

# TRIBAL SUPREME COURT PROJECT

## MEMORANDUM

SEPTEMBER 22, 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>).

On Monday, September 25, 2017, the Court will hold its long conference during which the Justices will consider nearly two-thousand petitions filed during its summer recess. During its long conference, the Justices will consider 4 of the 15 Indian law petitions currently pending before the court: *Washington State Dep't of Licensing v. Cougar Den* (tax), *Hackford v. Utah* (reservation diminishment), *S.S. v. Colorado River Indian Tribes* (ICWA), and *Williams v. Poarch Band of Creek Indians* (sovereign immunity). Then on Monday, October 2, 2017, the Court has its first session, which marks the beginning of October Term 2017 (OT17), and when it is likely to issue the order list from its long conference.

The October Term 2017 is shaping up to be a potentially significant one for Indian law. In addition to being the first full term of Associate Justice Neil Gorsuch, a number of pending petitions involve important Indian law issues as well as subjects the Court has not addressed in a long time, such as treaty rights (*Washington v. U.S.*) and Indian reserved water rights (*Coachella Valley Water District v. Agua Caliente Band of Cahuilla Indians*).

The Tribal Supreme Court Project will host a free webinar to discuss these and other pending petitions on September 25 at 2pm Eastern. The webinar will provide an overview of how the certiorari process works and we will discuss the granted and pending petitions with the attorneys representing tribal governments in those cases. We will also review the principles of the Tribal Supreme Court Project and discuss how tribes can work together to improve our odds of success before the United States Supreme Court. **You can register for the free webinar at:** <https://attendee.gotowebinar.com/register/2917698525803063811>.

### 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 upheld the Gun Lake Trust Land Reaffirmation of 2014. That statute reaffirmed the Department of the Interior's decision to take the land in question into trust for the Gun Lake Tribe, and removed jurisdiction from the federal courts over any actions relating to that property. Mr. Patchak, who

previously 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, argues that the statute is unconstitutional. 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?

Mr. Patchak filed his brief in July 2017, and the United States and the Tribe filed their response briefs on September 11, 2017. The case will be argued on November 7, 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:

**UPPER SKAGIT INDIAN TRIBE V. LUNDGREN (17-387)** – On September 11, 2017, the Upper Skagit Indian Tribe filed a petition seeking review of a Washington Supreme Court decision, which held that an action against real property of the Upper Skagit Indian Tribe did not require an analysis of tribal sovereign immunity. In 2013, the Tribe bought property in Skagit County, Washington and received a statutory warranty deed. Subsequently, the adjacent property owners filed a quiet title action in state court, alleging they had acquired title to a strip of land along the common boundary through adverse possession before the Tribe purchased the land. The tribe raised sovereign immunity, and the trial court issued summary judgement in favor of the plaintiffs. The brief in opposition is due October 11, 2017.

**WASHINGTON V. U.S. (17-269)** – On August 17, 2017, the State of Washington filed a petition for writ of certiorari in the culverts subproceeding of *United States v. Washington*. Washington challenges the Ninth Circuit’s holding that the treaty right of taking fish secured to the western Washington tribes imposes on the State a duty to make feasible repairs to its road culverts to allow for the safe passage of salmon back to their spawning grounds. Response briefs are due October 20, 2017.

**MASSACHUSETTS V. WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) (17-215); TOWN OF AQUINNAH V. WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) (17-216)** – On August 8, 2017, Massachusetts, a local government, and community association, filed petitions seeking review of a First Circuit Court of Appeals decision reversing the District Court’s issuance of summary judgment in their favor in a dispute over the applicability of the Indian Gaming Regulatory Act (IGRA). Massachusetts brought a breach of contract action alleging that the Tribe's efforts to commence commercial gaming operations on tribal trust lands, pursuant to IGRA, without having obtained a license from the Commonwealth violated the settlement agreement between the State and the Wampanoag Tribe of Gay Head (Aquinnah). The Tribe argued that the settlement agreement and certain provisions of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987 were impliedly repealed by IGRA. The First Circuit held that the Tribe exercised jurisdiction sufficient to trigger IGRA’s application, and that IGRA impliedly repealed provisions of the Settlement Act that would have subjected the tribe to state gaming regulations. Briefs in opposition are due November 13, 2017.

**GREAT PLAINS LENDING, LLC, ET AL., V. CONSUMER FINANCIAL PROTECTION BUREAU (17-184)** – On August 3, 2017, two Tribally-owned lenders filed a petition challenging a Ninth Circuit Court of Appeals decision, which affirmed the District Court’s enforcement of civil investigative demands (CIDs) issued by the Consumer Financial Protection Bureau (CFPB) against the tribally-owned lenders. The Ninth Circuit held that the Consumer Financial Protection Act (CFPA) applies to Tribes because it is a federal statute of general applicability and Congress did not expressly exclude Tribes from its application. The Ninth Circuit rejected the Tribal entities’ argument that the term “person” within the statute does not include sovereigns, such as states and tribes. The response brief is due October 5, 2017.

**FRENCH V. STARR (17-197)** – On August 2, 2017, Mr. French, appearing *pro se*, filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the District Court’s grant of summary judgment in favor of members of the Colorado River Indian Tribes’ (CRIT) Tribal Court and Tribal Council. Petitioner argues that CRIT lacked jurisdiction to adjudicate eviction proceedings relating to his leasehold on the California side of the Colorado River because his lot is not part of the Colorado River Indian Reservation. The Ninth Circuit held Petitioner is estopped from contesting CRIT's title because he paid rent under the leasehold to the Bureau of Indian Affairs for the benefit of CRIT, and then directly to CRIT, from 1983 through 1993. Having resolved the question of title, the Court went on to hold that the matter is squarely controlled by *Water Wheel Camp Recreational Area, Inc. v. La Rance*, 642 F.3d 802 (9th Cir. 2011), which upheld CRIT’s jurisdiction over a non-Indian in an unlawful detainer action stemming from a leasehold on tribal land. The brief in opposition was filed on September 6, 2017.

**ALASKA V. ROSS (17-118)** On July 21, 2017, the State of Alaska filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which reversed the District Court’s ruling that the National Marine Fisheries Service acted arbitrarily and capriciously when it listed a bearded seal subspecies as “threatened” due to habitat loss precipitated by climate change. The brief in opposition is due September 27, 2017.

**S.S. V. COLORADO RIVER INDIAN TRIBES (17-95)** – On July 17, 2017, a petition was filed on behalf of two Indian children seeking review of an Arizona Court of Appeals decision, which upheld dismissal of an Indian father’s action to terminate his ex-wife’s parental rights. The Arizona court held (1) that private proceedings to terminate parental rights are subject to ICWA Sections 1912(d) (the active-efforts provision) and 1912(f) (the termination-burden provision), (2) that evidence indicated active efforts were successful, and (3) that ICWA does not violate the children’s Constitutional rights to Equal Protection. The brief in opposition was filed September 18, 2017.

**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 Ninth Circuit Court of Appeals, which held that the *Winters* doctrine does not distinguish between surface water and groundwater. The court held that when the United States established the reservation as a homeland for the Agua Caliente Band of Cahuilla Indians, the federal government reserved appurtenant water sources – including groundwater – for use by the Tribe. The briefs in opposition are due on October 6, 2017.

**HACKFORD V. UTAH (17-44)** – On July 3, 2017, an individual seeking to enjoin the prosecution of traffic citations against him by the State of Utah filed a petition seeking review of the Tenth Circuit Court of Appeals decision, which held that the State of Utah had jurisdiction because the location of the alleged offenses was no longer part of the Uintah and Ouray Indian Reservation, and, therefore, not Indian Country. Utah waived its right to respond to the Petition, and it is scheduled for the Court’s September 25, 2017 conference.

**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 that transports motor fuel across state lines for sale on the Reservation. The petition is scheduled for the September 25, 2017 conference.

**UPSTATE CITIZENS FOR EQUALITY V. UNITED STATES (NO. 16-1320); TOWN OF VERNON V. U.S. (17-8)** – On April 26, 2017, a civic organization and local residents filed a petition seeking review of a decision by the Second Circuit Court of Appeals, 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, and the petition is scheduled for consideration at the September 25, 2017 conference.

On June 23, 2017, the Town of Vernon filed a separate petition pursuant to an extension granted by the Court, and on August 28, 2017, the United States filed its brief in opposition. The petition is scheduled for the October 6, 2017 conference.

**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 Eleventh Circuit Court of Appeals, 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. The Petition is scheduled for conference on September 25, 2017.

## **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: Sanat Pattanaik, 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 Senior Staff Attorney, 202-785-4166 (williams@narf.org).**