TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 2, 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).

The October 2015 Term of the Supreme Court of the United States is shaping up as the busiest term for the Tribal Supreme Court Project in its history, and has the potential to become a "watershed" term for the future development of Indian law. At present, the Court will hear and decide three Indian law cases on the merits. On December 1, 2015, the Court heard oral argument in *Menominee Indian Tribe v. United States* which asks the Court to consider the historic and unique relationship between the United States and tribes, with the Indian Self-Determination Act as the "core" of this relationship, as a factor within any equitable tolling analysis in the context of self-determination contracts. On December 7, 2015, the Court will hear oral argument in *Dollar General v. Mississippi Band of Choctaw Indians* to decide, once again, the scope of tribal civil jurisdiction over non-Indians who come on to the reservation to do business with the Tribe and its members. Thus, the nature and source of tribal inherent sovereign authority will once again be taken up by the Court where at least four Justices openly question its exercise in relation to non-Indians. And on January 20, 2016, the Court will hear oral argument in *Nebraska v. Parker* where it will consider whether changing demographics and justifiable expectations of non-Indians should be given greater weight in its analysis of whether Indian reservation boundaries have been diminished or disestablished. This case has the potential to re-define the manner in which courts will view tribal regulatory authority over non-Indian communities located within the reservation.

On December 11, 2015, the Court will consider whether to grant the petition filed by the United States in *U.S. v. Bryant* which involves the question of whether tribal court criminal convictions for domestic violence may be used in federal court prosecutions as a habitual offender under 18 USC §117 only if the tribal court guarantees a right to counsel. The Ninth Circuit, in conflict with the Eighth and Tenth Circuits, concluded that it is constitutionally impermissible to use uncounseled convictions to establish an element of the offense in a subsequent prosecution under § 117(a). This creates a high probability that the Court will hear and decide a fourth Indian law case this term. And other petitions are awaiting consideration. For example, it appears that the Court is holding the petition filed in *Jensen v. EXC, Inc.* as it considers the question of tribal civil jurisdiction over torts committed by non-Indians in *Dollar General*. And in relation to the question of reservation diminishment/disestablishment, petitions were filed by Wasatch County and Uintah County against the Ute Indian Tribe on November 13, 2015, based on the Court's 1994 decision in *Hagen v. Utah.* In a separate federal criminal prosecution, a petition was filed on November 19, 2015, in *Zepeda v. United States* which seek review of an en banc decision of the Ninth Circuit regarding how courts are to determine who is "Indian" under the Indian Major Crimes Act, and

whether the consideration of "some quantum of Indian blood" impermissibly discriminates on the basis of race.

The Project is actively engaged on each and every one of these cases as summarized below.

PETITIONS GRANTED

NEBRASKA V. PARKER (NO. 14-1406) – On October 1, 2015, the Court granted 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. 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 both the Tribe and the United States are respondents on the merits. On November 16, 2015, the State of Nebraska filed its opening brief. On November 23, 2015, two amicus briefs were filed in support of the State: (1) Amicus Brief of the Village of Hobart Wisconsin, joined by Pender Public Schools; and (2) Amicus Brief of Citizens Equal Rights Foundation.

In its Question Presented, Nebraska asserts: "In *Solem v. Bartlett*, this Court articulated a three-part analysis designed to evaluate whether a surplus land act diminished a federal Indian reservation. The Court found that the "statutory language used to open the Indian lands," "events surrounding the passage of a surplus land Act," and "events that occurred after the passage of a surplus land Act" are all relevant to determining whether diminishment has occurred. Later, in *Hagen v. Utah*, this Court explained that the diminishment inquiry requires courts "examine all circumstances surrounding the opening of a reservation." This Court has also reiterated after *Solem* that '[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character . . . *de facto*, if not *de jure*, diminishment may have occurred.' *South Dakota v. Yankton Sioux*. The questions presented for review are: (1) Whether ambiguous evidence concerning the first two *Solem* factors forecloses any possibility that diminishment could be found on a *de facto* basis; and (2) Whether the original boundaries of the Omaha Indian Reservation were diminished following passage of the Act of August 7, 1882. (citations omitted).

The Project is working closely with the attorneys for the Omaha Tribe to prepare a response in coordination with the United States, and to develop an effective amicus brief strategy. The Tribe's and United States' response briefs are due on December 16, 2015, and amicus briefs in support are due on December 23, 2016. The Court has scheduled oral argument for January 20, 2016.

STURGEON V. MASICA (NO. 14-1209) – On October 1, 2015, the Court granted review of an Indian-law related decision of the U.S. Court of Appeals for the Ninth Circuit which held that the Alaska National Interest Lands Conservation Act of 1980 did not prevent the National Park Service from imposing its generally applicable regulations on non-federal lands within conservation system units in Alaska. The Question Presented is: "Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System." A reversal of the Ninth Circuit opinion could have a very negative impact on the Katie John Native subsistence rights case. *See State of Alaska v. Jewell* (No. 13-562 – cert denied March 31, 2014).

MENOMINEE INDIAN TRIBE OF WISCONSIN V. UNITED STATES (NO. 14-510) – On December 1, 2015, the Court heard oral argument in *Menominee Indian Tribe v. United States* to resolve a conflict between the U.S. Courts of Appeals for the DC Circuit and the Federal Circuit regarding the appropriate standard for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service for unpaid contract support costs. The Court limited its review to the following Question Presented: "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?" Geoffrey Strommer, Hobbs, Straus, Dean & Walker, argued for petitioner Menominee Indian Tribe; and Ilana Eisenstein, U.S. Solictor General's Office, argued for respondent United States.

Background: On June 30, 2015, following the recommendation of the United States to grant cert, 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 (ASNA).* In its response, the United States recommended 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. . . . This Court's review is warranted to resolve that conflict, as well as to ensure that the proper equitable tolling framework is applied to Contract Disputes Act claims generally."

The Project worked closely 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. Copies of the briefs are available on the Project webpage (http://sct.narf.org/caseindexes/menominee_v_us.html).

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS (NO. 13-1496) – On December 7, 2015, the Court will hear oral argument in *Dollar General v Mississippi Band of Choctaw Indians* which challenges Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation doing business on trust lands leased from the Tribe. The Question Presented is: "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." Thomas Goldstein, Goldstein & Russell, will argue for petitioner Dollar General; Neal Katyal, Hogan Lovells, will argue for respondent Mississippi Band of Choctaw Indians; and Edwin Kneedler, U.S. Solicitor General's Office, will argue for amicus United States.

Background: On June 15, 2015, contrary to the recommendation of the U.S. Solicitor General to deny cert, the Court granted review. The Dollar General store is located on tribal trust land within the reservation. 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 the young man was sexually assaulted by the store's manager. The Supreme Court of the Mississippi Band of Choctaw Indians, the U.S. Federal District Court for the Southern District of

Mississippi, and the U.S. Court of Appeals for the Fifth Circuit had all upheld the Tribal Court's jurisdiction over the tort claims against Dollar General.

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 attack 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 Project worked closely with the attorneys for the Tribe to develop and coordinate a robust amicus brief strategy in support of Tribal court jurisdiction. The Tribe filed its response brief on October 15, 2015, and eight amicus briefs in support of the Tribe were filed on October 22, 2015: (1) Amicus Brief of the United States; (2) Amicus Brief of the State of Mississippi (joined by Colorado, New Mexico, North Dakota, Oregon and Washington); (3) Amicus Brief of NCAI (joined by USET, ITAA, CTAG, and 58 federally-recognized Indian tribes); (4) Amicus Brief of National American Indian Court Judges Association (joined by numerous Tribal and Inter-tribal Court Systems); (5) Amicus Brief of the Oklahoma Tribes; (6) Amicus Brief of the National Indigenous Women's Resource Center (joined by over 100 Domestic Violence and Sexual Assault Organizations); (7) Amicus Brief of Historical and Legal Scholars; (8) Amicus Brief of the American Civil Liberties Union. 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. Copies of the briefs are available on the Project webpage (http://sct.narf.org/caseindexes/dollar_general_v_choctaw.html).

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:

ZEPEDA V. UNITED STATES (NO. 15-675) – On November 19, 2015, Damien Zepeda, a criminal defendant, filed a petition seeking review of an en banc opinion of the U.S. Court of Appeals for the Ninth Circuit which held that under the Indian Major Crimes Act, the federal government must prove Indian status by demonstrating that the defendant: (1) has some quantum of Indian blood; and (2) is a member of, or is affiliated with, a federally recognized tribe. The Ninth Circuit held further that a defendant must have been an Indian at the time of the charged conduct, and that, under the second prong, a tribe's federally recognized status is a question of law to be determined by the trial judge. The Question Presented is: "Whether, as construed by the Ninth Circuit, Section 1153 impermissibly discriminates on the basis of race." The United States brief in opposition is due on December 21. 2015.

WHITE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA (NO. 15-667) – On November 19, 2015, three scientists at the University of California filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which dismissed their claims under the Native American Graves Protection and Repatriation Act based on their inability to join the Kumeyaay Cultural Repatriation Committee

(consortium of 12 tribes) as a "required party" under Rule 19 of the Federal Rules of Civil Procedure based on the doctrine of tribal sovereign immunity. The KCRC's brief in opposition is due on December 21, 2015.

WASATCH COUNTY V. UTE INDIAN TRIBE (NO. 15-640); UINTAH COUNTY V. UTE INDIAN TRIBE (NO. 15-641) – On November 13, 2015, Wasatch County and Uintah County filed separate petitions seeking review of a decision by U.S. Court of Appeals for the Tenth Circuit which reversed the district court and held that the Tribe is entitled to a preliminary injunction to enjoin county officials from prosecuting tribal members for crimes committed within the undiminished portions of the reservation in conformity with the Supreme Court's 1994 decision in *Hagen v. Utah*. The Tribe's briefs in opposition are due on December 16, 2015.

TWO SHIELDS V. WILKINSON (NO. 15-475) – On October 13, 2015, individual Indian allottees—victims of an alleged scheme by certain private individuals and businesses to induce the United States to approve below-market oil and gas leases—filed a petition seeking review of a decision by the U.S Court of Appeals for the Eighth Circuit which dismissed their case based on their failure to join the United States as a "required party" under Rule 19 of the Federal Rules of Civil Procedure (inability to join based on sovereign immunity). On November 6, 2015, the respondents waived their right to respond, and the petition has been scheduled for conference on December 11, 2015.

ALASKA V. ORGANIZED VILLAGE OF KAKE (NO. 15-467) – On October 12, the State of Alaska filed a petition seeking review of an Indian law-related en banc decision (6-5) by U.S. Court of Appeals for the Ninth Circuit which held that, under the Administrative Procedures Act, the U.S. Department of Agriculture must provide a reasoned explanation for its 2003 decision to reverse its earlier determination that exempting the Tongass National Forest from the 2001 Roadless Rule (limiting road construction and timber harvesting in national forests) "would risk the loss of important roadless area [ecological] values." The United States brief in opposition is due on December 14, 2015.

UNITED STATES V. BRYANT (NO. 15-420) – On October 5, 2015, the United States filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that tribal court criminal convictions for domestic violence may be used in federal court prosecutions as a habitual offender under 18 USC §117 only if the tribal court guarantees a right to counsel. The Ninth Circuit concluded that it is constitutionally impermissible to use uncounseled convictions to establish an element of the offense in a subsequent prosecution under § 117(a). The brief in opposition was filed on November 4, 2015, and the petition has been scheduled for conference on December 11, 2015.

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, 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 from EXC, Inc. which was filed on October 7, 2015. The petition was scheduled for conference on November 6, 2015, but no action was taken by the Court. The petition is likely being held over by the Court as it considers *Dollar General v. Mississippi Band of Choctaw Indians.*

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).