

# **Review of US Supreme Court Indian Law Cases 2017-2018**

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# 2017-18 Term

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- Cert granted in 3 Indian Law related cases and denied 25 petitions
- Cases decided:
- *Patchak v. Zinke*, decided Feb. 27, 2018
- *Upper Skagit Indian Tribe v. Lundgren*, decided May 21, 2018
- *Washington v. U.S.*, decided June 11, 2018
- (All considered wins for Tribal interests)

# Patchak v. Zinke

- David Patchak challenged Secretary of Interior decision to place land into trust for the Gun Lake Tribe with the plan to open a casino in rural Michigan
- *Carcieri v. Salazar*, 555 U.S. 379 (2009), held Tribes in existence on or before June 18, 1934 could bring land into trust under IRA, 25 U.S.C. § 465 et seq.
- Since Gun Lake Tribe attained federal recognition in 1999 Patchak asserted not eligible for trust decision

# Factual background

- Gun Lake Tribe federally recognized in 1999 and petitioned for “Bradley Property” to be placed into trust in 2001; Sec’y of Interior approved in 2005
- Casino began operation in 2011
- Patchak argued rural location was unique and that he moved there for those unique qualities and thus, he was injured by operation of the casino
- BIA denied standing for Patchak – argued up to US Supreme Court

# Patchak continued

- *Patchak v. Salazar*, (D.C. Cir. 2011)
- *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 US 209 (2012): waiver of US sovereign immunity under the Administrative Procedures Act, may proceed with action
- Congress enacted Gun Lake Trust Land Reaffirmation Act, 128 Stat. 1913 (2014) – affirming in § 2(a) and in § 2(b) holding no action may be maintained in federal court relating to the land.

# Patchak v. Zinke, 583 U.S. \_\_\_ (2018)

- Held by plurality that the Gun Lake Trust Land Reaffirmation Act § 2(b) did not violate Art. III of the U.S. Constitution
- Thomas, Breyer, Alito and Kagan: § 2(b) changed the law and was well within Congressional power to change the jurisdiction of the federal courts; did not interfere with judicial power as no judgment had been rendered in live case; upholds jurisdiction-stripping statutes of Congress

# Concurrences

- Breyer: Constitutional use of Congressional power to affirm Secretarial decision to take land into trust
- Ginsburg and Sotomayor: Consent to suit by the US may be withdrawn at any time and extends to pending litigation; Congress acted effectively to displace the APA's waiver of immunity for suits against the US with a contrary command applicable to the Bradley Property
- Sotomayor: restoration of Federal Government's sovereign immunity in the Gun Lake Act

# Dissent

- Roberts with Kennedy and Gorsuch: Independent Judiciary separate from Congress; Congress has “never gone so far as to target a single party for adverse treatment and direct the precise disposition of a pending case”; ...”concept of ‘changing the law’ must imply some measure of generality or preservation of an adjudicative role for the courts”



# Upper Skagit Indian Tribe v. Lundgren, 138 S.Ct. 1649 (2018)

- Tribe purchased 40 acres and survey found an acre was inside of fence of the Lundgrens who then filed a quiet title action in Washington state court; Tribe asserted sovereign immunity
- 7-2 decision; Thomas with Alito in dissent
- Gorsuch majority opinion: vacate and remanded on the following issues - 1 in rem nature of property owners' action did not, by itself, establish that suit was outside scope of tribe's sovereign immunity, and
- 2 Court would not affirm on alternative common-law ground that tribe could not assert sovereign immunity because suit related to immovable property located in Washington state that was purchased by the tribe in same manner as a private individual.
- Concurrence Roberts with Kennedy: if Lundgrens left without a remedy would be willing to revisit extent of tribal sovereign immunity
- Dissent Thomas with Alito: would use alternative ground of immovable property as an exception to sovereign immunity and decide in Lundgrens favor

# Washington v. US, 584 US \_\_\_ (2018)

- 4-4 decision, one sentence affirming 9<sup>th</sup> Cir. (Justice Kennedy recused due to prior involvement in the case on the 9<sup>th</sup> Cir.)
- “Culverts case” – 9<sup>th</sup> Cir. Held that treaty rights protected right to fish and the right to healthy habitats and numbers of fish; therefore state must remove 817 culverts (estimated cost of \$3.7 bil)

# 2018-19 Term

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- 6 denials for cert petitions in Indian law cases
- Pending for 4 Indian law cases
- Cert granted in 3 Indian law cases
- *Washington State Dept. of Licensing v. Cougar Den*, oral argument set for Oct. 30, 2018
- *Herrera v. Wyoming*, oral argument not set
- *Carpenter v. Murphy*, oral argument set for Nov. 27, 2018

# Washington State Dept of Licensing v. Cougar Den

- Article III of Yakama Nation Treaty of 1855: right to travel provision
- Yakama Nation Corporation imports fuel from Oregon to the Yakama Reservation to be sold; Washington seeks to tax on the importation of the fuel
- Washington State Supreme Court upheld Tribe's right to import without paying state fuel tax or an importer's license

# Herrera v. Wyoming

- Wyoming argues through admission to the Union or through the establishment of the Bighorn National Forest that the right of the Crow Tribe to hunt on the unoccupied lands of the US under the 1868 Treaty of Fort Laramie was abrogated
- Wyoming state courts have convicted and upheld conviction of Clayvin Herrera for shooting an elk outside of the state hunting season in the Bighorn National Forest; Mr. Herrera returned to the Crow Reservation with the elk to feed his family

# Carpenter v. Murphy

- Whether Oklahoma has jurisdiction over Muscogee (Creek) Reservation to prosecute Mr. Murphy for murder; 10<sup>th</sup> Cir held that Congress never disestablished the reservation
- Whether the 1866 territorial boundaries of the Muscogee (Creek) Nation of Eastern Oklahoma constitute an “Indian reservation” under 18 U.S.C. § 1151(a)

# Links for 2018-19 Term

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- Cert Petitions:
- <https://narf.org/nill/bulletins/sct/2018-2019update.html>
- **BRAKEBILL, ET AL. V. JAEGER (ND VOTER ID LAW)**
- <https://www.narf.org/cases/nd-voter-id/>