TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 15, 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 start of the October Term 2014 has remained relatively quiet in relation to Indian law cert petitions and cases. As we approach the December recess, eleven cert petitions involving questions of Indian law have been filed, with the Supreme Court denying review of five petitions thus far. As reported previously, 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* (summarized below). The Solicitor General has not yet filed its brief, making it unlikely that the Court will consider the petition during the early January conferences. However, on January 9, 2015, the Court is scheduled to consider the petition filed by the Seminole Tribe in *Seminole Tribe of Florida v. Florida Department of Revenue* which seeks 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 well-regarded SCOTUSblog has listed this petition as both a "petition of the day" and a "petition to watch" for this conference. If granted, *Seminole Tribe* would be briefed on the merits, argued and decided during this term.

As noted in the last update, the Court has held-over the petition filed in *Knight v. Thompson* as it considers the petition filed in *Holt v. Hobbs*. Both *Holt* and *Knight* involve challenges by inmates to prison grooming policies under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA). Although *Holt* was argued early in the term, the Court has not yet issued its opinion. Meanwhile, the Project has remained busy in the lower federal and state courts. Recently, the Project assisted with the preparation of two amicus briefs in support of the petition for rehearing/rehearing en banc filed by the Sac & Fox Nation of Oklahoma in *Thorpe v. Borough of Thorpe*, one on behalf of NCAI and one on behalf of Senator Ben Nighthorse Campbell. In *Thorpe*, the Third Circuit reversed the district court decision which had held that the Borough of Thorpe satisfies the definition of "museum" under the Native American Graves Protection and Repatriation Act (NAGPRA), and that the remains of Jim Thorpe could be subject to repatriation proceedings as required under NAGPRA. The Third Circuit held that although the Borough of Thorpe "technically" meets the definition of "museum," NAGPRA does not apply in this case since its literal application "will produce a result demonstrably at odds with the intentions of its drafters." The Third Circuit concluded: "Thorpe's remains are located at their final resting place and have not been disturbed. We find that applying NAGPRA to Thorpe's burial in the Borough is such a clearly absurd result and so contrary to Congress's intent to protect Native American

burial sites that the Borough cannot be held to the requirements imposed on a museum under those circumstances."

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:

GATZAROS V. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (NO. 14-665) – On December 2, 2014, the petitioners, owners of a substantial interest in Monroe Partners, LLC (an entity that owned fifty percent of Greektown Casino in Detroit), filed a petition seeking review of an unpublished decision of the U.S. Court of Appeals for the Sixth Circuit which affirmed the district court's dismissal of their suit seeking recovery of approximately $74 million under a guaranty agreement that was signed by the Tribe. The response of the Tribe is due on January 5, 2015.

STOCKBRIDGE MUNSEE COMMUNITY V. NEW YORK (NO. 14-538) – On November 7, 2014, the Stockbridge-Munsee Community filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that its Indian land claims are barred by the *City of Sherrill* equitable defenses and distinguished the recent decision of the Supreme Court of the United States in *Petrella v. Metro-Goldwyn-Mayer, Inc.* which held that courts may not override the judgment of Congress and apply equitable defenses to summarily dispose of claims at law filed within the established statute of limitations. The response of the State of New York is due on January 12, 2015.

MENOMINEE INDIAN TRIBE OF WISCONSIN V. UNITED STATES (NO 14-510) – On November 3, 2014, the Menominee Indian Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the District of Colombia which held that the Tribe did not establish the necessary grounds for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service for unpaid contract support costs. The Tribe maintains that this decision is in direct conflict with the Federal Circuit's 2012 decision in *Arctic Slope Native Ass'n Ltd. v. Sebelius.* The response of the United States is due on January 5, 2015.

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. The State of Florida filed its brief in opposition on November 24, 2014. The Tribe filed its reply on December 5, 2015, and the petition has been scheduled for conference on January 9, 2015.

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 (CVSG or call for the views of the Solicitor General) 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. The Solicitor General has not yet filed the brief its behalf of the United States.

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 has been taken. (Note: The Court did grant review in another case, *Holt v. Hobbs*, No. 13-6827, involving a RLUIPA challenge by a Muslim prisoner to the grooming policy of the Arkansas Department of 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, and a decision is likely before the end of the year.)

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

MM&A PRODUCTIONS, LLC V. YAVAPAI APACHE NATION (NO. 14-425) – On December 15, 2014, the Court denied review of a petition filed by an entertainment production consultant which sought 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 was "whether the authority of a tribal official who signs a waiver of sovereign immunity may be established under the doctrine of apparent authority."

FRIENDS OF AMADOR COUNTY V. JEWELL (NO. 14-340) – On December 1, 2014, the Court denied review of a petition filed by Friends of Amador County (FOAC), a community organization opposed to the development of additional casinos in the county, which sought 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 had 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.

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 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).