TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 17, 2012

UPDATE OF RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org/sct/index.html).

As expected, the Court has denied or dismissed all of the petitions seeking review of the *Cobell* decision by the U.S. Court of Appeals for the D.C. Circuit which affirmed the district court's judgment approving the *Cobell* class action settlement agreement. The settlement resolved a long-running class action lawsuit regarding the U.S. government's trust management and historical accounting of individual American Indian trust accounts. In a November 27, 2012, press release, Secretary of the Interior Ken Salazar outlined the steps that Interior will take to help implement the historic $3.4 billion settlement. Initial payments should be received by the individual class members prior to the upcoming holidays.

Although no Indian law cases have been granted review on the merits thus far this term, immediately following the holidays, there will be increased attention to the Court's Indian law docket. When it returns for its conference on January 4, 2013, the Court will consider three of the nine Indian law petitions currently pending. The most troubling petition is *Adoptive Couple v. Baby Girl, Birth Father and Cherokee Nation* which involves a challenge to provisions within the Indian Child Welfare Act (ICWA) protecting the rights of Indian parents, families and tribes in relation to Indian children. The petition filed by a non-Indian couple is supported by a total of five amicus briefs, two of which were prepared by former U.S. Solicitor Generals: Paul Clement and Gregory Garre. Amici include the American Academy of Adoption Attorneys, the National Council for Adoption and the California State Association of Counties.

Another troubling Indian law petition is *Contour Spa at the Hard Rock Inc. v. Seminole Tribe of Florida,* which asks the Court to review the doctrine of tribal sovereign immunity in a breach of lease suit. On average, the Court is asked to review at least seven petitions each term seeking reversal of *Kiowa Tribe* or asking the Court to limit the scope of the doctrine of tribal sovereign immunity. Thus far, Indian country has weathered this constant assault, but we are seeing more of these cases where extremely "bad facts" have the potential to make "bad law." The third Indian law petition scheduled for conference is *Michigan v. Bay Mills Indian Community*. Here, the state is asking the Court to review the Sixth Circuit's decision that federal courts lack jurisdiction to adjudicate Indian Gaming Regulatory Act (IGRA) claims to the extent those claims are based on an allegation that a Tribe's casino is not on "Indian lands" and its determination that such claims are also barred by the doctrine of tribal sovereign immunity.

CASES RECENTLY DECIDED BY THE SUPREME COURT

At present, one Indian law case has been granted review by the Court during the October Term 2012:

UNITED STATES V. SAMISH INDIAN NATION (NO. 11-1448) – On October 9, 2012, the Court issued an order granting the petition of the United States, vacating the judgment with respect to all matters relating to the Samish Tribe's Revenue Sharing Act claim and remanding the case to the U.S. Court of Appeals for the Federal Circuit with instructions to dismiss that claim as moot. This case arose from a series of suits brought by the Samish Tribe to obtain treaty rights and statutory benefits from the United States as a result of its efforts to be a "federally recognized" Indian tribe which began in 1972. The U.S. had sought review by the Court of a decision by the Federal Circuit which held that the Samish Tribe may pursue its claims for money damages under the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act). The Federal Circuit had held that the Revenue Sharing Act is a "money mandating statute" and is not limited by operation of the Anti-Deficiency Act, 31 U.S.C.§ 1341.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, several petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

NATIVE VILLAGE OF EYAK V. BLANK (NO. 12-668) – On November 28, 2012, the Native Village of Eyak filed a petition seeking review of an en banc decision of the U.S. Court of Appeals for the Ninth Circuit which held that the Native Villages of Eyak, Tatitlek, Chenega, Nanwalek and Port Graham do not possess aboriginal hunting and fishing rights in the areas of the Outer Continental Shelf they traditionally used. The question presented in the petition is: "The Ninth Circuit agreed with the district court's findings that at the time of first contact with Europeans, the Chugach were a culturally, ethnically and linguistically related people who had made actual and continuous use and occupancy of an area of the Outer Continental Shelf for a long time. The courts also agreed there was no evidence that others used the area, except for the periphery. Based on these showings by the Chugach, did the Ninth Circuit err in concluding that the exclusive use required to establish aboriginal title was defeated by a failure to demonstrate an ability to expel a hypothetical invader, by other groups' use of the periphery of the Chugach territory, and by the fact that the Chugach villages were politically independent?" The United States brief in opposition is due on December 31, 2012.

MADISON COUNTY V. ONEIDA INDIAN NATION OF NEW YORK (NO. 12-604) – On November 12, 2004, Madison County and Oneida County filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which affirmed the district court's dismissal of their counterclaim that the Oneidas' reservation was disestablished. The question presented in the petition is: "Does the 300,000-acre ancient Oneida reservation in New York still exist, neither disestablished nor diminished, despite (1) the federal government's actions taken in furtherance of disestablishment (including, but not limited to, the 1838 Treaty of Buffalo Creek); (2) this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("Sherrill") that the Oneida Indian Nation of New York cannot exercise sovereignty over lands it purchases in the ancient reservation area; and (3) this Court's finding in that case that land in the ancient reservation area has not been treated as an Indian reservation by the

federal, state or local governments for nearly two centuries?" The Tribe's brief in opposition is due on January 16, 2012.

MICHIGAN V. BAY MILLS INDIAN COMMUNITY (NO. 12-505) – On October 23, 2012, the State of Michigan filed a petition seeking review of a decision by the U.S. Court of Appeals for the Sixth Circuit which held that federal courts lack jurisdiction to adjudicate their IGRA claims to the extent those claims are based on an allegation that the Tribe's casino is not on Indian lands and that such claims are also barred by the doctrine of tribal sovereign immunity. The Tribe filed its brief in opposition on November 26, 2012, and the petition has been scheduled for conference on January 4, 2013.

ADOPTIVE COUPLE V. BABY GIRL, BIRTH FATHER AND CHEROKEE NATION (NO. 12-399) – On October 1, 2012, a non-Indian couple filed a petition seeking review of a decision by the South Carolina Supreme Court which affirmed the state family court's denial of the adoption and order requiring the adoptive parents to transfer the child to the biological father who is a member of the Cherokee Nation. The South Carolina Supreme Court held: (1) the Indian Child Welfare Act (ICWA) extends greater rights to unwed fathers than state law in the determination of whether an unwed father is a "parent;" and (2) state courts must consider the heightened federal requirements to terminate parental rights as to ICWA parents. On October 22, 2012, a response brief in support of the petition was filed by the Guardian Ad Litem as Representative of Baby Girl. On October 31, 2012, five amicus briefs in support of the petition were filed, including briefs by the American Academy of Adoption Attorneys, the National Council for Adoption and the California State Association of Counties. The Tribe and the Birth Father filed their brief in opposition on November 30, 2012, and the petition has been scheduled for conference on January 4, 2013.

CONTOUR SPA AT THE HARD ROCK INC. V. SEMINOLE TRIBE OF FLORIDA (NO. 12-372) – On September 21, 2012, Contour Spa filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that its breach of lease suit against the Seminole Tribe is barred by the doctrine of tribal sovereign immunity. The Eleventh Circuit rejected the arguments of Contour Spa that the Tribe's immunity was: (1) voluntarily waived by the Tribe in its removal of the case from state to federal court; (2) impliedly waived under the Indian Civil Rights Act; and (3) foreclosed under the principles of equitable estoppel. The Tribe filed its brief in opposition on November 26, 2012, and the petition has been scheduled for conference on January 4, 2013.

MARCEAU V. BLACKFEET HOUSING AUTHORITY (NO. 12-278) – On August 26, 2012, tribal members who had bought or leased defective homes built under the auspices of the U.S. Department of Housing and Urban Development ("HUD") by the Blackfeet Housing Authority filed a second petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court decision dismissing their Administrative Procedure Act claims relating to the construction of homes using wooden foundations based on the six year statute of limitations. The Ninth Circuit also found that HUD is only legally required to respond to requests for repairs from the Tribe's housing authority, not from individual homeowners. The Ninth Circuit did not revisit its previous decision that a trust relationship was not created by HUD's involvement in the construction of the homes. The United States filed its brief in opposition on December 5, 2012.

THE NEW 49'ERS, INC. V. KARUK TRIBE OF CALIFORNIA (NO. 12-289) – On August 29, 2012, the New 49'ers, a recreational mining company which owns and leases numerous mining claims in and around the Klamath and Six Rivers National Forests, filed a petition seeking review of an en banc decision of the U.S. Court of Appeals for the Ninth Circuit which held that the U.S. Forest Service violated the

Endangered Species Act ("ESA") by not consulting with the appropriate wildlife agencies before allowing suction dredge mining activities to proceed under a Notice of Intent ("NOI") in coho salmon critical habitat within the Klamath National Forest. On September 12, 2012, the Tribe filed a waiver of its right to respond, and the petition was scheduled for conference on October 5, 2012. However, on October 4, 2012, the Court extended the time to file a response to November 8, 2012, because amicus briefs in support of the petition were filed by the Northwest Mining Association and the Eastern Oregon Mining Association. The petition was rescheduled for conference on December 7, 2012. On December 6, 2012, the Court requested a response from the Tribe which is due on January 7, 2012.

ORAVEC V. COLE (NO 12-222) – On August 20, 2012, Mr. Oravec, an agent with the Federal Bureau of Investigation, filed a petition seeking review of a decision by the U.S. Circuit Court of Appeals for the Ninth Circuit which held that he was not entitled to qualified immunity in a "*Bivens* action" brought by the relatives of two deceased Native American men. In their amended complaint, the relatives alleged that Mr. Oravec violated their right to equal protection when he failed to conduct a sufficiently thorough investigation of the deaths out of an alleged animus toward Native Americans. The relatives alleged that Mr. Oravec provided the family with less investigatory services than he would have provided to a non-Native family. The petition was scheduled for conference on October 3, 2012, but the Court has requested a response brief which is due on December 21, 2012.

YOUNG V. FITZPATRICK (NO. 11-1485) – On June 4, 2012, Mr. Young, as representative of the estate of his brother, filed a petition seeking review of an unpublished decision by the Washington State Court of Appeals which held that, based on the doctrine of tribal sovereign immunity, state courts do not have subject matter jurisdiction over claims against tribal police officers acting in their official capacity on tribal lands. The tribal police officers filed their brief in opposition on July 9, 2012, and the petition was scheduled for conference on September 24, 2012. On October 1, 2012, the court issued a CVSG, inviting the Solicitor General to file a brief expressing the views of the United States.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court has denied or dismissed the following Indian law petitions for writ of certiorari:

FURRY V. MICCOSUKEE TRIBE (NO. 12-376) – On November 26, 2012, the Court denied review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that a wrongful death suit against the Miccosukee Tribe was barred by the doctrine of tribal sovereign immunity. Mr. Furry, as personal representative of the estate for his daughter, alleged that the Miccosukee Tribe violated 18 U.S.C. § 1161 and Florida's dram shop law by knowingly serving excessive amounts of alcohol to his daughter, who then got in her car, drove off while intoxicated, and ended up in a fatal head-on collision with another vehicle.

GOODBEAR V. COBELL (NO. 12-355) – On November 6, 2012, at the request of the petitioners pursuant to Rule 46, the Court dismissed the petition. Carol Eve Good Bear, Charles Colombe and Mary Aurella Johns, members of the Cobell plaintiffs' class, had filed a petition seeking review of the decision of the U.S. Court of Appeals for the D.C. Circuit which affirmed the district court's judgment approving the Cobell class action settlement agreement. The petitioners had challenged the lower court's finding of "commonality" in certifying the class certification and its ruling that no opt out procedure was required for the mandatory Historical Accounting Class within the settlement.

CRAVEN V. COBELL (NO. 12-234) – On October 29, 2012, the Court denied review of a decision of the U.S. Court of Appeals for the D.C. Circuit which affirmed the district court's judgment approving the Cobell class action settlement agreement. In the D.C. Circuit, Craven had challenged the fairness of the settlement agreement, contending that "an impermissible intra-class conflict permeates the scheme to compensate class members for surrendering their established right to injunctive relief and that this conflict undermines the commonality, cohesiveness and fairness" required to certify a class.

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to NCAI, attn: Sharon Ivy, 1516 P Street, NW, Washington, DC 20005. **Please contact us if you have any questions or if we can be of assistance: John Dossett, NCAI General Counsel, 202-255-7042 (jdossett@ncai.org), or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 (richardg@narf.org).**