Jay A. Jerde, James Kaste, Michael J. McGrady and Jeremiah I. Williamson of the state Attorney General's Office.

The EPA is represented by Samuel C. Alexander and David A. Carson of the U.S. Department of Justice.

The Northern Arapaho Tribe is represented by Andrew W. Baldwin, Berthenia S. Crocker, Kelly A. Rudd and Janet E. Millard of Baldwin Crocker & Rudd PC.

The Eastern Shoshone Tribe is represented by Donald R. Wharton of the Native American Rights Fund and Robert Hitchcock of the tribe's Attorney General's Office.

The case is Wyoming et al. v. U.S. Environmental Protection Agency et al., case numbers 14-9512 and 14-9514, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by Mark Lebetkin and Brian Baresch.
