TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 15, 2015
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).

Although the October Term 2014 had been relatively quiet in relation to cert petitions and cases involving questions of federal Indian law, the Term has ended with a flurry of activity. First, on June 15, 2015, contrary to the recommendation of the U.S. Solicitor General's Office, the Court granted review in *Dollar General v Mississippi Band of Choctaw Indians,* a decision by the U.S. Court of Appeals for the Fifth Circuit which had upheld Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation 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 youth program and his parents brought an action in Tribal Court alleging that he was assaulted by the store manager.

Second, on June 30, 2015, the Court granted review in *Menominee Indian Tribe of Wisconsin v. United States,* 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 decision in *Arctic Slope Native Ass'n Ltd. v. Sebelius (ANSA).* In its response, the United States recognized the circuit conflict and recommended that the Court grant review to address "the uncertainty created by the Federal Circuit's erroneous decision in *ASNA*—and the increasing volume of untimely claims inspired by it—[which] have con-founded the government's attempts to achieve orderly resolution of the ongoing litigation over tribal contract support costs."

Third, on July 2, 2015, the Project coordinated the filing of four amicus briefs in support of the petition for cert filed in *Sac and Fox Nation v. Borough of Jim Thorpe*, in which the Tribe and the sons of Jim Thorpe are seeking the return of the remains of Jim Thorpe to Oklahoma to complete the traditional tribal burial ceremony begun in 1953. The four amicus were filed on behalf of: (1) the National Congress of American Indians; (2) Senator Ben Nighthorse Campbell, Representative Tom Cole and Governor Bill Richardson; (3) Scholars of Statutory Interpretation and Native American Law; and (4) the Becket Fund for Religious Liberty, Church of the Lukumi Babalu Aye, International Society for Krishna Consciousness, Muslim Public Affairs Council, National Council of Churches of Christ in the USA, and the Queens Federation of Churches.

PETITIONS GRANTED

MENOMINEE INDIAN TRIBE OF WISCONSIN V. UNITED STATES (NO 14-510) – On June 30, 2015, the Court granted 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 (ANSA).* On May 26, 2015, the United States filed its response recommending that the Court grant cert to address "the uncertainty created by the Federal Circuit's erroneous decision in *ASNA*—and the increasing volume of untimely claims inspired by it—[which] have con-founded the government's attempts to achieve orderly resolution of the ongoing litigation over tribal contract support costs." The United States stated: "Although the D.C. Circuit correctly rejected the Tribe's arguments here, the resulting division of authority has exacerbated the uncertainty that the government and tribal contractors face. This Court's review is warranted to resolve that conflict, as well as to ensure that the proper equitable tolling framework is applied to CDA claims generally."

In its order, the Court limited its review to the following question: "Whether the D. C. Circuit misapplied this Court's Holland decision when it ruled that the Tribe was not entitled to equitable tolling of the statute of limitations for filing of Indian Self-Determination Act claims under the Contract Disputes Act?" Copies of the cert petition and brief in opposition are available on the Project webpage (http://sct.narf.org/caseindexes/menominee_v_us.html). The Project is working with the attorneys for the Tribe to develop and coordinate an amicus brief strategy in support of the Tribe. At this time the Tribe and the U.S. are discussing a possible extension of time for the filing of briefs in this matter.

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS (NO. 13-1496) – On June 15, 2015, contrary to the recommendation of the United States to deny cert, the Court granted review in *Dollar General v Mississippi Band of Choctaw Indians,* a decision by the U.S. Court of Appeals for the Fifth Circuit which had upheld Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation 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 youth program and his parents brought an action in Tribal Court alleging that he was assaulted by the store manager.

Copies of the cert petition, brief in opposition and US amicus brief recommending denial of cert are available on the Project webpage (http://sct.narf.org/caseindexes/dollar_general_v_choctaw.html). The Project is working with the attorneys for the Tribe to develop and coordinate an amicus brief strategy in support of the Tribe. Unless the Court provides otherwise, or a party requests an extension, the Petitioner's opening brief will be due on July 30, 2015 (45 days). The Tribe's brief will be due on August 31, 2015 (30 days), and any amicus briefs in support of the Tribe will due on September 8, 2015 (7 days).

KNIGHT V THOMPSON (NO. 13-955) – On January 26, 2015, the Court issued a "GVR" (petition granted, judgment vacated and case remanded) for further consideration in light of its unanimous decision in *Holt v. Hobbs*. In *Holt*, the Court held that Arkansas violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) where its grooming policy did not allow beards and it refused to grant a religious exemption to an inmate whose Muslim religion required him to wear a beard. Shortly before the Court granted review in *Holt*, a group of Native American inmates filed a petition in *Knight v. Thompson*,

asking the Court to review a decision of the U.S. Court of Appeals for the Eleventh Circuit which held in favor of prison officials in Alabama who refused to grant a religious exemption from their restrictive grooming policy to allow Native Americans to wear long hair consistent with their Native religious beliefs. The Native American Rights Fund, representing the National Congress of American Indians and Huy filed "friend of the Court" briefs supporting the prisoners in both *Holt* and *Knight*.

Like Mr. Holt, the Native American prisoners in *Knight* are seeking relief under RLUIPA, which requires that a substantial burden on an inmate's religious exercise be the least restrictive means of furthering a compelling government interest. This standard, referred to as "strict scrutiny," is the most stringent legal standard applied to laws and government rules. A lack of consistent application of this rigorous standard by the lower federal courts has allowed some state prison systems to unduly restrict religious practices of Native American inmates. Nearly 80% of U.S. prison systems allow Native Americans to wear long hair, either through blanket policies or special religious exemptions. By and large, prison officials have found ways to mitigate the minimal risks associated with these practices and have observed numerous benefits to Native inmate behavior and rehabilitation as a result. However, a handful of state prison systems stubbornly refuse to accommodate certain facets of Native religion, such as long hair at issue in *Knight*. Those prison officials have hidden behind safety, security and hygiene concerns to frustrate sincere religious beliefs and practices. Yet, these same prison officials openly admit that they did not investigate, or even consider, the successful accommodation measures taken by the 80% of prison systems allowing long hair, or exemptions for Native American inmates. Rather than apply RLUIPA's strict scrutiny to the state's arguments and ask, "Why not Alabama?" the lower courts in *Knight* deemed the policies of other jurisdictions simply irrelevant to the operation of Alabama prisons and accorded "due deference" to the uninformed opinions and unsubstantiated claims of prison officials.

The *Holt* opinion, and the *Knight* case on remand, should change a fundamental aspect of how certain prison systems deal with Native Americans and their religious practices. For those Natives who reside in the darkest corners of U.S. penal systems, it is no longer the rule that they cannot engage in their traditional religious practices merely because their jailors say so. Courts will demand more, just as Congress intended when it enacted RLUIPA.

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:

TORRES V. SANTA YNEZ BAND OF CHUMASH INDIANS (NO. 14-1521) – On June 22, 2015, a non-Indian contractor filed a petition seeking review of an unpublished decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court's finding that the bankruptcy court did not abuse its discretion in denying the contractor's motion for sanctions after concluding that the Santa Ynez Band of Chumash Indians did not act in bad faith by filing a proof of claim in his bankruptcy proceedings. The Tribe's brief in opposition is due on July 27, 2015.

SAC AND FOX NATION V. BOROUGH OF JIM THORPE (NO. 14-1419) – On June 2, 2015, the Sac and Fox Nation, William Thorpe and Richard Thorpe (the sons of Jim Thorpe) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Third Circuit which reversed the U.S. District Court for the Middle District of Pennsylvania. The Third Circuit concluded that although the Borough of Jim Thorpe technically meets the definition of "museum" under NAGPRA, "Congress could not have intended the kind of patently absurd result that would follow from a court resolving a family dispute by applying

NAGPRA to Thorpe's burial in the Borough under the circumstances here." On July 2, 2015, four amicus briefs in support of the Tribe were filed on behalf of: (1) the National Congress of American Indians; (2) Senator Ben Nighthorse Campbell, Representative Tom Cole and Governor Bill Richardson; (3) Scholars of Statutory Interpretation and Native American Law; and (4) the Becket Fund for Religious Liberty, Church of the Lukumi Babalu Aye, International Society for Krishna Consciousness, Muslim Public Affairs Council, National Council of Churches of Christ in the USA, and the Queens Federation of Churches. On July 2, 2015, the Borough filed a waiver of its right to respond.

NEBRASKA V. PARKER (NO. 14-1406) – On May 27, 2015, the State of Nebraska and the Village of Pender, Nebraska filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which affirmed the decision of the U.S. District Court for the District of Nebraska and held that an 1882 Act of Congress did not diminish the Omaha Indian Reservation. Thus, the establishments in Pender which served alcoholic beverages could be subject to the Omaha Tribe's liquor licensing and tax regulations. The Tribe's response brief is due on June 29, 2015.

OKLAHOMA V. HOBIA (NO. 14-1177) – On March 23, 2015, the State of Oklahoma filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that, in light of *Bay Mills*, the State has failed to state a valid claim for relief against the Kialegee Tribal Town under IGRA and a state-tribal gaming compact. The question presented is: "Does *Michigan v. Bay Mills*, 134 S.Ct. 2024 (2014), require dismissal of a State's suit to prevent tribal officers from conducting gaming that would be unlawful under the Indian Gaming Regulatory Act and a state-tribal gaming compact when (1) the suit for declaratory and injunctive relief has been brought against tribal officials - not the tribe; (2) the gaming will occur in Indian country on the land of another tribe; and (3) the state-tribal compact's arbitration provision does not require arbitration before filing suit?" On April 24, 2015, the Tribe filed a waiver of its right to respond and the petition was scheduled for conference on May 21, 2015. However, on May 11, 2015, the Court requested a response from the Tribe which was filed on July 10, 2015.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

STOP THE CASINO 101 V. BROWN (NO-14-1236) – On May 26, 2015, the Court denied the petition filed by the Stop the Casino 101 Coalition, an unincorporated citizen group, which sought review of a decision by the Court of Appeal of California which held that the gaming compact between California and the Graton Tribe was "in accordance with federal law" and consistent with the provisions of the California Constitution.

WESTERN SKY FINANCIAL V. JACKSON (NO. 14-991) – On April 27, 2015, the Court denied review of a petition filed by Western Sky Financial, an on-line lending company owned by an enrolled member of the Cheyenne River Sioux Tribe and operates on Cheyenne River Indian Reservation in South Dakota, seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which held that the "arbitration provision contained in the loan agreements (prepared by Western Sky) is unreasonable and substantively and procedurally unconscionable under federal, state, and tribal law." The Seventh Circuit had also held that the Tribal Court did not have subject matter jurisdiction over the claims, and no colorable claim of tribal jurisdiction was raised to invoke the rule of tribal exhaustion.

STATE OF WISCONSIN V. LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN, ET AL. (NO. 14-792) – On April 20, 2015, the Court denied review of a petition filed by the State of Wisconsin seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which held that the Tribes met their burden of proof (*e.g.,* circumstances have changed so much that night hunting of deer with lights is no longer a substantial safety hazard) to reopen the court's 1991 judgment under FRCP Rule 60(b). The Seventh Circuit remanded the case to the district court, stating that the "burden of production should be placed on the state, for as the record stands the evidence presented by the tribes that night hunting for deer in the ceded territory is unlikely to create a serious safety problem provides a compelling reason for vacating the 1991 judgment that prohibited Indians from hunting deer at night in that territory."

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION V. MCKENNA (NO. 14-947) – On March 9, 2015, the Court denied review of a petition filed by the Yakama Indian Nation seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the plain text of the Yakama Treaty of 1855 did not preclude enforcement of the State of Washington's escrow statute, which requires tobacco companies to reimburse the State for health care costs related to the use of tobacco products.

STOCKBRIDGE MUNSEE COMMUNITY V. NEW YORK (NO. 14-538) – On March 2, 2015, the Court denied a petition filed by the Stockbridge-Munsee Community 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. The Second Circuit had 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.

GATZAROS V. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (NO. 14-665) – On February 23, 2015, the Court denied review of a petition filed by the owners of a substantial interest in Monroe Partners, LLC (an entity that owned fifty percent of Greektown Casino in Detroit), who sought 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.

SEMINOLE TRIBE OF FLORIDA V. STATE OF FLORIDA (NO. 14-351) – On January 12, 2015, the Court denied a petition filed by the Seminole Tribe of Florida 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.

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).