TRIBAL SUPREME COURT PROJECT MEMORANDUM

SEPTEMBER 26, 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).

On September 30, 2013, the U.S. Supreme Court will hold its long conference to decide how many new cases to accept for review from a huge list of petitions that have stacked up during its summer recess. Among the 2000+ petitions to be considered are six Indian law cases which range from questions arising—once again—under the Indian Child Welfare Act (*Nebraska v. Elise M.* and *James L. v Devin H.*); to whether certain Alaska Native Villages possess aboriginal hunting and fishing rights in the areas of the Outer Continental Shelf (*Native Village of Eyak v. U.S.*); to whether Indian land claims should be dismissed based on the Supreme Court's 2005 decision in *City of Sherrill* as "equitably barred" for being inherently disruptive to the settled expectations of non-Indian landowners (*Onondaga Nation v. New* York); to issues related to the payment of state cigarette taxes by individual Indian retailers and wholesalers (*Tonasket v. Sargent* and *Matheson v. Washington Department of Revenue*). SCOTUSblog has named one Indian law case, *Nebraska v. Elise M.* on its list of "Petitions to watch" for the long conference.

Although concerned about the possible grant of review in another ICWA case in the wake of last term's decision in *Adoptive Couple v. Baby Girl*, the focus for the Tribal Supreme Court Project is currently fixed on *Michigan v. Bay Mills*—a case granted review by the Court even though the United States had filed a brief recommending that cert be denied. Although this litigation should be about the merits of Bay Mills' claims under the Michigan Indian Land Claims Settlement Act to conduct gaming on lands acquired with settlement funds—it is not. In its current posture before the Court, the State of Michigan is using this case to mount a full frontal attack on tribal sovereign immunity and the authority of states to regulate "gaming activity" under the Indian Gaming Regulatory Act (IGRA). The State of Alabama, joined by fifteen other states, and the State of Oklahoma have filed amicus briefs in support of Michigan (see summaries below).

On the merits, Michigan is asking the Court to examine "IGRA as a whole" to find Congressional intent to waive tribal sovereign immunity or, in the alternative, to overrule *Santa Clara Pueblo* and apply a "less strict standard" when considering whether legislation such as IGRA abrogates tribal sovereign immunity. If the statutory arguments are not successful, the state is asking the Court to recognize that tribal sovereign immunity "is a federal common law doctrine" created by this Court and subject to adjustment by this Court. Thus, according to Michigan, the Court should narrowly read *Kiowa* as a "contract-based

ruling" and (at the extreme) hold that a tribe's immunity is limited to its on-reservation governmental functions. With the doctrine of tribal sovereign immunity and the authority of states under IGRA on the table, this case has become high-stakes litigation for Indian tribes across the country. Although Bay Mills and other tribes have solid legal arguments to make to the Court, the optics and politics of this case do not bode well for a good outcome.

CASES GRANTED REVIEW BY THE SUPREME COURT

MICHIGAN V. BAY MILLS INDIAN COMMUNITY (NO. 12-505) – On December 2, 2013, the Supreme Court is scheduled to hear oral argument involving the petition filed by the State of Michigan 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 the state's 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 Solicitor General had filed a brief expressing the views of the United States and recommending that the Court deny review of the petition.

The Bay Mills Indian Community opened a casino in late 2010 on fee land about 90 miles south of its Upper Peninsula reservation. The Tribe had purchased the land with interest earnings from a settlement with the federal government over compensation from land ceded in 1800s treaties. Under the Michigan Indian Land Claims Settlement Act of 1997, any land acquired with these settlement funds would "be held as Indian lands are held." Michigan argued that the tribe opened the casino on lands that do not qualify as "Indian lands" under IGRA and in violation of a state-tribal gaming compact. The questions presented in the petition are:

> The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located off of "Indian lands." The petition presents two recurring questions of jurisprudential significance that have divided the circuits: (1) Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands; and (2) Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

On August 30, 2013, Michigan filed its opening brief and is using this case to mount a full frontal attack on tribal sovereign immunity and the authority of states to regulate "gaming activity" under the Indian Gaming Regulatory Act (IGRA). First, Michigan asks the Court to examine "IGRA as a whole" to find Congressional intent to waive of tribal sovereign immunity or, in the alternative, to overrule *Santa Clara Pueblo* and apply a "less strict standard" when considering whether legislation such as IGRA abrogates tribal sovereign immunity. Second, if the statutory arguments are not successful, Michigan asks the Court to recognize that tribal sovereign immunity "is a federal common law doctrine" created by this Court and subject to adjustment by this Court. Thus, according to Michigan, the Court should narrowly read *Kiowa* as a "contract-based ruling" and (at the extreme) hold that a tribe's immunity is limited to its on-reservation governmental functions.

On September 6, 2013, two amicus briefs in support of Michigan were filed. First, the State of Alabama, joined by fifteen other states, filed an amicus brief asking the Court to allow states to sue tribes for declaratory and injunctive relief when tribes are operating "unlawful gambling, payday lending, and similar activities" within the state. The states' amicus brief characterize the commercial

activities of Indian tribes as "hav[ing] built everything from brick-and-mortar casinos to Internet-based banks, based on the perception that they can evade federal and state regulations within state territory." Second, the State of Oklahoma filed its own amicus brief to the draw the Court's attention to three examples of what it characterizes as the failure of the United States and the National Indian Gaming Commission to stop "illegal tribal gambling" within the state.

The Tribe's response brief is due on October 24, 2013, with any supporting amicus briefs due on October 31, 2013.

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:

GRAND CANYON SKYWALK DEVELOPMENT LLC V. GRAND CANYON RESORT CORPORATION (NO. 13-313) – On September 5, 2013, Grand Canyon Skywalk Development, a non-Indian corporation, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the petitioner must exhaust its remedies in tribal court before it may proceed in federal court since the tribal court does not plainly lack jurisdiction over the action against tribal officials. The brief in opposition is due on November 12, 2013.

GRAND RIVER ENTERPRISES SIX NATIONS V. OKLAHOMA (NO. 13-266) – On August 26, 2013, the Grand River Enterprises Six Nations, a Canadian company owned by members of the Six Nations which manufactures tobacco products, filed a petition seeking review of a decision by the Oklahoma Court of Appeals which held that the Escrow Statute enacted by Oklahoma pursuant to the Master Settlement Agreement extends to all on-reservation sales of cigarettes—including all sales by Indian tribes to tribal members. The state's brief in opposition is due on September 27, 2013.

MATHESON V. STATE OF WASHINGTON (NO. 13-135) – On July 26, 2013, an enrolled tribal member who is a licensed Washington cigarette wholesaler filed a petition seeking review of a decision by the Court of Appeals of the State of Washington which held that even though she is correct that the state cannot tax interstate or on-reservation shipments: (1) she failed to demonstrate that the cigarettes were shipped to another tribal member or out-of-state; (2) by virtue of her voluntarily obtaining Washington cigarette wholesaler license, she has the requisite contacts with the state to qualify as a taxpayer; and (3) contrary to the wholesaler's assertion, Indians who conduct business off-reservation are subject to generally applicable state law. On August 7, 2013, the state filed a waiver of its right to respond, and the petition has been scheduled for conference on September 30, 2013.

JAMES L. V DEVIN H. (NO. 13-49) – On July 8, 2013, James L., an enrolled member of the Choctaw Nation, filed a petition seeking review of a decision of the Court of Appeals Fifth District of Texas which held that this child custody dispute and proceeding did not qualify as a "foster care placement," and thus does not trigger the provisions of the Indian Child Welfare Act (ICWA). The questions presented are: (1) Does the ICWA apply to an involuntary child custody proceeding involving an Indian child, between biological parents and a third party non-parent? (2) Does awarding conservatorship of a child to a third-party non-parent, over the objections of a biological parent and without a finding of parental unfitness, unconstitutionally infringe upon "the interest of parents in the care, custody and control of their children"?

No brief in opposition was filed and the petition has been scheduled for conference on September 30, 2013.

TONASKET V. SARGEANT (NO. 12-1410) – On May 30, 2013, a tribal member who is a smoke shop retailer filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held, in line with *Miller v. Wright*: (1) the Colville Confederated Tribes 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; and (2) 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. The Tribes filed its brief in opposition on June 26, 2013, and the petition has been scheduled for conference on September 30, 2013.

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" to not transfer jurisdiction to a tribal court. The Tribe filed its brief in opposition on July 25, 2013, and the petition has been scheduled for conference on September 30, 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. On May 23, 2013, the State of New York filed a waiver of its right to respond. On July 3, 2013, the Court requested a response from the State of New York which was filed on September 3, 2013. The petition has been scheduled for conference on September 30, 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 filed its brief in opposition on July 2, 2013, and the petition has been scheduled for conference on September 30, 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. In light of recent settlement agreements, the petitioners filed a letter with the Court on June 5, 2013.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court has not yet denied or dismissed the any Indian law petitions for writ of certiorari. The Court's long Conference is scheduled for September 30, 2013.

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).