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MEMORANDUM

June 24, 2016

TO: USET Sovereignty Protection Fund
FROM: Gregory Smith
RE: Dollar General Case

Yesterday the U.S. Supreme Court affirmed the decision of the Fifth Circuit in *Dollar General Corp. v. Mississippi Band of Choctaw Indians*. The Supreme Court's decision was 4-4 and simply states: "PER CURIAM. The judgment is affirmed by an equally divided Court." The decision is attached.

There were no written opinions by any of the justices. The result of the Supreme Court's action is that the favorable Fifth Circuit decision on the issue of tribal jurisdiction will remain the law of that circuit, but it is not binding on other circuits. Nationwide resolution of this tribal jurisdiction issue by the Supreme Court has been deferred to another day.

Fifth Circuit Ruling

The Fifth Circuit in its decision in the case upheld tribal court jurisdiction over tort claims against a nonmember corporation doing business on the reservation. The Fifth Circuit based its opinion on an analysis of the Supreme Court's 1981 decision in *Montana v. United States*, in which the Supreme Court held the Crow Tribe lacked jurisdiction to regulate nonmembers' hunting and fishing on non-Indian fee land located within the reservation. In discussing non-Indian fee land, the U.S. Supreme Court held that as a "general proposition . . . the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." However, the Court wrote two exceptions into that general rule, the first being that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."

The Fifth Circuit held that the tribal court had jurisdiction pursuant to the first *Montana* exception, finding that Dollar General Corp. entered into a consensual relationship with the Tribe by participating in the internship program. Dollar General Corp. argued that the Supreme Court's opinion in the 2008 *Plains Commerce Bank* case, another case also involving tribal jurisdiction over nonmembers, required an additional showing that the specific consensual relationship interferes with tribal governance and internal relations. The Fifth Circuit disagreed, holding that such a showing was not required for the first *Montana* exception. It also held that application of tribal civil law is a permissible means of regulating conduct for purposes of the first *Montana* exception.

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Dollar General Corp. asked the U.S. Supreme Court to review the Fifth Circuit's decision. It urged the Supreme Court to consider broadly whether tribal courts may *ever* exercise civil jurisdiction over nonmembers, regardless of the *Montana* exceptions. The Supreme Court granted review, despite the fact that the U.S. Department of Justice filed a brief recommending that the Court not review the case because the Department believed the Fifth Circuit was correct that the tribal court had jurisdiction. The Department also asserted that the Tribe had jurisdiction on the separate basis that the improper conduct occurred on tribal trust land, so that the *Montana* exceptions do not come into play.

Tribal Supreme Court Project Call

The NCAI/NARF Tribal Supreme Project held a call yesterday to discuss the Supreme Court's decision in the case. More than 90 tribal representatives participated in the call. Neal Katyal of Hogan Lovells, who argued the case before the Supreme Court for the Mississippi Band of Choctaw Indians, stated that he thinks the Court's decision is a good one because it holds the line on the issue. He admitted that he thought the Court granted certiorari to reverse the Fifth Circuit. Call participants agreed that Indian Country needs to keep educating the Justices about Indian law issues and also agreed that as this case ended in a tie that the next Supreme Court Justice will be key on Indian law matters. Others from the Tribe's legal team joined Mr. Katyal in thanking the Supreme Court Project for the support and work on the amicus briefs. There were eight amicus briefs filed in support of the Tribe, and it was stated that these amicus briefs really helped hold the line. The Tribe's legal team found the decision encouraging in that four Justices resisted what was assumed to be intense pressure from the Justices who sought to reverse the Fifth Circuit decision.

The possibility of Dollar General Corp. asking the Court for a rehearing next term (when there are nine Justices) was also discussed. Per U.S. Supreme Court Rule 44, any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. Mr. Katyal, however, stated that he thought the Court would not grant a rehearing if Dollar General requested one. Furthermore, the Tribe's legal team said that Dollar General's counsel indicated that it plans to go to trial in the case.

Call participants discussed the effort to update and revise the Indian Trader regulations, 25 C.F.R. Part 140, as an effort to shore up the law in this area. The Indian Trader effort seeks to clarify tribal court jurisdiction over those conducting business in Indian Country. NCAI is holding a session on this effort during its Mid-Year Conference next week. Another thought on the effort to continue to educate Justices and others about tribal jurisdiction and to help shore up the law was for Indian law scholars to write law review articles on the topic to counter existing anti-tribal jurisdiction articles.

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