Washington State Dep't of Licensing v. Cougar Den

Presented by Joel West Williams, Senior Staff Attorney
Native American Rights Fund

23rd Annual KU Tribal Law & Government Conference:
The United States Supreme Court and the Future of Federal Indian Law
March 8, 2019

This presentation will focus on strategic considerations in Indian law cases before the United States Supreme Court, particularly the filing of amicus briefs. We will discuss general principles of amicus brief strategy utilized by the Tribal Supreme Court Project and how they were implemented in the *Cougar Den* case.

I. TRIBAL SUPREME COURT PROJECT

During its October 2000 Term, the United States Supreme Court issued two devastating Indian law opinions: *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001) (tribes lack authority to tax non-Indian businesses within their reservations) and *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal Courts lack jurisdiction to hear cases against non-Indians for harm done on their reservations). These losses were indicative of the Court's steady departure from the longstanding, established principles of Indian law.

In his 2001 seminal article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001), Indian law scholar David Getches provided an in-depth analysis of the U.S. Supreme Court's re-writing of federal Indian law, noting that Indian tribes were without an intellectual leader on the Court and were losing approximately 80% of their cases argued before the Court. At the direction of tribal leaders, the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI) formed the Tribal Supreme Court Project in response to these negative trends. The purpose of the Project is to strengthen tribal advocacy before the U.S. Supreme Court by developing new litigation strategies and coordinating tribal legal resources, and to ultimately improve the win-loss record of Indian tribes. The Project is staffed by NARF and NCAI attorneys and consists of a Working Group of over 300 attorneys and academics from around the nation who specialize in Indian law and other areas of law that impact Indian cases. A prominent function that the Project serves in Indian law cases is the coordination of amicus briefs filed in support of Indian interests before the Court.

II. GENERAL AMICUS CONSIDERATIONS

A guiding principle of amicus practice before the Supreme Court is provided by the Court itself in Rule 37.1: "An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." Sup. Ct. R. 37.1

A 2004 survey of former Supreme Court law clerks conducted by the Journal of Law and Politics, reported that 56% of former clerks said that amicus briefs were particularly helpful in highly specialized and technical cases, including Indian law cases. Kelly J. Lynch, *Best Friends?: Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & Politics 33, 41 (2004). Accordingly, high quality amicus briefs

can be very helpful to the Court and can get the attention of the Justices, and this may be especially true in the highly specialized area of Indian law. For example, Justice Breyer referenced an NCAI amicus brief filed in *Gamble v. United States* (17-646), a Double Jeopardy case not involving tribes directly. The NCAI brief in that case discussed negative law enforcement and public safety concerns if the Court adopted the Petitioner's proposed rule.

Since the Tribal Supreme Court Project's founding in 2001, we have followed some general principles for achieving the most effective amicus support in Indian law cases, including:

- Coordinated, strategic approach to amicus briefs
- Fewer, more focused amicus briefs
- Avoiding repetition that scatters the Court's attention
- Avoiding "me, too" amicus briefs, which merely restate the party's arguments

In order to capture the attention of clerks and Justices, the statement of interest and introductory section are very important. Those sections should focus on why the amici has a unique perspective that the Court should listen to, what that perspective is, and why it is particularly important in this case. The message of the amicus brief should also fit well with the messenger – the party submitting the amicus brief. The most helpful amicus briefs focus on topics such as:

- How a particular rule may impact a broader legal landscape, or impact parties outside the litigation
- Non-legal information such as historical context or practical consequences, such as economic impacts
- Informing the Court on how particular rules or regulations are implemented
- Highlighting or providing more detail on important facts

There are some common mistakes in amicus briefs that should be avoided:

- Repeating the party's analysis ("me, too" brief)
- Overstating practical consequences
- Attempting to supplement the record

A. Petition Stage

"An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari . . . may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 2(b) of this Rule. **An *amicus curiae* brief in support of a petitioner or appellant shall be filed within 30 days after the case is placed on the docket or a response is called for by the Court, whichever is later, and that time will not be extended**. . . . **An amicus curiae brief in support of a respondent, an appellee, or a defendant shall be submitted within the time allowed for filing a brief in opposition or a motion to dismiss or affirm** . . . ." Sup. Ct. R. 37.2(a) (emphasis added).

As a general rule, we don't file amicus briefs supporting a respondent. Such amicus briefs are counter-productive because they tend to attract the Court's attention. When the tribal interest is on the petitioner's side, we focus on particularly important and cert worthy cases.

B. Amicus Briefs on the Merits

"An *amicus curiae* brief in a case before the Court for oral argument may be filed if it reflects that written consent of all parties has been provided, or if the Court grants leave to file under subparagraph 3(b) of this Rule. **The brief shall be submitted within 7 days after the brief for the party supported** is filed, or if in support of neither party, within 7 days after the time allowed for filing the petitioner's or appellant's brief. **Motions to extend the time for filing an *amicus curiae* brief will not be entertained**. . . ." Sup. Ct. R. 37.3 (a) (emphasis added).

The same general principles and guidelines outline above apply to amicus briefs on the merits. We file amicus briefs more frequently on the merits (almost always) than at the petition stage. Also note that the time for filing amicus briefs is much shorter at the merits stage, which means the Project must be coordinating amicus briefs well in advance, especially when supporting a tribal interest on the petitioner's side.

III. *COUGAR DEN* AMICUS BRIEFS

As with all other cases, the amicus brief strategy for the *Cougar Den* case began with consultation with the attorneys representing the tribal interests in the case. This included not only the attorneys representing Cougar Den, but also attorneys for the Yakama Nation. We identified subjects and messages that were most crucial to the case, various interests with a stake, and the best messengers. In this instance, all of them came from Indian Country, but that is not always the case. We often look to law scholars and stakeholders outside Indian Country who have important information or perspectives that the Court should consider. The amicus briefs supporting Cougar Den were as follows:

- **Yakama Nation**: Because this case involved a business owned by a tribal member, it was particularly important for the tribe to file an amicus brief detailing its understanding of the treaty. The tribe's understanding of the treaty provision is especially relevant because Indian treaties are construed as "the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *see also United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Worcester v. Georgia*, 31 U.S. 515, 551-554 (1832).

- **NCAI**: Focused on the correct interpretive method for Indian treaties. The brief illustrated how deeply rooted the Indian canon of construction is in Supreme Court jurisprudence. This was an especially salient topic in this case because the State of Washington was pressing the argument that a separate tax canon – that federal statutes should not be interpreted to provide a tax exemption unless the exemption is clearly expressed – should be applied.

The NCAI amicus brief had a very well written statement of interest, and the last paragraph contained a message that was echoed by some Justices during oral argument:

> NCAI submits that the construction of an Indian treaty must ensure that the Indians receive the benefit of the bargain they negotiated in consideration for the extensive lands and rights they relinquished to the United States. This means that the treaty cannot be interpreted as a statute enacted by Congress would be read. Nor can it be read narrowly to maximize the State's taxing power. Instead, as this Court has held for nearly two centuries, a treaty must be read liberally as the Indians would have

understood it under the circumstances, including the promises and assurances made during treaty negotiations by agents of the United States government.

- **Nez Perce and Confederated Salish and Kootenai Tribes of the Flathead Reservation (CSKT)**: Both of these tribes have "right to travel" provisions in their treaties. Like Yakama Nation, it was important for the Court to hear how they understand these treaty provisions and how the Court's ruling will impact them. The amicus brief also sets forth a detailed historical context for their treaties. The brief also discusses fuel tax agreements the tribes have with Montana and Idaho, which helps demonstrate for the Court that there are mechanisms to resolve the underlying issue even if the Court affirms.

Like the NCAI amicus brief, it contains a short and direct statement of interest, the last paragraph of which reads:

> The Nez Perce Tribe and CSKT are the only other Indian tribes with an expressly reserved treaty right to travel similar to the Yakama treaty right at issue in this case. They write here as amici to emphasize the historical and present-day significance of the reserved right to travel. They also write to address misconceptions and flawed assumptions about the treaty right to travel that have been introduced by Petitioner and its supporters.

- **Sacred Ground Legal Services**: This amicus brief provides details on past disputes between the tribe and state regarding motor fuel taxes, which were extensively cited by the State of Washington in its briefing. It was authored by the attorney who represented the tribe in those cases. It also discusses how the structure of state tax provision at issue in the case creates the revenue problem that the state complains about, and points out how it could be corrected.

All of the materials for the Cougar Den case are available at https://sct.narf.org/caseindexes/washington_v_cougar_den.html.

IV. SUMMARY OF *COUGAR DEN* ORAL ARGUMENT

On October 30, 2018, the U.S. Supreme Court heard argument in *Washington State Department of Licensing v. Cougar Den* (16-1498). In this case the Washington Department of Licensing (Department) seeks reversal of a Supreme Court of Washington decision, which held that the right-to-travel provision of the Yakama Nation Treaty of 1855 preempts the imposition of taxes and licensing requirements by the Department on a tribally chartered corporation that transports motor fuel across state lines for sale on the Reservation.

Justices Kagan, Sotomayor, and Gorsuch dominated the questioning of the Department's attorney, Noah Purcell, with Justice Kavanaugh asking a few questions as well. These justices kept returning to the theme of the tribe's bargained-for right to transport goods to market on highways off-reservation. For example, when the Department asserted that it could impose the tax at issue because it is non-discriminatory, Justice Kagan questioned why that mattered: ". . . [I]t does seem to me that from the Yakama's point of view, and they're, after all, the people who entered into the treaty, . . . this tax is burdening exactly what they bargained to get, which is the ability to transport their goods without any burdens, without a tax." Justice Kavanaugh similarly questioned whether the State's non-discriminatory imposition of the tax mattered by emphasizing the tribe's bargain:

> But . . . the effect was that, in taking your goods to market, which was the promise, in exchange for a huge area of land, an area of land the size of the State of Maryland that was given up by the tribe, that you could take your goods to market. And this burdens, as Justice Kagan said, this burdens substantially their ability to take goods to market.

Also, some justices clearly had in mind cases determining the scope of tribal fishing rights. Justice Sotomayor asked Mr. Purcell at the beginning of his argument:

> If we accept that the travel provision entitled this tribe to travel with goods back and forth to a market without a tax, without a license, just like in the fishing rights case, then what gives you the right to charge them within the state? Meaning they're traveling free of tax, free of license, they go to the reservation, you can't tax them on the reservation. . . So I'm not quite sure what permits you to tax them at all.

Justice Gorsuch also questioned Mr. Purcell regarding the binding effect of the federal district court findings in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), regarding the tribe's understanding of the treaty provision, which the State of Washington never appealed and which were adopted by the lower court here. When Mr. Purcell said that those findings were not binding on the U.S. Supreme Court, Justice Gorsuch responded, "Well, I don't feel bound. I wonder if you are, though."

Arguing for the United States, Ann O'Connell emphasized the United States' argument that while the treaty protected a Yakama citizen's right to travel on public highways, it does not immunize them from excise taxes on the goods obtained off-reservation and carried inside their vehicles. She described the tax as an "economic burden on the fuel that's being carried in the truck," and not "a restriction on their ability to use the highway in common with others." When the Justices returned to the theme of analogies to fishing rights cases, Ms. O'Connell drew a distinction for the Court, arguing that "in common with" the citizens of the state has different meanings in those two different contexts. According to Ms. O'Connell, the right-to-travel provision only secures travel "without taxes imposed or without rules imposed that were unique to Indians." To which Justice Kavanaugh simply responded, "It doesn't say that." And Justice Gorsuch commented, "What kind of promise is that? Given the constitutional rights to travel and equal protection, . . . is that an illusory promise, the promise you've just described?"

Notably, Chief Justice Roberts, Justice Alito, and Justice Ginsburg asked no questions of Mr. Purcell or Ms. O'Connell. Justice Breyer did not ask any questions of Mr. Purcell, but did ask a series of questions to Ms. O'Connell that appeared aimed at determining what level of burden on Tribal citizens may be permissible.

When Adam Unikowsky took the podium to argue Cougar Den's case, Chief Justice Roberts and Justices Alito and Breyer appeared more skeptical of the company's position. Justice Breyer posed questions probing the outer boundaries of the tribe's treaty right, inquiring about whether goods bought online were subject to state taxation under Cougar Den's argument: "Would [Cougar Den's argument] deny the state the right to tax the Indian tribe when they've done what everybody else has done, just bought things online, and they haven't yet paid the use tax or haven't yet paid the comparable sales tax?" And Justice Breyer added, "Now that's what's really bothering me." This theme also came up in one of Chief Justice Roberts' hypotheticals as well, when he asked about whether an

inspection fee for apples coming into the state would be preempted by the treaty: "Everybody else bringing apples in has to pay the fee to inspect the apples, but the tribe doesn't . . .?" Justice Alito was troubled by Cougar Den's argument that the focus of the analysis should be on what the Tribal citizen is doing (i.e., transporting goods, or merely possessing them), calling it "artificial" and a "metaphysical question." While the vast majority of questions during Mr. Unikowsky's argument came from the Chief Justice and Justices Breyer and Alito, Justice Kavanaugh asked a few questions toward the end, including the closing question for Mr. Unikowsky: "To state the obvious, the value, current value of the land the tribe gave up is enormous, right?"

Finally, it is worth noting an issue that did not come up during oral argument: In its briefing, the Department urged the Court not to apply the Indian canon and construe the treaty provision as the Yakama Nation understood it in 1855, when it entered into the treaty, but instead to apply a "clear statement" canon typically applied statutes, which requires Congress to use clear, express language in order to preempt state taxes. The State did not press this position during argument, and none of the Justices asked questions about which approach the Court should take.

The transcript of the argument is available at: https://sct.narf.org/caseindexes/washington_v_cougar_den.html.