

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

OCTOBER 21, 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).

The Court's October Term 2014 ("OT14") began on Monday, October 6, 2014. The Court has not granted review in any Indian law cases. The Court has requested the views of the United States in response to the petition filed in *Dollar General Corporation v. Mississippi Band of Choctaw Indians*. In *Dollar General*, a non-Indian corporation is seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which upheld Tribal Court jurisdiction over tort claims brought by a tribal member based on a consensual relationship between the store owned by Dollar General and the Tribe. The store is located on tribal trust land leased to the non-Indian corporation and the store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the program brought an action in Tribal Court alleging that he was assaulted by the store manager. In its petition, Dollar General frames the question presented as follows: "The case accordingly presents the issue left open in *Hicks* and the Question the Court granted certiorari to decide in *Plains Commerce*: Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members." The Solicitor General will file a brief on the question on behalf of the United States.

The Court has held-over the petition filed in *Knight v. Thompson* as it considers the petition filed in *Holt v. Hobbs*. On October 7, 2014, the Court heard oral argument in *Holt*. Both *Holt* and *Knight* involve challenges by inmates to prison grooming policies under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). In *Knight*, the Alabama Department of Corrections requires all male prison inmates to wear a "regular haircut," defined as "off neck and ears," with no exemptions, including Native American male inmates who seek a religious exemption based on wearing long hair as a central tenet of their religious faith. In *Holt*, the Court is considering a RLUIPA challenge by a Muslim prisoner to the grooming policy of the Arkansas Department of Corrections prohibiting beards of any length. Overall, the argument seemed to go well for Mr. Holt, but the question is whether the Court will be able to set forth a legal principle that can be broadly applied through its opinion in this case. The Justices appeared to be struggling to find the right formula to balance the due deference afforded to prison officials under RLUIPA against its least restrictive means requirement in relation to certain grooming policies which on their face (no pun intended) do not raise security or safety issues.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

MM&A PRODUCTIONS, LLC V. YAVAPAI APACHE NATION (NO. 14-425) – On October 9, 2014, an entertainment production consultant which produces and markets entertainment programs for Indian casinos filed a petition seeking review of a decision by the Arizona Court of Appeals which affirmed the trial court’s dismissal of a contract action for lack of subject matter jurisdiction based on the doctrine of tribal sovereign immunity. Specifically, the question presented is “whether the authority of a tribal official who signs a waiver of sovereign immunity may be established under the doctrine of apparent authority.” The Tribe’s response is due on November 13, 2014.

SEMINOLE TRIBE OF FLORIDA V. STATE OF FLORIDA (NO. 14-351) – On September 25, 2014, the Seminole Tribe of Florida filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that state sovereign immunity bars the tribe’s suit for declaratory relief and its effort to enjoin state officials from unlawfully collecting motor fuel excise taxes from the tribe. The State of Florida has established a pre-collection tax regime whereby exempt entities must petition for a refund of motor fuel taxes. According to the Eleventh Circuit, since any relief would necessarily come out of the state treasury, the tribe’s suit falls outside the *Ex Parte Young* doctrine which permits suit against state officials for prospective relief only. Florida’s response is due on October 27, 2014.

FRIENDS OF AMADOR COUNTY V. JEWELL (NO. 14-340) – On September 18, 2014, Friends of Amador County (FOAC), a community organization opposed to the development of additional casinos in the county, 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 decision that the Buena Vista Rancheria is a required and indispensable party under Rule 19 who cannot be joined under the doctrine of tribal sovereign immunity. In the underlying action, FOAC filed several claims challenging the Tribe’s gaming compact with California, including: (1) whether certain lands qualify as “Indian lands” under IGRA; and (2) whether the federal government erred in granting the tribe federal recognition. Specifically, the Question Presented in the petition is: “Whether in an action by a third party against the Secretary of the Interior under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, a putative Indian tribe may invoke its sovereign immunity to prevent a court from reviewing the lawfulness of the Secretary’s decision to recognize it as a tribe.” The United States and the Tribe’s responses are due on October 24, 2014.

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS (NO. 13-1496) – On October 6, 2014, the Court requested the views of the United States in relation to the petition filed by the General Dollar General Corporation seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the Tribal Court has jurisdiction over tort claims brought by a tribal member based on the consensual relationship between the store owned by Dollar General and the Tribe. The store is located on tribal trust land leased to the non-Indian corporation and the store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the program brought an action in Tribal Court alleging that he was assaulted by the store manager.

KNIGHT V THOMPSON (NO. 13-955) – On February 6, 2014, several Native American male inmates in the custody of the Alabama Department of Corrections filed a petition seeking review of a decision by the Eleventh Circuit which held under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) the State had demonstrated that its hair-length policy is the least restrictive means of furthering its compelling governmental interests. The facility 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 Court granted review in another case, *Holt v. Hobbs*, No. 13-6827, involving a RLUIPA challenge by a Muslim prisoner to the grooming policy of Arkansas Corrections. In *Holt*, the Project prepared and filed an amicus brief on behalf of NCAI and Huy highlighting issues raised in the *Knight* case and supporting petitioner. The Court heard oral argument in *Holt* on October 7, 2014.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

HICKS V. HUDSON INSURANCE CO. (NO. 14-283) – On October 14, 2014, the Court denied review of a petition filed by a non-Indian employee of a tribal casino who sought review of a decision by the Oklahoma Supreme Court which dismissed her workers compensation claims brought in state court against the insurer for the Muscogee Creek Nation based on the doctrine of tribal sovereign immunity. The question presented was: “Whether an insurance company doing business with a federally recognized American Indian Tribe is entitled to sovereign immunity for the acts and omission it takes in furtherance of the business of insurance.”

YOWELL V. ABBEY (NO. 13-1049) – On October 6, 2014, the Court denied review of a petition filed by Raymond Yowell, an 84-year-old Western Shoshone Indian and cattle rancher, who sought 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 claims against state and federal officials and vacated 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.

MARCUSSEN V. BURWELL (NO. 13-1447) – On October 6, 2014, the Court denied review of a petition filed by Lana Marcussen who sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit which summarily affirmed dismissal of a federal court challenge to pending state court proceedings involving ICWA under the Rooker-Feldman doctrine. Specifically, the questions presented were: (1) Whether the Rooker Feldman doctrine should be overruled for denying all judicial relief by removing the subject matter jurisdiction of the federal courts to hear any civil action brought against federally mandated statutes enforced in the state courts; and (2) Whether Congress has the authority to adopt laws intended to be primarily or exclusively enforced in the state courts.

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).