TRIBAL SUPREME COURT PROJECT
MEMORANDUM

OCTOBER 26, 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 held its long conference, during which the Justices considered nearly two-thousand petitions filed during its summer recess. Included among them were four Indian law petitions pending before the court: *Washington State Department of Licensing v. Cougar Den* (tax), *Hackford v. Utah* (reservation diminishment), *Upstate Citizens For Equality v. United States* (tribal trust land acquisition), and *Williams v. Poarch Band of Creek Indians* (sovereign immunity). On October 2, 2017, the Court held its first session, marking the beginning of October Term 2017 (OT17). At that time, the Court issued orders denying review in *Hackford v. Utah* and *Williams v. Poarch Band of Creek Indians*. It also rescheduled consideration of the *Upstate Citizens for Equality v. United States* petition for its October 6 conference, and called for the views of the Solicitor General (CVSG) in *Washington State Dep't of Licensing v. Cougar Den*.

On October 10, 2017, the Court issued an order list from its October 6 conference, where three Indian law petitions were considered: *Upstate Citizens for Equality v. United States*, its sister case *Town of Vernon v. United States* (tribal trust land acquisition), and *French v. Starr* (tribal court jurisdiction). It denied review in *French v. Starr*, and held over consideration of the two other petitions. *Upstate Citizens* and *Town of Vernon* were subsequently held over in the October 13 conference, and again prior to commencement of the October 27 conference.

The Court will hold its next conference on October 27, where it will consider one Indian law petition: *S.S. v. CRIT* (ICWA). Additionally, on November 7, 2017, the Court will hear argument in *Patchak v. Zinke*, its first Indian law case of the term.

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.
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> 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:

HERRERA V. WYOMING (17-532) – On October 5, 2017, a member of the Crow Tribe filed a petition challenging a Wyoming state court conviction for unlawfully hunting elk in the Big Horn National Forest. The Crow Tribe's 1868 treaty with the United States reserves hunting rights in ceded lands, which include what is now the Bighorn National Forest, so long as those lands remain "unoccupied." However, the state court did not allow Petitioner to assert the Tribe's treaty hunting right as a bar to prosecution, instead holding that Wyoming's admission to the Union abrogated the Tribe's treaty hunting rights, and in the alternative that the creation of the Bighorn National Forest constituted an "occupation" of those lands. A state appellate court affirmed, and the Wyoming Supreme Court denied review. The brief in opposition is due November 9, 2017.

STATE OF KANSAS V. NATIONAL INDIAN GAMING COMMISSION (17-463) – On September 25, 2017, the State of Kansas filed a petition challenging a Tenth Circuit Court of Appeals decision, which affirmed the district court and held that a legal opinion letter of National Indian Gaming Commission's general counsel regarding the eligibility of Indian lands for gaming is not a final agency action reviewable under the Administrative Procedures Act. The brief in opposition is due October 30, 2017.

WINDOW ROCK UNIFIED SCHOOL DISTRICT V. REEVES (17-447) – On September 25, 2017, an Arizona public school district filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which held that the school district must exhaust tribal remedies regarding an employment dispute arising on tribal land leased by the school district from the Navajo Nation. Several current and former employees of the school district filed complaints with the Navajo Nation Labor Commission (NNLC), and the school district moved to dismiss claiming that the NNLC lacked jurisdiction. However, prior to the NNLC ruling on the motion to dismiss, the school district filed for declaratory and injunctive relief in federal district court, likewise asserting that the NNLC lacked jurisdiction over the employment disputes. The federal district court granted the school district summary judgment, concluding that tribal jurisdiction was plainly lacking. The Ninth Circuit reversed, holding that tribal court jurisdiction is plausible because the claims arose from conduct on tribal land and implicate no state criminal law enforcement interests; consequently, the school district must exhaust tribal remedies. The brief in opposition is due November 24, 2017.

TAVARES V. WHITEHOUSE (17-429) – On September 21, 2017, a member of the United Auburn Indian Community filed a petition challenging a Ninth Circuit Court of Appeals decision, which held that federal courts lack subject matter jurisdiction to consider a tribal member's habeas corpus petition challenging an order banishing her from all tribal land for 10 years. Specifically, the Ninth Circuit held that a temporary exclusion from Indian tribal land is not a "detention" for purpose of the habeas corpus provision of the Indian Civil Rights Act (ICRA), and ICRA's "detention" requirement has a narrower meaning than the "custody" showing required under other federal habeas statutes. The brief in opposition was due October 23, 2017, but one has not been docketed.

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 was filed on October 13, 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. Briefs in opposition are due November 27, 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 a 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 Class II 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 brief in opposition is due November 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 briefs in opposition are due October 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 petition is scheduled for the Court's October 27, 2017, conference.

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 were filed on October 13, 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 that transports motor fuel across state lines for sale on the Reservation. On October 2, 2017, the Court called for the views of the Solicitor General.

UPSTATE CITIZENS FOR EQUALITY V. U.S. (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 23, 2017, the Town of Vernon filed a separate petition pursuant to an extension granted by the Court. The United States filed its briefs in opposition on June 30,

2017, and August 28, 2017, respectively. Both petitions have been scheduled for conference three times (October 6, October 13, and October 27) but were held over by the Court.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

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.

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.

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.

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).**