TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 10, 2017
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 (http://sct.narf.org).

October Term 2016 (OT16) was an eventful year. On April 10, 2017, Neil M. Gorsuch took his seat as an Associate Justice of the Supreme Court of the United States, filling the year-long vacancy following the death of Justice Antonin Scalia. On behalf of the Tribal Supreme Court Project, NARF prepared a report reviewing his background, analyzing his judicial philosophy, and examining his experience with Indian law cases. As reported, Justice Gorsuch has significantly more experience with Indian law cases than any other recent Supreme Court nominee. His 10 written opinions generally recognize Tribes as sovereign governments, but the 28 Indian law cases on which he participated addressed only a subset of issues important to Indian tribes. As with all Supreme Court nominees, it is impossible to predict how he will decide particular cases that may come before him on the Supreme Court. The full report is available at http://sct.narf.org/articles/gorsuch-indian-law.pdf.

On April 25, 2017, the Court issued its opinion in *Lewis v. Clarke*, reversing the Connecticut Supreme Court and holding that, "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." After a stunning victory in *Michigan v. Bay Mills Indian Community* in June 2014, which affirmed the doctrine of tribal sovereign immunity, the Court created a bright line rule that tribal sovereign immunity does not extend to suits brought against tribal employees or officials in their individual capacity – unless there is a determination that the Tribe is the "real party in interest." However, the Court left open the question of whether tribal employees and officials would be entitled to "official immunity" – immunity for actions taken within the scope of their employment – on a similar basis as state and federal employees and officials.

On June 19, 2017, the Court issued its opinion in *Matel v. Tam*, affirming the U.S. Court of Appeals for the Federal Circuit and holding that the disparagement clause of federal trademark law, 15 U.S.C. §1052(a), violates the First Amendment's Free Speech Clause and is unconstitutional. Although *Tam* is not an Indian law case, its impact was immediate in relation to the *Blackhorse* litigation pending before the U.S. Court Appeals for the Fourth Circuit which challenged the trademark registration of Washington football team. In a press statement, NARF expressed its disappointment with the Court's decision which clears "the legal pathway for the Washington professional football team to continue to use a racial slur for Native Americans as its mascot." And while the Court explicitly acknowledged that this type of

demeaning speech is "hateful," it found that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"

The close of OT16 also provides us with an opportunity to review the docket of the Tribal Supreme Court Project and the type of Indian cases coming before the Court. In all, seventeen cert petitions in Indian law cases were filed and decided by the Court, with one cert petition granted: *Lewis v. Clarke* (sovereign immunity). Of the sixteen petitions denied/dismissed, four involved Indian lands: *City of Myton* (diminishment); *Central New York Business Association* (trust acquisition); *Citizens Against Reservation Shopping* (trust acquisition); and *Wolfchild* (aboriginal lands). Two petitions involved federal acknowledgment: *Mackinac Tribe* and *Nisenan Tribe*; while another two involved disenrollment: *Alto* and *Aguayo*. And the Court denied review in two other important decisions in which Tribes prevailed in the lower courts: *R.P. v. Los Angeles County Department of Children and Family Services* (ICWA adoptive placement preferences) and *Kelsey v. Bailey* (conviction of tribal member for crime on Indian lands outside the reservation).

In looking ahead to October Term 2017, changes are afoot for the Tribal Supreme Court Project. After fourteen years as a staff attorney with NARF, Richard Guest is leaving Washington, DC for sunny southern California. His responsibilities for NARF's work on behalf of the Project are now in the capable hands of Joel West Williams who can be reached at williams@narf.org. As always, John Dossett will continue to be at the helm on behalf of NCAI. It has been an honor and a privilege to serve Indian country in this capacity for so many years.

INDIAN LAW CASES DECIDED BY THE SUPREME COURT

LEWIS V. CLARKE (NO. 15-1500) – On April 25, 2017, the Court issued its opinion, reversing the Connecticut Supreme Court and holding that, "in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." Further, the Court held that "an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach." This case involved Mr. Clarke, a limousine driver employed by the Mohegan Tribal Gaming Authority, who rear-ended and injured the Lewises on an interstate highway outside the Tribe's reservation in Connecticut. The Connecticut Supreme Court held that the doctrine of tribal sovereign immunity extends to Mr. Clarke as an employee of a Tribe who was acting within the scope of his employment when the accident occurred.

Writing for a unanimous Court, Justice Sotomayor observed that a government employee who is acting within the scope of his employment at the time a tort is committed is not – by itself – sufficient to bar suit against that employee on the basis of sovereign immunity. The opinion makes clear that this common law principle applies regardless of whether the employee works for the federal government, a state government, or a tribal government. The Court also points to the distinction drawn from its legal precedent between individual- and official-capacity suits. In an official-capacity suit, the relief sought is only nominally against the government official and is – in fact – against the official's office and thus the sovereign itself. On the other hand, an individual-capacity suit seeks to impose personal liability upon the government official for their tortious actions. Accordingly, it is the identity of the "real party in interest" that dictates which immunities may be available. In applying these principles to this case, the result was apparent to the Court:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee

> operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which 'will not require action by the sovereign or disturb the sovereign's property.'"

The Court rejected Mr. Clarke's argument that the Mohegan Tribal Gaming Authority is the real party in interest here because it is required by tribal law to indemnify tribal employees for any adverse judgment under these circumstances. The Court observed that it has never before had occasion to decide the question of whether an indemnification clause is sufficient to extend a sovereign immunity defense to a suit against an employee in his individual capacity. Based on the same general principles outlined above, the Court held that "an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak." Once again, the Court made it clear that this principle will apply equally regardless of whether it is the immunity of the federal government, a state government, or a tribal government, at issue.

The implications of this decision are unclear at this point, but should begin to be clarified through pending and future litigation. The Court has laid down a bright-line rule that tribal sovereign immunity does not extend to suits brought against tribal employees or officials in their individual capacity – unless there is a determination that the Tribe is the "real party in interest." In addition, the Court left open the question of whether tribal employees and officials are entitled to "official immunity" – immunity for actions taken within the scope of their employment – on a similar basis as state and federal employees and officials. A copy of the opinion, the oral argument transcript and the briefs filed in this case are available at http://sct.narf.org/ caseindexes/ lewis_v_clark.html.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case:

PATCHAK V. ZINKE (NO. 16-498) – On May 1, 2017, the Court granted review of a petition filed by David Patchak, a non-Indian landowner seeking review of a decision by the U.S. Court of Appeals for the D.C. Circuit which held that the Gun Lake Trust Land Reaffirmation of 2014, a standalone statute reaffirming the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, was constitutionally sound and removed jurisdiction from the federal courts over any actions relating to that property. Mr. Patchak had successfully argued before the Supreme Court in 2012 that he had prudential standing to bring an APA action and a *Carcieri* challenge to the acquisition of trust land for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians/Gun Lake Tribe. The Court has granted review of Question Presented 1:

> Petitioner filed a lawsuit challenging the Department of Interior's authority to take into trust a tract of land ("the Bradley Property") near Petitioner's home. In 2009, the District Court dismissed his lawsuit on the ground that Petitioner lacked prudential standing. After the Court of Appeals reversed the District Court, this Court granted review and held that Petitioner has standing, sovereign immunity was waived, and his "suit may proceed." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. at 2199, 2203 (2012) ("*Patchak I*"). While summary judgment briefing was underway in the District Court following remand from this Court, Congress enacted the Gun Lake Act—a standalone statute which directed that any pending (or future) case "relating to" the

Bradley Property "shall be promptly dismissed," but did not amend any underlying substantive or procedural laws. Following the statute's directive, the District Court entered summary judgment for Defendant, and the Court of Appeals affirmed.

1. Does a statute directing the federal courts to "promptly dismiss" a pending lawsuit following substantive determinations by the courts (including this Court's determination that the "suit may proceed")—without amending underlying substantive or procedural laws—violate the Constitution's separation of powers principles?

The petitioner's opening brief is due on July 13, 2017, and the United States' and the Tribe's briefs in response are due on September 11, 2017. The case will not be argued until after the Court returns from its summer recess on October 2, 2017.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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:

COACHELLA VALLEY WATER DISTRICT V. AGUA CALIENTE BAND OF CAHUILLA INDIANS; DESERT WATER AGENCY V. AGUA CALIENTE BAND OF CAHUILLA INDIANS (NOS. 17-40 AND 17-42) – On July 5, 2017, two California water agencies filed separate petitions seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the *Winters* doctrine does not distinguish between surface water and groundwater. When the United States established the reservation as a homeland for the Agua Caliente Band of Cahuilla Indians, the court held that the federal government reserved appurtenant water sources – including groundwater – for use by the Tribe. The briefs in opposition are due on August 7, 2017.

WASHINGTON STATE DEPARTMENT OF LICENSING V. COUGAR DEN (NO. 16-1498) – On June 14, 2017, the Washington Department of Licensing filed a petition seeking review of a decision by the Supreme Court of Washington which held that the right to travel provision of the Yakama Nation Treaty of 1855 preempts the imposition of taxes and licensing requirements by the Department on a tribally chartered corporation which transports motor fuel across state lines for sale on the Reservation. The brief in opposition is due on July 17, 2017

UPSTATE CITIZENS FOR EQUALITY V. UNITED STATES (NO. 16-1320) – On April 26, 2017, plaintiffs (towns, civic organization, and local residents) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which affirmed the district court's dismissal of their challenge to the Secretary's authority to accept into trust approximately 13,000 acres of land in New York State for the benefit of the Oneida Indian Nation. On June 30, 2017, the United States filed its brief in opposition.

WILLIAMS V. POARCH BAND OF CREEK INDIANS (NO. 16-1324) – On March 1, 2017, a former tribal employee filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which affirmed the district court's dismissal of her claims brought under the Age Discrimination in Employment Act (ADEA). The Eleventh Circuit held that the Tribe had not waived its immunity and Congress did not clearly abrogate tribal immunity from private suit under the ADEA. On June 29, 2017, the Tribe filed a waiver of its right to respond.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

CITY OF MYTON V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION (NO. 16-868) – On July 3, 2017, the Court granted the motion of the City of Myton under Rule 43 to voluntarily dismiss its petition which had sought review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the town lies entirely with the boundaries of the reservation and is "Indian country" for purposes of determining criminal jurisdiction.

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION V. JEWELL (NO. 16-1135) – On May 15, 2017, the Court denied a petition filed by a group of civic associations, state assemblyman, and county government representatives seeking review of a summary order issued by the U.S. Court of Appeals for the Second Circuit, which upheld the dismissal of their claims challenging a decision by the Department of the Interior to accept into trust approximately 13,000 acres for the benefit of the Oneida Indian Nation of New York.

TUNICA-BILOXI GAMING AUTHORITY V. ZAUNBRECHER (NO. 15-1486) – On May 1, 2017, the Court denied review of a petition filed by the Tunica-Biloxi Tribe seeking review of a decision by the Louisiana Court of Appeals which held that state courts have subject matter jurisdiction over a tort suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment at the tribal-owned casino located on tribal trust land.

SUN V. MASHANTUCKET PEQUOT GAMING ENTERPRISE (NO. 16-1008) – On April 17, 2017, the Court denied review of a petition filed by a group of gamblers seeking review of a summary order issued by the U.S. Court of Appeals for the Second Circuit which affirmed the dismissal of their § 1983 claims against tribal officials who refused to payout their winnings at the casino based on the court's lack of personal jurisdiction based on the failure of petitioners to perfect service. Although petitioners raised the issue of tribal sovereign immunity, the Second Circuit determined that it did not need to address it or the relevance of the Ninth Circuit's recent decision in *Pistor v. Garcia*.

CITIZENS AGAINST RESERVATION SHOPPING V. JEWELL (NO. 16-572) – On April 3, 2017, the Court denied a petition filed by a non-Indian group seeking review of a decision by the U.S. Court of Appeals for the District of Colombia Circuit which upheld the decision of the Secretary to take land in trust for the Cowlitz Tribe based on *Chevron* deference applicable to the two-part inquiry in concluding that the Cowlitz Tribe is a "recognized Indian tribe now under Federal jurisdiction."

MEYERS V. ONEIDA TRIBE OF WISCONSIN (NO. 16-745) – On March 20, 2017, the Court denied a petition seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which affirmed the district court and held the Tribe has sovereign immunity from a putative class action lawsuit brought pursuant to the Federal Fair Credit Reporting Act.

ALTO V. JEWELL (NO. 16-799) – On February 27, 2017, the Court denied a petition filed by former enrolled tribal members of the San Pasqual Band of Mission Indians seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the 2011 decision of the Assistant Secretary of Indian Affairs, which reversed an earlier 1995 decision upholding the enrollment of petitioners, was not barred by the doctrines of issue or claim preclusion, and was not arbitrary, capricious or an abuse of discretion.

AGUAYO V. JEWELL (NO. 16-660) – On January 23, 2017, the Court denied a petition filed by former enrolled tribal members of the Pala Band of Mission Indians seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court and held that the Bureau of Indian Affairs did not act arbitrarily and capriciously when it concluded that, according to tribal law, it had no authority to intervene in a tribal membership dispute.

R.P. V. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES (NO. 16-500) – On January 9, 2017, the Court denied a petition filed by the non-Indian foster parents of Alexandria P. ("Lexi") seeking review of a decision by the Court of Appeal of the State of California which affirmed the lower court and held that the foster parents failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA).

MACKINAC TRIBE V. JEWELL (NO. 16-539) – On January 9, 2017, the Court denied a petition filed by the Mackinac Tribe seeking review of a per curiam opinion of the United States Court of Appeals for the District of Colombia Circuit which held that the Tribe must exhaust its administrative remedies for federal acknowledgement under Part 83 prior to making a claim of federal recognition for purposes of requiring the Secretary of the Interior to conduct an IRA election under Part 81.

NISENAN TRIBE OF THE NEVADA CITY RANCHERIA V. JEWELL (NO. 16-616) – On January 9, 2017, the Court denied a petition filed by the Nisenan Tribe, a non-federally recognized Indian tribe that was a party to the *Tillie Hardwick* class action litigation, seeking review of a decision by the U.S Court of Appeals for the Ninth Circuit which affirmed the district court's dismissal of the Tribe from the *Tillie Hardwick* case effective, *nunc pro tunc*, as of 1983, and then dismissed its 2009 action as time-barred under the six-year statute of limitations.

WOLFCHILD V. REDWOOD COUNTY (NO. 16-286) – On November 7, 2016, the Court denied a petition filed by the lineal descendants of the loyal Mdewakanton which sought review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that they did not have cause of action under federal common law for violation of possessory rights to aboriginal land, and that the 1863 Act that authorized the Interior Secretary to set apart land for loyal Mdewakanton did not create private remedy.

PRO-FOOTBALL, INC. V. BLACKHORSE (NO. 15-1311) – On October 3, 2016, the Court denied the petition for writ of certiorari before judgment (by the Fourth Circuit) filed by Pro-Football. However, the Court granted review of the petition filed by the United States in *Matel v. Tam,* No. 15-1293, and affirmed the en banc decision of the U.S. Court of Appeals for the Federal Circuit, holding that the disparagement clause in § 2(a) of the Lanham Act is facially invalid under the free speech clause of the First Amendment.

KELSEY V. BAILEY (NO. 16-5120) – On October 3, 2016, the Court denied review of a petition filed by a member of the Little River Band of Ottawa Indians seeking review of a decision by the U.S. Court of Appeals for the Sixth Circuit which upheld his criminal conviction in tribal court for misdemeanor sexual assault against a tribal employee at the Band's Community Center which is located on land owned by the Tribe but outside its reservation boundaries.

JONES V. NORTON (NO. 16-72) – On October 3, 2016, the Court denied the petition filed by the parents of Todd Murray, an enrolled member of the Ute Indian Tribe, seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the district court's dismissal of their §1983 claims

against state law enforcement officials for violation of his rights under the 1868 Ute Treaty which resulted in his death.

FLUTE V. U.S. (NO. 15-1534) – On October 3, 2016, the Court denied review of a petition filed by a group of Native Americans who are descendants of the victims of the 1864 Sand Creek Massacre seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that their action for an accounting of funds held by the federal government in trust for payment of reparations to their ancestors is barred by the doctrine of sovereign immunity.

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 Joel West Williams, NARF Staff Attorney, 202-785-4166 (willams@narf.org).**