TRIBAL SUPREME COURT PROJECT MEMORANDUM

JUNE 4, 2014
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

MICHIGAN V. BAY MILLS INDIAN COMMUNITY (NO. 12-505) – On May 27, 2014, in a stunning victory for Indian tribes, the Supreme Court of the United States issued its opinion in *Michigan v. Bay Mills Indian Community*, reaffirming the vitality of the doctrine of tribal sovereign immunity. The lawsuit had its origin in a dispute between the State of Michigan and the Bay Mills Indian Community over whether certain lands constituted "Indian lands" eligible for gaming under the Indian Gaming Regulatory Act (IGRA), but had turned into a much larger legal battle over the rights of all Indian tribes across the country.

In a 5-to-4 decision, Justice Kagan, joined by Chief Justice Roberts, Justices Kennedy, Breyer and Sotomayor, affirmed the decision of the U.S. Court of Appeals for the Sixth Circuit which had held that federal courts lack jurisdiction to adjudicate the State's claims against the Bay Mills Indian Community under the Indian Gaming Regulatory Act (IGRA)," and that the claims are barred by the doctrine of tribal sovereign immunity. In an unexpected development, Chief Justice Roberts provided the crucial fifth vote to secure this legal victory, having not voted in favor of tribal interests in a single case since he joined the Court in 2005.

First, the Court quickly recognized that although Congress did provide for a partial abrogation of tribal sovereign immunity within IGRA, *see* 25 U.S.C. §2710(d)(7)(A)(ii), none of the State's arguments fell within the plain terms of IGRA. The State's arguments conceded that the casino was sited outside of "Indian lands," but attempted to link tribal administrative actions on-Reservation (*e.g.*, licensing) with "class III gaming activity" under IGRA. But the Court responded: "that argument comes up snake eyes, because numerous provisions IGRA show that 'class III gaming activity' means just what it sounds like—the stuff involved in playing class III games." The Court also rejected State's offer to take a "holistic" approach to interpreting IGRA to authorize suit against a Tribe for illegal gaming both inside and outside of Indian country. The Court admonished the State that it does not need to rewrite IGRA when states already have other powers to regulate or prohibit tribal gaming outside of Indian country, including licensing authority, potential suits against tribal officials, criminal prosecutions, and gaming compact negotiations. The plain language of IGRA must prevail.

Second, the Court declined the State's invitation to revisit and reverse its decision in *Kiowa.* The Court looked to the doctrine of *stare decisis*—the long line of precedent affirming tribal sovereign immunity, its reliance on the rule in *Kiowa* in subsequent cases, and the reliance interests of tribes and their business partners—as a strong basis "to stand pat." And the Court, in no uncertain terms, reaffirmed the principle announced in *Kiowa* that the Court should defer to Congress to determine the circumstances where Indian tribes should be subject to suit. And although the Project has characterized the recent losing streak for Indian tribes before the Court as "an era of judicial termination of tribal sovereignty," the Court took this opportunity to reassert the primary authority of Congress over Indian affairs: "The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress." Nonetheless, the majority opinion explicitly leaves open the door to potential exceptions to the general rule in *Kiowa*. In footnote 8, the Court states:

> Adhering to *stare decisis* is particularly appropriate here given that the State, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a "special justification" for abandoning precedent is not before us. [citations omitted].

Justice Thomas wrote the principal dissent, joined by Justices Scalia, Ginsberg, and Alito. None of the dissenting Justices took issue with majority's interpretation and holding in relation to IGRA. However, the dissent views *Kiowa* as a mistake which the Court should rectify. In their view, the doctrine of tribal sovereign immunity is judge-made and the Court should never have extended it in *Kiowa* to bar suits against tribes for off-reservation commercial activities. For the dissent, *Kiowa* has created a multitude of problems that are to be solved by the Court, not Congress, and should be reversed.

Justice Thomas explicitly recognizes that Indian tribes retain a sovereignty "of a unique and limited character," with immunity from suit as one attribute of that sovereignty. The dissent has no objection to tribes raising the immunity defense in tribal courts, but contends that it "cannot be sustained in the courts of another sovereign" (*e.g.*, state and federal courts). Justice Thomas asserts that the decision of the Court in *Bay Mills* "strips the States of their prerogative 'to decide for themselves whether to accord such immunity to Indian tribes as a matter of comity.'"

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:

YOWELL V. ABBEY NO. 13-1049) – On January 17, 2014 Raymond Yowell, an 84-year-old Western Shoshone Indian and cattle rancher, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which reversed a district court order denying the Bureau of Land Management (BLM) and Department of Treasury's motion to for summary judgment regarding his civil rights action against state and federal officials and vacating the injunction issued against BLM. Throughout his life, Mr. Yowell had let his livestock graze on the "historic grazing lands associated with the South Fork Indian Reservation." In the 1990s, the BLM accused him of trespassing and in 2002,

without a warrant or court order, seized and sold his cattle. The Ninth Circuit held that the district court had abused its discretion in granting the injunction and had erred in denying the motion for summary judgment based on the qualified immunity of the state and federal officials. The brief in opposition is due on June 4, 2014.

KNIGHT V THOMPSON (NO. 13-955) – On February 6, 2014, several Native American male inmates in the custody of the Alabama Department of Corrections (ADOC) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that ADOC carried its burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that its hair-length policy is the least restrictive means of furthering its compelling governmental interests, including safety and security within the prison system. The ADOC requires all male prison inmates to wear a "regular haircut," defined as "off neck and ears," with no exemptions, religious or otherwise. The Native American male inmates seek a religious exemption based on wearing long hair as a central tenet of their religious faith. In the lower courts, the United States had intervened and filed an amicus brief in support of the Native American inmates. The Project worked with the attorneys for the prisoners to prepare and file a tribal amicus brief in support of the cert petition on behalf of NCAI and Huy. Amicus briefs in support were also filed by the Sikh Coalition and the International Center for Advocates against Discrimination. The ADOC filed their brief in opposition on April 11, 2014, and the petition was scheduled for conference on May 15, 2014, but no action was taken.

NATIVE WHOLESALE SUPPLY COMPANY V. STATE OF IDAHO (NO. 13-838) – On January 13, 2014, Native Wholesale Supply (NWS), an Indian retailer and cigarette wholesaler operating on the Seneca Reservation in New York, filed a petition seeking review of a decision by the Supreme Court of Idaho which held that the State can regulate the importation of cigarettes onto reservations located within Idaho. On January 16, 2014, the State of Idaho filed a waiver of its right to respond and the petition was scheduled for conference on February 21, 2014. However, on February 4, 2014, the Court requested a response which was filed on March 6, 2014. The petition was scheduled for conference on April 18, 2014, but no action was taken. On June 3, 2014, the Court relisted the petition for its conference on June 19, 2014.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

MICHIGAN V. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (NO. 13-1372) – On June 3, 2014, the Michigan Solicitor General filed a letter with the Clerk of the Court withdrawing its 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 the state's IGRA claims since such claims do not seek to enjoin a "gaming activity" (*i.e.*, application to take land in trust is not a "gaming activity" under IGRA). The Tribe had filed its brief in opposition on May 23, 2014, and the Court had scheduled the petition for conference on June 19, 2014. The State of Michigan withdrew the petition "in light of the Supreme Court's recent decision in *Michigan v. Bay Mills Indian Community*."

VILLAGE OF HOBART V. ONEIDA TRIBE OF INDIANS OF WISCONSIN (NO. 13-847) – On May 27, 2014, the Court denied the petition filed by Village of Hobart seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which affirmed the district court and held that the Village of Hobart may not assess its storm water management fees on parcels of land owned by the Tribe and held in trust by the United States.

STATE OF ALASKA V. JEWELL (NO. 13-562) – On March 31, 2014 the Court denied a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the federal district court's decisions upholding the 1999 Final Rules promulgated by the Secretary of the Interior and the Secretary of Agriculture to implement part of the Alaska National Interest Lands Conservation Act concerning subsistence fishing and hunting rights. As threshold issues, the Ninth Circuit held that the Secretaries appropriately used notice and comment rulemaking, rather than adjudication, to identify whose waters are "public lands" for determining the scope of the Act's subsistence policy; and the Secretaries were entitled to "some deference" in construing the term "public lands." Further, the Ninth Circuit held that the Secretaries applied the federal reserved water rights doctrine in a principled manner and that it was reasonable for the Secretaries to decide: (1) that "public lands" subject to the Act's subsistence priority included the waters within and adjacent to federal reservations; and (2) reserved water rights for Alaska Native Settlement allotments were best determined on a case-by-case basis.

MADISON COUNTY V. ONEIDA INDIAN NATION OF NEW YORK (NO. 12-604) – On March 26, 2014, the petition filed by Madison County and Oneida County was dismissed pursuant to Supreme Court Rule 46. The petition had sought review of a decision by the U.S. Court of Appeals for the Second Circuit which had dismissed the counties' claim that the Oneidas' reservation was disestablished. The parties had reached a Settlement Agreement in lower court proceedings challenging recent land trust acquisitions. In essence, the Settlement Agreement resolved both the trust litigation in the lower court and the tax foreclosure litigation in the Supreme Court. On March 4, 2014, the U.S. District Court for the Northern District of New York issued an order which dismissed various motions to intervene and approved the Settlement Agreement in which the counties agreed to withdraw their petition for writ of certiorari and the State agreed to withdraw its amicus brief pending before the Supreme Court.

WOLFCHILD V. UNITED STATES (NO. 13-794); ZEPHIER V. UNITED STATES (NO. 13-795) – On March 10, 2014, the Court denied petitions brought by two groups of individuals who claim to be descendants of the "loyal" Mdewakanton Sioux filed petitions seeking review of a second decision by the U.S. Court of Appeals for the Federal Circuit which rejected their new claims raised on remand. In 2009, the Federal Circuit first held that (1) the 1888, 1889 and 1890 Appropriation Acts enacted for the benefit of the loyal Mdewakanton Sioux and their lineal descendants which included lands, improvements to lands and monies as the corpus did not create a trust; and (2) if the referenced Appropriations Acts did create a trust (which they did not), the 1980 Act terminated that trust by giving the three Mdewakanton Indian communities beneficial ownership of the lands. After the U.S. Supreme Court denied review in 2010, the groups continued to pursue revenues derived from the lands based on new theories and new claims. The Federal Circuit held that "none of the new theories breathes life into this case because none supports an actionable claim for relief under governing law."

GRAND CANYON SKYWALK DEVELOPMENT LLC V. GRAND CANYON RESORT CORPORATION (NO. 13-313) – On December 16, 2013, the Court denied a petition filed by Grand Canyon Skywalk Development, a non-Indian corporation, 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.

GRAND RIVER ENTERPRISES SIX NATIONS V. OKLAHOMA (NO. 13-266) – On December 2, 2013, the Court denied review of a petition filed by Grand River Enterprises Six Nations, a Canadian company owned by members of the Six Nations which manufactures tobacco products, 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.

ONONDAGA NATION V. NEW YORK (NO. 12-1279) – On October 15, 2013, the Court denied a petition filed by the Onondaga Nation 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" as inherently disruptive of the settled expectations of the non-Indian landowners based on the Supreme Court's 2005 decision in *City of Sherrill*.

MATHESON V. STATE OF WASHINGTON (NO. 13-135) – On October 7, 2013 the Court denied review of a petition filed by a tribal member who is a licensed Washington cigarette wholesaler who sought 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.

JAMES L. V DEVIN H. (NO. 13-49) – On October 7, 2013, the Court denied review of a petition filed by James L., an enrolled member of the Choctaw Nation, who sought review of a decision of the Court of Appeals Fifth District of Texas which held that the 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).

TONASKET V. SARGEANT (NO. 12-1410) – On October 7, 2013, the Court denied review of a petition filed by a tribal member who is a smoke shop retailer who sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held: (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.

NEBRASKA V. ELISE M. (NO. 12-1278) – On October 7, 2013, the Court denied review of a petition filed by the State of Nebraska (through the Lancaster County Attorney's Office) which sought 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.

NATIVE VILLAGE OF EYAK V. BLANK (NO. 12-668) – On October 7, 2013, the Court denied review of a petition filed by the Native Village of Eyak which sought 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.

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).**