



**U.S. Supreme Court Confirmation Hearings
Judge Neil Gorsuch
Summary of Discussion of Federal Indian Law
March 24, 2017**

On Monday March 20, 2017 the Senate Committee on the Judiciary began its four day confirmation hearing for Supreme Court nominee Judge Neil Gorsuch. Day One included opening statements by members of the Committee along with an introductory statement from Judge Gorsuch where he noted that he has “decided cases for Native Americans seeking to protect tribal lands.” Day Two and Day Three were devoted to questions from Committee members on Judge Gorsuch’s record and career. Finally, Day Four concluded with testimony from witnesses who either championed or opposed Judge Gorsuch’s nomination. The Committee is expected to vote on Judge Gorsuch’s nomination on April 3, 2017 with a full Senate vote expected shortly thereafter.

Judge Gorsuch currently serves on the U.S. Court of Appeals for the Tenth Circuit, which encompasses the territory of 76 federally recognized Indian tribes. NCAI has long sought the nomination of Justices with knowledge of federal Indian law, and more generally with experience on western issues. Gorsuch’s western credentials were a focus of these hearings, and his Indian law decisions were the subject of several key moments during both days of questioning.

Western Experience. As a Senator from Judge Gorsuch’s home state, Senator Michael Bennet (D- Colorado) introduced Judge Gorsuch. Bennet said Judge Gorsuch exemplifies some of the finest qualities of Colorado, and if confirmed, will be the first Justice from the West outside of California since Justice Sandra Day O’Connor. Neal Katyal, the Acting Solicitor General under President Obama, made an introductory statement supporting Gorsuch and quoting Justice Scalia on the absence of westerners in the current makeup of the Supreme Court. Katyal recently represented tribal interests before the Court in *Michigan v. Bay Mills*, *Dollar General v. Mississippi Choctaw* and *Lewis v. Clarke*. Former Chief Judge Robert Harlan Henry of the U.S. Court of Appeals for the Tenth Circuit testified that Judge Gorsuch possesses unique qualifications in his mastery of law and that he has dealt with a lot of cases from the Great American West. Judge Henry further stated that “we have our cases involving our Native American Nations, cases involving land and water that are important and his experience in these areas will be helpful to the Court.”

Indian Law Decisions Highlighted. Senator Dianne Feinstein (D-California) is the Ranking Member on the Committee and her first line of questioning focused on a fundamental concern. “How do we have confidence in you that you won’t just be for the big corporations?” she asked. She was, she added, “just looking for something” in his record to give her confidence that he could also support “the little guy.” Judge Gorsuch was prepared and listed cases from his record in which he ruled for those who are not wealthy or powerful, starting with three of his Indian law

cases. This was repeated on the second day of questioning when Chairman Grassley read out the holdings of a string of cases, starting with these same three Indian law cases.

The first was *Ute Indian Tribe v. State of Utah*, 790 F.3d 1255 (10th Cir. 2015) where the State of Utah was unlawfully prosecuting tribal members in state court for conduct on tribal lands. Gorsuch's decision demonstrates an appreciation for the federal responsibility to protect tribal sovereignty from state intrusion: "Indeed, the harm to tribal sovereignty in this case is perhaps as serious as any to come our way in a long time." *Ute Tribe* at 1005. Next, Gorsuch referenced *Ute Indian Tribe v. Myton*, 835 F.3d 1000 (10th Cir, 2016) where his decision addressed local government efforts to prosecute tribal members for crimes committed within reservation boundaries. This decision takes the unusual step of reassigning the case to a new federal district court judge because of failure to give effect to previous rulings.

And the third Indian law case Gorsuch referenced was *Fletcher v. United States*, 730 F.3d 1206 (10th Cir. 2013) where members of the Osage Nation sought an accounting for Indian trust funds. The decision held that the common law trust duty of accounting applies so long as consistent with Congress's statutory directions. Rather than defer to the Department of Interior's interpretation of the Indian Trust Asset Management Reform Act, Judge Gorsuch uses the Indian canon of construction to support his analysis. "If any doubt remains (and we harbor none), we would still reach the same conclusion because, again, statutory ambiguities in the field of trust relations must be construed for, not against, Native Americans." *Fletcher* at 1212.

Tribal Sovereignty and the U.S. Constitution. Toward the end of Day Two, Judge Gorsuch was asked a question by Senator Ben Sasse (R-Nebraska) who had spoken with a teacher planning to use the hearings for a civics lesson. Could Judge Gorsuch explain why the Constitution has a Bill of Rights? Gorsuch explained separation of powers under the Constitution, among the branches of the federal government and with the states, and then he added in the tribes. "The federal government has certain enumerated powers and authorities, and what the federal government doesn't enjoy the states do as sovereigns. In this country as well, we have tribes which also bear sovereignty in our part of the world, and bear recognition as such, and I'm glad to have the opportunity to recognize that fact here as a Westerner." His unprompted inclusion of Indian tribes among the sovereigns in a very basic explanation of the Constitution is a positive sign. A video clip is here.

<https://www.c-span.org/video/?c4662595/gorsuch-federalism-indian-tribes>

On Indian Tribes Generally. Senator Flake from Arizona asked a broad question about Indian tribes and the transcript follows, a clip is here:

<https://www.c-span.org/video/?c4662592/gorsuch-indian-tribes>

Flake: Another aspect of living in the American West is we share a lot of land with the Indian tribes and the prevalence of tribes out west can complicate things in a legal sense, say deciding between municipalities or local or state government. What have you ruled on or have you dealt with in terms of relationship between state and local government and the tribes?

Gorsuch: Senator, I have had a number of tribal cases and tribes are, as you know, sovereign nations and our constitutional order affords this body considerable power in

dealing with those sovereign nations by treaty and otherwise. Out West, there are all sorts of variations on that arrangement. There are classic reservations as many people in the East conceive of them. There are also ancient pueblos that predate this country by many hundreds of years. Then there are allotments to individuals and groups. Depends where you are. That sounds like Oklahoma. Pueblos sounds like New Mexico. When I think of reservations I think of Utah and some places in Colorado or Wyoming. Our history with Native Americans, not the prettiest history. As a judge, you try very hard to administer the law fairly without respect to persons, and equally. I point you maybe to my cases involving the Ute Indian Tribe where they had a long time trying to control their tribal lands, or Fletcher involving the Osage Nation in Oklahoma and their right to an accounting of the property due them under agreements with the United States. I try to treat all persons who come before me fairly.

Religious Freedom. In response to questions from Senator Hatch (R-Utah), who was the main author of the Religious Land Use and Institutionalized Persons Act (RLUIPA), Judge Gorsuch discussed his decision in *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), where an enrolled member of the Northern Arapaho Tribe housed in a special protective unit sought access to a sweat lodge located in the general prison yard. State prison officials asserted that the cost of security for transport to the sweat lodge was unduly burdensome, and Yellowbear filed for injunctive relief under RLUIPA. The United States District Court for the District of Wyoming granted summary judgment for prison personnel. The Tenth Circuit reversed and remanded with Gorsuch writing that the existence of a compelling government interest to deny a prisoner's request under RLUIPA must be based on more than generalized security and cost concerns. "[T]he deference this court must extend to the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat." *Yellowbear* at 59. The opinion was quoted by Justice Sotomayor's concurrence in *Holt v. Hobbs*, 135 S.Ct. 853, 867 (2015). *Yellowbear* was again referenced at least two more times during the confirmation hearings. The most detailed discussion is here.

<https://www.c-span.org/video/?c4662890/gorsuch-religious-freedom-yellowbear>

Conclusion. As with any nominee to the Supreme Court, it is impossible to predict how Judge Gorsuch will decide cases that will come before him in the future. However it is encouraging that Judge Gorsuch has significant experience with federal Indian law and is comfortable discussing the fundamental principles of tribal sovereignty and the federal trust responsibility in a Senate confirmation hearing. The confirmation hearing also served as a bit of a civics lesson on federal Indian law for a broad audience of lawmakers and many others interested in the Supreme Court. Judge Gorsuch's experience and familiarity with federal Indian law is noteworthy on a Supreme Court where most of the Justices came to the Court with little or no experience.