TRIBAL SUPREME COURT PROJECT MEMORANDUM

JANUARY 12, 2018
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).

Since the last update, the Court has granted review in one Indian law case: *Upper Skagit Indian Tribe v. Lundgren* (tribal sovereign immunity). Additionally, on January 8, 2018, the Court called for the views of the Solicitor General (CVSG) in one case, *Herrera v. Wyoming* (treaty hunting rights). Finally, the Court denied review in five Indian law petitions: *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)* (17-215) and *Town of Aquinnah v. Wampanoag Tribe of Gay Head (Aquinnah)* (17-216) (IGRA); *Window Rock Unified School District v. Reeves* (17-447) (tribal court exhaustion); *Kansas v. NIGC* (Indian land eligibility for gaming), *Great Plains Lending, LLC, et al., v. Consumer Financial Protection Bureau* (17-184) (application of Consumer Financial Protection Act to tribally-owned lender). All of these cases are summarized below.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in two Indian law cases:

UPPER SKAGIT INDIAN TRIBE V. LUNDGREN (17-387) – On December 8, 2017, the Court granted review of a petition filed by the Upper Skagit Indian Tribe seeking review of a Washington Supreme Court decision, which held that an tribal sovereign immunity did not bar an in rem action against real property of the Upper Skagit Indian Tribe. 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 before the state trial court, which subsequently issued summary judgement in favor of the plaintiffs.

The question presented is: Does a court's exercise of in rem jurisdiction overcome the jurisdictional bar of tribal sovereign immunity when the tribe has not waived immunity and Congress has not unequivocally abrogated it?

The Tribe's brief is due January 22, 2018.

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 Act 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?

The Court heard oral argument in this case on November 7, 2017, and the transcript is available at: https://sct.narf.org/documents/patchak_v_jewell/oral_argument_transcript.pdf

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:

KEEPSEAGLE, ET AL. V. PURDUE (17-807) – On December 1, 2017, two individual class members filed a petition seeking review a U.S. Court of Appeals for the District of Columbia decision, which upheld a district court finding that the addendum to a class action settlement agreement was "fair, reasonable, and equitable." This class action lawsuit was brought against the United States Department of Agriculture (USDA) by a class of Native American farmers and ranchers alleging systemic racial discrimination by the USDA. Ultimately, a settlement was reached that created a fund of over $680 million. At the conclusion of the claims process, $380 million remained in the fund. The settlement agreement required any leftover funds to be distributed to *cy-pres* beneficiaries: non-profit organizations providing services to Native American farmers. Because such a large amount was not anticipated in the residuary, the parties negotiated a modification to the settlement agreement that provided for supplemental distributions to class

members and a modified *cy-pres* distribution. The District Court approved the modification over the objections of two class members who appealed. The brief in opposition is due January 22, 2018.

NORTON, ET AL. V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, ET AL. (17-855) – On December 12, 2017, several non-Indian local police officers and deputy sheriffs filed a petition seeking review of the Tenth Circuit Court of Appeals decision, which reversed the district court and held that a Tribe's trespass claim against non-member police officers was within the jurisdiction of the tribal court. The case arose out of the death of a Ute tribal member following a police pursuit on the Uintah and Ouray Indian Reservation. The tribal member's parents, his estate, and the Ute Indian Tribe sued the officers involved in Ute Tribal Court for wrongful death, trespass, and other torts. The officers then challenged the Tribal court's jurisdiction in federal district court. The district court enjoined the Tribal court action, holding that *Nevada v. Hicks* bars tribal civil jurisdiction over the officers, making exhaustion of tribal court remedies unnecessary. In reversing, the Tenth Circuit concluded that the Tribe's trespass claim fell within jurisdiction of tribal court under *Montana v. United States* and that no state interest was implicated by nonmember police officer pursuing a tribal member on tribal land for on-reservation offense, and thus tribal jurisdiction was not barred over trespass claim against officers. The Tenth Circuit further held that the bad faith exception from exhaustion of tribal court remedies was not available as to trespass claim against nonmember police officers. The brief in opposition is due January 16, 2018.

RENTERIA, ET AL. V. SUPERIOR COURT OF CALIFORNIA, TULARE COUNTY, ET AL. (17-789) – On November 27, 2017, California residents Efrim and Talisha Renteria filed a petition seeking review of a California trial court decision which held that a guardianship proceeding involving three children who would be subject to the Indian Child Welfare Act (ICWA) because their father was a member of the Shingle Springs Band of Miwok Indians. After their parents died in a car crash, the children initially were taken in by the Renterias, who are related to the children's mother. Subsequently, Regina Cuellar, a Shingle Springs tribal member who is related to the children's father, sought custody. In the trial court, the Renterias moved to bar application of ICWA, arguing that a guardianship proceeding was not a "child custody proceeding" as defined in ICWA. The trial court denied that motion. Although the trial court has not yet decided placement, the Renterias appealed the decision to apply ICWA. The California Court of Appeals summarily denied their appeal, and the California Supreme Court denied review, prompting the Renterias' petition for certiorari. On December 15, 2017, the Tribe and Ms. Cuellar both waived their right to respond to the petition; the State court, also named as a respondent, has filed no response. The case has been distributed for consideration at the Court's February 16, 2018, conference.

PUBLIC SERVICE COMPANY OF NEW MEXICO V. BARBOAN, ET AL. (17-756) – On November 22, 2017, Public Service Company of New Mexico (PNM) filed a petition seeking review of a Tenth Circuit Court of Appeals decision, which affirmed the U.S. District Court of New Mexico, and held that the public utility could not condemn a right-of-way for electric transmission lines across allotments in which the Navajo Nation possesses a fractional interest. The right-of-way was first granted by BIA in 1960 for a fifty year period. At that time, ownership in the allotments was only with individual Indians, but in 2006 and 2009, the Navajo Nation acquired ownership interests in two of the allotments through conveyances and intestate succession. Initially in 2009, PNM sought renewal of its right-of-way from BIA pursuant to 25 U.S.C. § 324. However, BIA informed PNM that it could not approve the renewal because a majority of individual Indian landowners did not consent, as required by statute. Thereafter, PNM filed suit in the Federal District Court of New Mexico seeking to condemn the right-of-way in perpetuity pursuant to 25 U.S.C. § 357 and naming all those with ownership interests, including the Navajo Nation. The Tenth Circuit affirmed the District Court ruling that "When all or part of a parcel of allotted land owned by one

or more individuals is transferred to the United States in trust for a tribe, that land becomes 'tribal land' not subject to condemnation under § 357." The Brief in Opposition is due January 22, 2017.

LEWIS TEIN, P.L., ET AL. V. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA (17-702) – On November 13, 2017, a law firm and its partners filed a petition seeking review of a Florida District Court of Appeals decision, which reversed a trial court's denial of the Tribe's motion to dismiss based on tribal sovereign immunity. The law firm, which previously represented the tribe, sued seeking damages for the Tribe's alleged misconduct during the course of several lawsuits filed by the Tribe against the law firm. The Florida District Court of Appeals held that although there was a limited waiver of the tribe's sovereign immunity in a previous lawsuit involving Lewis Tein, the waiver did not extend to a new lawsuit filed against the Tribe by the firm. The court further concluded that the tribe's litigation conduct itself did not constitute "a clear, explicit, and unmistakable waiver" of the tribe's immunity in a subsequent lawsuit seeking damages based on that conduct. The petition is scheduled for the January 12, 2018 conference.

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. On January 8, 2018, the Court called for the views of the Solicitor General.

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. A brief in opposition was not filed, and on November 16, 2017, the Court requested a response, which is due on February 16, 2018.

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. The petition is scheduled for the Court's January 12, 2018, conference.

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 petition was scheduled for the Court's conferences on January 5, 2018 and January 12, 2018. However, it has been rescheduled both times and no new date has been set.

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.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

MASSACHUSETTS V. WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) (17-215); TOWN OF AQUINNAH V. WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) (17-216) – On January 8, 2018, the Court denied review of a pair of petitions, one filed by Massachusetts, the other by a local government and a community association, 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.

WINDOW ROCK UNIFIED SCHOOL DISTRICT V. REEVES (17-447) – On January 8, 2018, the Court denied review of a petition filed by an Arizona public school district 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.

GREAT PLAINS LENDING, LLC, ET AL., V. CONSUMER FINANCIAL PROTECTION BUREAU (17-184) – On December 11, 2018, the Court denied review of a petition filed by two Tribally-owned lenders 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.

STATE OF KANSAS V. NATIONAL INDIAN GAMING COMMISSION (17-463) – On December 11, 2018, the Court denied review of a petition filed by the State of Kansas 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.

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 November 27, 2017, the Court denied review of two separate petitions filed by California water agencies 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.

UPSTATE CITIZENS FOR EQUALITY V. U.S. (NO. 16-1320); TOWN OF VERNON V. U.S. (17-8) – On November 27, 2017, the Court denied review of a decision by the Second Circuit Court of Appeals, which affirmed the district court's dismissal of challenges by a civic organization and local residents 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 Nation of New York. On June 23, 2017, the Town of Vernon filed a separate petition pursuant to an extension granted by the Court. Justice Thomas filed a dissenting opinion from the denial of certiorari, in which he restated his view that "the Indian Commerce Clause does not appear to give Congress the power to authorize the taking of land into trust under the IRA." No other justices joined Justice Thomas' dissent.

S.S. V. COLORADO RIVER INDIAN TRIBES (17-95) – On October 30, 2017, the Court denied review of a petition 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.

FRENCH V. STARR (17-197) – On October 10, 2017, the Court denied review of 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 argued 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 October 2, 2017, the Court denied review of a petition filed by an individual seeking to enjoin the prosecution of traffic citations against him by the State of Utah. The petition sought review of a 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 October 2, 2017, the Court denied review of a petition filed by a former tribal employee 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 sovereign immunity and Congress did not clearly abrogate tribal sovereign 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).**