

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

OCTOBER 5, 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).

On September 28, 2015, the Court held its “long” conference at which it considered nearly 2000 petitions filed during the summer months, including five petitions in Indian law cases. In its order list of October 1, 2015, the Court granted review in 13 cases, including the petition filed by the State of Nebraska in *Nebraska v. Parker* (No. 14-1406) in which the State is challenging whether the establishments in the Village of Pender which serve alcoholic beverages are subject to the Omaha Tribe’s liquor licensing and tax regulations. Thus, the Tribal Supreme Court Project has been and continues to prepare for a very busy October Term 2015 (“OT2105”). In June 2015, the Court granted review of two petitions in Indian law cases: *Dollar General Corporation v. Mississippi Band of Choctaw Indians* (tribal court jurisdiction over non-Indians doing business on-reservation) and *Menominee Indian Tribe of Wisconsin v. United States* (equitable tolling of statute of limitations in suits against U.S.). The latter two cases are currently being briefed by the parties, and will likely be argued during the December 2015 session.

In its order list of October 5, 2015, the Court summarily denied review of the four other petitions filed in Indian Law cases in considered during its long conference: *Oklahoma v. Hobia* (*ex parte Young* suit in wake of *Bay Mills* decision); *Sac and Fox Nation v. Borough of Jim Thorpe* (repatriation of remains of Jim Thorpe under NAGPRA); *Torres v. Santa Ynez Band of Chumash Indians* (contractor bankruptcy and sanctions involving a tribe); and *Wisconsin v. Ho Chunk* (state regulation of class II gaming).

PETITIONS GRANTED

NEBRASKA V. PARKER (NO. 14-1406) – On October 1, 2015, the Court granted review of a unanimous 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. The State of Nebraska and the Village of Pender are challenging whether the establishments in Pender which serve alcoholic beverages are subject to the Omaha Tribe’s liquor licensing and tax regulations. The United States, which intervened in the Eighth Circuit in support of the Omaha Tribe, filed the brief opposing review and will likely be taking a lead role on the merits. Unless the parties seek an extension of time, the State’s opening brief is due on November 16, 2015, and the U.S. and Tribe’s response briefs are due on December 16, 2015.

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 Columbia 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 *ANSA*—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 has been working with the attorneys for the Tribe in preparing the case on the merits. On September 2, 2015, the Menominee Tribe filed its opening brief. On September 9, 2015, NARF prepared and filed an amicus brief on behalf of NCAI which focused on the Indian Self-Determination Act as the “core” of the historic and unique relationship between the United States and tribes and the need for the courts to consider this relationship as a factor within its equitable tolling analysis in the context of contract support cost claims. The United States’ response is due on October 21, 2015, and oral argument will likely take place during the Court’s December 2015 sitting.

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 by Dollar General 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 sexually assaulted by the store’s manager. The Supreme Court of the Mississippi Band of Choctaw Indians, and the U.S. Federal District Court for the Southern District of Mississippi on review, had also upheld the Tribal Court’s jurisdiction over the tort claims against Dollar General.

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 continues to work with the attorneys for the Tribe to develop and coordinate a robust amicus brief strategy in support of the Tribe. Petitioner Dollar General filed its opening brief on August 31, 2015. Four amicus briefs were filed in support of Dollar General: (1) Amicus Brief of the State of Oklahoma (joined by Wyoming, Utah, Michigan, Arizona and Alabama); (2) Amicus Brief of the Association of American Railroads; (3) Amicus Brief of the Retail Litigation Center, Inc.; and (4) Amicus Brief of the South Dakota Bankers’ Association. Dollar General and its amici aggressively attacked the fairness of

tribal courts and tribal law to non-Indians and are asking the Court to ignore its precedent, reverse the lower courts, and establish either: (i) an *Oliphant*-style civil jurisdiction rule (*i.e.*, no tribal civil jurisdiction over non-Indians); or (ii) a rule that Tribes have no civil jurisdiction over torts committed by non-Indians; or (iii) a rule requiring “express and unequivocal” consent by a non-Indian to the jurisdiction of the Tribal court or Congressional authorization of such jurisdiction.

The Tribe’s response brief is due on October 15, 2015, and any amicus briefs in support of the Tribe will be due on October 22, 2015. Oral argument will likely be scheduled during the December 2015 sitting. At present, the Tribe and the Project are coordinating and preparing six amicus briefs in support of Tribal court jurisdiction: (1) Amicus Brief of the United States; (2) Amicus Brief of the State of Mississippi (to be joined by other states); (3) Amicus Brief of NCAI, other Inter-tribal Organizations and Individual Tribes; (4) Amicus Brief of National American Indian Court Judges Association and various Tribal and Inter-tribal Court Systems; (5) Amicus Brief of the National Indigenous Women’s Resource Center, along with other Domestic Violence and Sexual Assault Organizations; and (6) Amicus Brief of Historical and Legal Scholars. And at least two additional amicus briefs are also under active consideration. Each amicus brief is focused on its own unique message, with an overall presentation to the Court of the inherent nature of Tribal sovereignty and the scope of Tribal governing authority over non-Indians with the reservation.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, the following petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

JENSEN V EXC INC. (NO. 15-64) – On July 13, 2015, the Jensen/Johnson family, all enrolled members of the Navajo Nation, filed a petition seeking review of the a decision by the U.S. Court of Appeals for the Ninth Circuit which held that, under *Strate v. A-1 Contractors*, the Navajo Nation Tribal Courts may not exercise adjudicatory jurisdiction over a highway accident that occurred on an Arizona state highway within the exterior boundaries of the Navajo Reservation. On July 21, 2015, EXC Inc. filed a waiver of its response, and the petition was scheduled for conference on September 28, 2015. However, on August 10, 2015, the Court requested a response which is now due on October 9, 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.

WISCONSIN V HO-CHUNK NATION (NO. 15-114) – On October 5, 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 reversed the federal district court, found that the state did not criminalize non-banked poker and held that the Indian Gaming Regulatory Act does not permit the state to interfere Class II poker on tribal land.

TORRES V. SANTA YNEZ BAND OF CHUMASH INDIANS (NO. 14-1521) – On October 5, 2015, the Court denied review of a petition filed by a non-Indian contractor 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.

SAC AND FOX NATION V. BOROUGH OF JIM THORPE (NO. 14-1419) – On October 5, 2015, the Court denied review of a petition filed by the Sac and Fox Nation, William Thorpe and Richard Thorpe (the sons of Jim Thorpe) 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 had 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.”

OKLAHOMA V. HOBIA (NO. 14-1177) – On October 5, 2015, the Court denied review of a petition filed by the State of Oklahoma 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 was: “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?”

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).