TRIBAL SUPREME COURT PROJECT MEMORANDUM

MAY 15, 2013

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).

CASES GRANTED REVIEW BY THE SUPREME COURT

At present, two Indian law cases have been granted review by the Court during the October Term 2012:

ADOPTIVE COUPLE V. BABY GIRL, BIRTH FATHER AND CHEROKEE NATION (NO. 12-399) – On April 16, 2013, the Court heard oral argument on the petition filed by a non-Indian couple 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 prospective adoptive parents to transfer the child to the Father who is a member of the Cherokee Nation. The South Carolina Supreme Court had 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. Petitioner's opening brief was filed on February 19, 2013. In an unusual twist, the Guardian Ad Litem as Representative of Baby Girl also filed an opening brief prepared by former U.S. Solicitor General Paul Clement supporting reversal. On February 26, 2013, a total of eight amicus briefs were filed in support of the Petitioners, including a brief by the Birth Mother submitted by another former U.S. Solicitor General Gregory Garre, as well as briefs by the American Academy of Adoption Attorneys, the National Council for Adoption, and the Christian Alliance for Indian Child Welfare.

In response to the Adoptive Couple's and their amici's assault on ICWA, the Tribal Supreme Court Project fully mobilized its resources in coordination with the attorneys for the Father and the Cherokee Nation to broaden support for the protections provided under ICWA to Indian children, Indian families and Indian tribes. In all, 24 amicus briefs in support of the Father and the Cherokee Nation have now been filed. One key amicus brief was submitted by the U.S. Solicitor General which emphasizes the importance of ICWA and states: "the United States has a substantial interest in the case because Congress enacted ICWA in furtherance of 'the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people.'" The brief further defends the constitutionality of ICWA, arguing that "ICWA, which is predicated on Congress's considered judgment

that application of its protections serves the best interests of Indian children and protects vital interests of their parents and Tribes, does not violate any substantive due process protections." It concludes that "[t]he South Carolina courts properly awarded custody of Baby Girl to Father."

A second key brief was filed by Arizona Attorney General Tom Horne, who was joined by attorneys general from 17 other states—Alaska, California, Colorado, Connecticut, Georgia, Idaho, Illinois, Maine, Michigan, Mississippi, Montana, New Mexico, New York, North Dakota, Oregon, Washington, and Wisconsin—and argued against interference in the relationship between states and tribes in matters regarding ICWA. The message of the brief is that "States and tribes have collaborated to ensure that the mandates and spirit of ICWA are fulfilled…. Early and complete compliance with ICWA ensures the security and stability of adoptive families as well as tribes and Indian families." And it is important to note that not one state submitted a brief in support of Adoptive Couple.

In another brief, 17 current and former members of Congress joined together to educate the Court about the circumstances and evidence that led to the enactment of ICWA in 1978. The members included nearly every Chair of the Senate Committee on Indian Affairs who reminded the Court that Congress has exclusive power to legislate with respect to Indian tribes:

> In 1978, Congress enacted ICWA in direct response to state adoption policies that were draining Indian tribes of their future citizens. Such practices threatened the very existence of Indian tribes. Without children to grow up as their citizens, tribes would be left with no one to speak their language, carry on their traditions and culture, or participate in their tribal governments…. Ultimately, any decision limiting Congress's authority to pass legislation like ICWA…would effectively preclude Congress from exercising its plenary authority in Indian affairs, and render Congress unable to fulfill its historic duties as trustee to the Indian tribes.

And in a brief filed by the Casey Family Programs and 17 leading child welfare organizations, the Court was informed that ICWA represents the "best practices" for all child custody determinations:

> No one understands the human toll custody disputes can take more than amici, 18 child welfare organizations who have dedicated literally scores of years to the on-the-ground development and implementation of best practices and policies for child placement decision making. Amici have seen up close what works, and what does not. In amici's collective judgment, ICWA works very well and, in fact, is a model for child welfare and placement decision making that should be extended to all children. Much forward progress in the child welfare area would be damaged by rolling the law back.

To complement these and other powerful amicus briefs from non-Indian governments and organizations, two national tribal amicus briefs were submitted along with six state-specific tribal amicus briefs. The first national tribal amicus brief focused on the legislative history and importance of ICWA and was submitted on behalf of the Association on American Indian Affairs, the National Congress of American Indians and the National Indian Child Welfare Association, who were joined by 30 Indian tribes and five Indian organizations. The second national tribal amicus brief addressed the constitutional issues raised by the petitioners and also includes over 70 tribes from across the nation who filed individually or as members of regional tribal organizations.

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:

NEBRASKA V. ELISE M. (NO. 12-1278) – On April 23, 2013, the State of Nebraska (through the Lancaster County Attorney's Office) filed a petition seeking review of a decision by the Nebraska Supreme Court which held that, under ICWA, a state court must treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether an Indian child case pending in state court has reached an "advanced stage" at the time a motion is made to transfer the case to tribal court. The court also clarified an earlier opinion and concluded that the best interest of the child is not a consideration for the threshold determination of whether there is "good cause" not to transfer jurisdiction to a tribal court. The Tribe's brief in opposition is due on May 28, 2013.

ONONDAGA NATION V. NEW YORK (NO. 12-1279) – On April 22, 2013, the Onondaga Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that the Onondaga's lands claims are "equitably barred" based on the Supreme Court's 2005 decision in *City of Sherrill* as inherently disruptive of the settled expectations of the non-Indian landowners. New York's brief in opposition is due May 28, 2013.

MILLER V. WRIGHT (NO. 12-1237) – On April 9, 2013, a group of cigarette vendors filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the Puyallup Tribe did not implicitly waive its sovereign immunity by agreeing to dispute resolution procedures when it entered into a cigarette tax compact with the State of Washington. The Ninth Circuit also held that federal antitrust law did not explicitly abrogate tribal immunity, and the Sherman Antitrust Act was not a law of general applicability vis-à-vis the tribe. On May 14, 2013, the Puyallup Tribe filed its brief in opposition.

NATIVE VILLAGE OF KIVALINA V. EXXON MOBILE CORPORATION (NO. 12-1072)—On February 25, 2013, petitioners Native Village of Kivalina and the City of Kivalina, a federally-recognized tribe and an Alaskan municipality, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court's dismissal of their claims for damages for lack of subject matter jurisdiction, holding that the Clean Air Act displaces their federal common law claims. Petitioners are the governing bodies of an Inupiat village located on an Arctic barrier island that is being destroyed by global warming. Petitioners allege that greenhouse gases have caused the Earth's temperature to rise, especially in the Arctic, which has melted the land-fast sea ice that protects the village from powerful

oceanic storms. As a result, Kivalina is now exposed to erosion and flooding from the sea and must relocate or face imminent destruction. Petitioners make clear that they seek damages - not injunctive relief - from the largest U.S. sources of greenhouses gases under the federal common law of public nuisance. The question presented is: "Whether the Clean Air Act, which provides no damages remedy to persons harmed by greenhouse gas emissions, displaces federal common-law claims for damages." Respondents filed their brief in opposition on April 18, 2013, and the petition has been scheduled for conference on May 16, 2013.

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 June 3, 2013.

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?" Three amicus briefs in support of the petition have been filed by: the State of New York; Cayuga and Seneca Counties; and, the Citizens Equal Rights Foundation. The Tribe's brief in opposition was filed on January 16, 2012, and the petition was scheduled for conference on February 15, 2013. On February 19, 2013, the Court issued a CVSG, inviting the Solicitor General to file a brief expressing the views of the United States.

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 was scheduled for conference on January 4, 2013. On January 7, 2013, the Court issued a CVSG, inviting the Solicitor General to file a brief expressing the views of the United States. On May 14, 2013, the United States filed an amicus brief recommending that the Court deny review of the petition.

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:

SANTANA V. MUSCOGEE (CREEK) NATION (NO. 12-9376) – On April 29, 2013, the Court denied review of a petition brought by a self-professed gambling addict who sought review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that there is no express grant of jurisdiction or waiver of immunity within the tribal-state gaming compact which allows state courts to hear compact-based tort claims against the Tribe.

RUDE V. COOK INLET REGION, INC. (NO. 12-988) – On April 15, 2013, the Court denied review of a petition filed by former shareholders and board members of the Cook Inlet Region, Inc. ("CIRI"), an Alaska Native Regional Corporation formed under the Alaska Native Claims Settlement Act ("ANCSA"), seeking review of a decision of the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court's finding of federal question jurisdiction over claims brought by CIRI against petitioners for violations of certain provisions of ANSCA regarding petitions to lift alienability restrictions.

THE NEW 49'ERS, INC. V. KARUK TRIBE OF CALIFORNIA (NO. 12-289) – On March 18, 2013, the Court denied 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. 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 this decision, and amicus briefs in support of the petition were filed by the Northwest Mining Association and the Eastern Oregon Mining Association.

MARCEAU V. BLACKFEET HOUSING AUTHORITY (NO. 12-278) – On January 14, 2013, the Court denied review of a second petition filed by 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 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.

ORAVEC V. COLE (NO. 12-222) – On January 14, 2013, the Court denied review of a petition filed by Mr. Oravec, an agent with the Federal Bureau of Investigation, 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.

CONTOUR SPA AT THE HARD ROCK INC. V. SEMINOLE TRIBE OF FLORIDA (NO. 12-372) – On January 7, 2013, the Court denied review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that a 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.

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: Sam Owl, 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).