TRIBAL SUPREME COURT PROJECT MEMORANDUM

FEBRUARY 17, 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 Term 2014 continues to be relatively quiet in relation to cert petitions and cases involving questions of federal Indian law. The Court is currently in recess until its scheduled February 20, 2015 conference. There still has not been any word from the Solicitor General regarding the United States' recommendation to the Court in response to the petition filed in *Dollar General Corporation v. Mississippi Band of Choctaw Indians* challenging tribal court jurisdiction (summarized below). Last month, the Court did deny the "petition to watch" filed by the Seminole Tribe in *Seminole Tribe of Florida v. Florida Department of Revenue* challenging the immunity of state officials in a tax dispute (summarized below). As a result, it is highly unlikely that any Indian law case will be argued and decided by the Court this term. Any subsequent grant of certiorari on a question of Indian law this term will not be argued and decided until next term. However, following its January 20, 2015 unanimous decision in *Holt v. Hobbs* regarding protections for religious freedoms of prisoners, the Court did issue a "GVR" (petition granted, judgment vacated and case remanded) in *Knight v. Thompson*, and the Eleventh Circuit must now reconsider the claims of the Native American inmates in Alabama (summarized below).

PETITIONS GRANTED

KNIGHT V THOMPSON (NO. 13-955) – On January 26, 2015, the Court issued a "GVR" (petition granted, judgment vacated and case remanded) for further consideration in light of its unanimous decision in *Holt v. Hobbs*. In *Holt*, the Court held that Arkansas violated the Religious Land Use and Institutionalized Persons Act (RLUIPA) where its grooming policy did not allow beards and it refused to grant a religious exemption to an inmate whose Muslim religion required him to wear a beard. Shortly before the Court granted review in *Holt*, a group of Native American inmates filed a petition in *Knight v. Thompson*, asking the Court to review a decision of the U.S. Court of Appeals for the Eleventh Circuit which held in favor of prison officials in Alabama who refused to grant a religious exemption from their restrictive grooming policy to allow Native Americans to wear long hair consistent with their Native religious beliefs. The Native American Rights Fund, representing the National Congress of American Indians and Huy filed "friend of the Court" briefs supporting the prisoners in both *Holt* and *Knight*.

Like Mr. Holt, the Native American prisoners in *Knight* are seeking relief under RLUIPA, which requires that a substantial burden on an inmate's religious exercise be the least restrictive means of furthering a compelling government interest. This standard, referred to as "strict scrutiny," is the most stringent legal

standard applied to laws and government rules. A lack of consistent application of this rigorous standard by the lower federal courts has allowed some state prison systems to unduly restrict religious practices of Native American inmates. Nearly 80% of U.S. prison systems allow Native Americans to wear long hair, either through blanket policies or special religious exemptions. By and large, prison officials have found ways to mitigate the minimal risks associated with these practices and have observed numerous benefits to Native inmate behavior and rehabilitation as a result. However, a handful of state prison systems stubbornly refuse to accommodate certain facets of Native religion, such as long hair at issue in *Knight*. Those prison officials have hidden behind safety, security and hygiene concerns to frustrate sincere religious beliefs and practices. Yet, these same prison officials openly admit that they did not investigate, or even consider, the successful accommodation measures taken by the 80% of prison systems allowing long hair, or exemptions for Native American inmates. Rather than apply RLUIPA's strict scrutiny to the state's arguments and ask, "Why not Alabama?" the lower courts in *Knight* deemed the policies of other jurisdictions simply irrelevant to the operation of Alabama prisons and accorded "due deference" to the uninformed opinions and unsubstantiated claims of prison officials.

The *Holt* opinion, and the *Knight* case on remand, should change a fundamental aspect of how certain prison systems deal with Native Americans and their religious practices. For those Natives who reside in the darkest corners of U.S. penal systems, it is no longer the rule that they cannot engage in their traditional religious practices merely because their jailors say so. Courts will demand more, just as Congress intended when it enacted RLUIPA.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, several petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court:

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION V. MCKENNA (NO. 14-947) – On February 2, 2015, the Yakama Indian Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the plain text of the Yakama Treaty of 1855 did not preclude enforcement of the State of Washington's escrow statute, which requires tobacco companies to reimburse the State for health care costs related to the use of tobacco products. The State's response is due on March 9, 2015.

STATE OF WISCONSIN V. LAC COURTE OREILLES BAND OF LAKE SUPERIOR CHIPPEWA INDIANS OF WISCONSIN (NO. 14-792) – On January 7, 2015, the State of Wisconsin filed a petition seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which reversed the district court holding that the Tribe did not meet its burden of proof (*e.g.*, circumstances have changed so much that night hunting of deer with lights is no longer a substantial safety hazard) to reopen the court's 1991 judgment under FRCP Rule 60(b). The Seventh Circuit remanded the case to the district court, stating that the "burden of production should be placed on the state, for as the record stands the evidence presented by the tribes that night hunting for deer in the ceded territory is unlikely to create a serious safety problem provides a compelling reason for vacating the 1991 judgment that prohibited Indians from hunting deer at night in that territory." The Tribe's brief in opposition is due on March 9, 2015.

GATZAROS V. SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS (NO. 14-665) – On December 2, 2014, the petitioners, owners of a substantial interest in Monroe Partners, LLC (an entity that owned fifty percent of Greektown Casino in Detroit), filed a petition seeking review of an unpublished decision of the U.S. Court of Appeals for the Sixth Circuit which affirmed the district court's dismissal of their suit

seeking recovery of approximately $74 million under a guaranty agreement that was signed by the Tribe. The Tribe filed a waiver of its right to respond on December 23, 2014, and the petition has been scheduled for conference on February 20, 2015.

STOCKBRIDGE MUNSEE COMMUNITY V. NEW YORK (NO. 14-538) – On November 7, 2014, the Stockbridge-Munsee Community filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that its Indian land claims are barred by the *City of Sherrill* equitable defenses and distinguished the recent decision of the Supreme Court of the United States in *Petrella v. Metro-Goldwyn-Mayer, Inc.* which held that courts may not override the judgment of Congress and apply equitable defenses to summarily dispose of claims at law filed within the established statute of limitations. On December 12, 2014, an amicus brief in support of the petition was filed on behalf of the Oneida Tribe of Wisconsin and a number of Law Professors. On January 26, 2015, the Oneida Indian Nation of New York and the State of New York filed their briefs in opposition, and the petition has been scheduled for conference on February 27, 2015.

MENOMINEE INDIAN TRIBE OF WISCONSIN V. UNITED STATES (NO 14-510) – On November 3, 2014, the Menominee Indian Tribe filed a petition seeking 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.* The response of the United States is due on March 6, 2015.

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS (NO. 13-1496) – On October 6, 2014, the Court requested the views of the United States (CVSG or call for the views of the Solicitor General) in relation to the petition filed by the Dollar General Corporation seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the Tribal Court has jurisdiction over tort claims brought by a tribal member based on the consensual relationship between the store owned by Dollar General and the Tribe. The store is located on tribal trust land leased to the non-Indian corporation and the store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the program brought an action in Tribal Court alleging that he was assaulted by the store manager. The Solicitor General has not yet filed the brief its behalf of the United States.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court has denied or dismissed the following petitions for writ of certiorari in Indian law cases:

SEMINOLE TRIBE OF FLORIDA V. STATE OF FLORIDA (NO. 14-351) – On January 12, 2015, the Court denied a petition filed by the Seminole Tribe of Florida seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that state sovereign immunity bars the tribe's suit for declaratory relief and its effort to enjoin state officials from unlawfully collecting motor fuel excise taxes from the tribe. The State of Florida has established a pre-collection tax regime whereby exempt entities must petition for a refund of motor fuel taxes. According to the Eleventh Circuit, since any relief would necessarily come out of the state treasury, the tribe's suit falls outside the *Ex Parte Young* doctrine which permits suit against state officials for prospective relief only.

MM&A PRODUCTIONS, LLC V. YAVAPAI APACHE NATION (NO. 14-425) – On December 15, 2014, the Court denied review of a petition filed by an entertainment production consultant which sought review of a decision by the Arizona Court of Appeals which affirmed the trial court's dismissal of a contract action for lack of subject matter jurisdiction based on the doctrine of tribal sovereign immunity. Specifically, the question presented was "whether the authority of a tribal official who signs a waiver of sovereign immunity may be established under the doctrine of apparent authority."

FRIENDS OF AMADOR COUNTY V. JEWELL (NO. 14-340) – On December 1, 2014, the Court denied review of a petition filed by Friends of Amador County (FOAC), a community organization opposed to the development of additional casinos in the county, which sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court's decision that the Buena Vista Rancheria is a required and indispensable party under Rule 19 who cannot be joined under the doctrine of tribal sovereign immunity. In the underlying action, FOAC had filed several claims challenging the Tribe's gaming compact with California, including: (1) whether certain lands qualify as "Indian lands" under IGRA; and (2) whether the federal government erred in granting the tribe federal recognition.

HICKS V. HUDSON INSURANCE CO. (NO. 14-283) – On October 14, 2014, the Court denied review of a petition filed by a non-Indian employee of a tribal casino who sought review of a decision by the Oklahoma Supreme Court which dismissed her workers compensation claims brought in state court against the insurer for the Muscogee Creek Nation based on the doctrine of tribal sovereign immunity.

YOWELL V. ABBEY (NO. 13-1049) – On October 6, 2014, the Court denied review of a petition filed by Raymond Yowell, an 84-year-old Western Shoshone Indian and cattle rancher, who sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit which reversed a district court order denying the Bureau of Land Management (BLM) and Department of Treasury's motion for summary judgment regarding his civil rights claims against state and federal officials and vacated the injunction issued against BLM. Throughout his life, Mr. Yowell had let his livestock graze on the "historic grazing lands associated with the South Fork Indian Reservation." In the 1990s, the BLM accused him of trespassing and in 2002, without a warrant or court order, seized and sold his cattle. The Ninth Circuit held that the district court had abused its discretion in granting the injunction and had erred in denying the motion for summary judgment based on the qualified immunity of the state and federal officials.

MARCUSSEN V. BURWELL (NO. 13-1447) – On October 6, 2014, the Court denied review of a petition filed by Lana Marcussen who sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit which summarily affirmed dismissal of a federal court challenge to pending state court proceedings involving ICWA under the Rooker-Feldman doctrine. Specifically, the questions presented were: (1) Whether the Rooker Feldman doctrine should be overruled for denying all judicial relief by removing the subject matter jurisdiction of the federal courts to hear any civil action brought against federally mandated statutes enforced in the state courts; and (2) Whether Congress has the authority to adopt laws intended to be primarily or exclusively enforced in the state courts.

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).