TRIBAL SUPREME COURT PROJECT MEMORANDUM

MARCH 10, 2014

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).

CASES GRANTED REVIEW BY THE SUPREME COURT

MICHIGAN V. BAY MILLS INDIAN COMMUNITY (NO. 12-505) – On December 2, 2013, the Supreme Court heard oral argument involving the petition filed by the State of Michigan seeking review of a decision by the U.S. Court of Appeals for the Sixth Circuit which held that federal courts lack jurisdiction to adjudicate the State's claims against the Bay Mills Indian Community under the Indian Gaming Regulatory Act (IGRA) to the extent those claims are based on an allegation that the Tribe's casino is not on "Indian lands," and that the claims are also barred by the doctrine of tribal sovereign immunity.

Summary of Oral Argument: As expected, Michigan Solicitor General John J. Bursch began oral argument with the State's principal contentions: (1) it makes no sense that Congress intended States to have a federal injunctive remedy for illegal gaming on-reservation under IGRA, but no remedy if that gaming took place on land outside the reservation and within the State's exclusive jurisdiction; and (2) a tribe should not have greater immunity than a foreign nation, such as France, which would not have blanket immunity if it opened up an illegal business in Michigan.

To begin questioning, Justice Sotomayor inquired about a "jurisdictional" issue raised within the amicus brief submitted by NCAI, *et al.,* (*i.e.* whether the State could pursue its appeal since the District Court had made clear that the State had not filed the motion for the injunction, had not intervened, and had only filed a brief supporting another party's motion in a related suit). However, no other Justice joined in the discussion which ended abruptly after Chief Justice Roberts inquired whether this issue involves a jurisdictional objection or a procedural objection (a procedural objection is waived by a party if it is not timely raised, whereas a jurisdictional objection can be raised at any time by any party or the Court). Therefore, it appears that a majority of the Court views the issue as procedural, therefore waived, and this case is properly before the Court.

The Court spent most of the oral argument exploring several interrelated issues: (a) the possibility of alternative remedies available to the parties that would resolve their dispute without requiring the Court to modify its 1998 decision in *Kiowa*; (b) assuming such alternative remedies are insufficient to resolve the dispute, the ways in which the Court could modify or limit tribal sovereign immunity to provide a remedy

to the State; and (c) whether it would be proper for the Court to modify the tribal sovereign immunity at all, or whether such modification is within the province of Congress.

Justice Ginsberg began the discussion of alternative remedies by asking why the State did not pursue arbitration—the dispute resolution agreed to by the parties under the gaming compact. Several of the Justices seemed to agree with the State that, in the end, although arbitration under the compact appears well-suited to resolve the underlying merits of the dispute, there is skepticism regarding whether or not Bay Mills would re-assert sovereign immunity if Michigan successfully invoked the arbitration provision. Justices Sotomayor and Kagan appeared more convinced by the plausibility of an alternative remedy in the form of an *Ex Parte Young* action against tribal officials to enjoin them from operating the casino (raised in the amicus briefs submitted by the United States and the Indian Law Scholars). The State responded that an *Ex Parte Young* suit is an imperfect remedy in this case for a number of reasons and looked to turn the discussion towards the need for the Court to modify *Kiowa*. However, the Justices observed that *Ex Parte Young* would likely provide all of the relief being sought by the State except for its claim for monetary damages.

Generally, the Court appeared to accept the fact that Michigan or the federal government could resolve the matter by initiating criminal proceedings against the individuals operating or working at the casino, but questioned their efficacy. Bay Mills conceded (as it did in regard to arbitration) that both the *Ex Parte Young* and criminal prosecution options were available remedies that could be pursued by the State. Bay Mills reminded the Court that the casino is currently closed and that the parties are currently in the process of renegotiating their state-tribal gaming compact where the State can bargain for additional remedies. However, several Justices appeared to view tribal sovereign immunity as a hurdle to any potential remedy.

Throughout the argument, various Justices noted several ways by which the Court could modify the doctrine of tribal sovereign immunity. Justice Kennedy, observing the unusual procedural posture of the case, proposed a ruling that would limit *Kiowa* to make the tribal sovereign immunity defense unavailable in the context of Indian gaming. Other Justices questioned whether Indian tribes should enjoy greater sovereign immunity than States or foreign nations. Justice Ginsburg proposed making a distinction between governmental and commercial (off-reservation) activity, whereby the latter would not be covered by tribal sovereign immunity. Michigan argued that the Court could either modify *Kiowa* on this governmental-versus-commercial distinction, or simply distinguish *Kiowa* on the basis that States are different—States are constitutional sovereigns entitled to be treated differently than ordinary business plaintiffs.

Finally, the Court discussed whether it should modify the doctrine of tribal sovereign immunity, or whether, in line with *Kiowa,* once again defer any changes to Congress. A majority of the Justices, including Chief Justice Roberts, expressed a belief in the inherent power of the Court to modify tribal sovereign immunity despite its holding in *Kiowa.* A decision is expected in March/April 2014.

<u>Background</u>: The Bay Mills Indian Community opened a casino in late 2010 on fee land about 90 miles south of its Upper Peninsula reservation. The Tribe had purchased the land with interest earnings from a settlement with the federal government over compensation from land ceded in 1800s treaties. Under the Michigan Indian Land Claims Settlement Act of 1997, any land acquired with these settlement funds would "be held as Indian lands are held." Michigan argued that the tribe opened the casino on lands that do not qualify as "Indian lands" under IGRA and in violation of a state-tribal gaming compact. The questions presented in the petition are:

> The Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. (IGRA), authorizes an Indian tribe to conduct class III gaming under limited circumstances and only on "Indian lands." 25 U.S.C. § 2710(d)(1). This dispute involves a federal court's authority to enjoin an Indian tribe from operating an illegal casino located off of "Indian lands." The petition presents two recurring questions of jurisprudential significance that have divided the circuits: (1) Whether a federal court has jurisdiction to enjoin activity that violates IGRA but takes place outside of Indian lands; and (2) Whether tribal sovereign immunity bars a state from suing in federal court to enjoin a tribe from violating IGRA outside of Indian lands.

In its opening brief, Michigan mounted a full frontal attack on tribal sovereign immunity seeking to extend the authority of states to regulate "gaming activity" under the Indian Gaming Regulatory Act (IGRA). First, Michigan asked the Court to examine "IGRA as a whole" to find Congressional intent to waive of tribal sovereign immunity or, in the alternative, to overrule *Santa Clara Pueblo* and apply a "less strict standard" when considering whether legislation such as IGRA abrogates tribal sovereign immunity. Second, if the statutory arguments are not successful, Michigan asked the Court to recognize that tribal sovereign immunity "is a federal common law doctrine" created by this Court and subject to adjustment by this Court. Thus, according to Michigan, the Court should narrowly read *Kiowa* as a "contract-based ruling" and (at the extreme) hold that a tribe's immunity is limited to its on-reservation governmental functions.

Two amicus briefs in support of Michigan were filed. First, the State of Alabama, joined by fifteen other states, asked the Court to allow states to sue tribes for declaratory and injunctive relief when tribes are operating "unlawful gambling, payday lending, and similar activities" within the state. The states' amicus brief characterize the commercial activities of Indian tribes as "hav[ing] built everything from brick-and-mortar casinos to Internet-based banks, based on the perception that they can evade federal and state regulations within state territory." Second, the State of Oklahoma filed its own amicus brief to draw the Court's attention to three examples of what it characterizes as the failure of the United States and the National Indian Gaming Commission to stop "illegal tribal gambling" within the state.

In response, the Tribe informed the Court that this case "is one of the rare cases before this Court that is squarely controlled by settled precedent." Based on the Court's 1998 decision in *Kiowa,* the Tribe argued that an Indian tribe is entitled to sovereign immunity unless Congress has abrogated its immunity, or the tribe has waived it, neither of which applies to this case. The Tribe goes on to point out that there are a variety of means for resolving this dispute, including arbitration which is the dispute resolution process agreed to by the state and the tribe in their gaming compact. Accordingly, "[t]here is no reason for the Court to rewrite the law or discard settled doctrine simply because Michigan is now unhappy with the bargain it struck."

Four amicus briefs were filed in support of the Bay Mills Indian Community. The United States, in support of the tribe, argued that IGRA does not authorize a suit against a tribe to enjoin gaming that takes place off Indian lands and that the Court's settled precedents recognize that Indian tribes have immunity from suit. In an effort to persuade the Court to preserve the doctrine of tribal sovereign immunity, the United States pointed to other alternative resolutions for this case, including mutual waivers of immunity in federal court; pending *Ex Parte Young* actions against state or tribal officials; tribe seeking NIGC final agency action; and enforcement of state's gaming laws. The National Congress of American Indians, joined by the National Indian Gaming Association, other intertribal organizations, and 51 federally recognized Indian tribes, filed an amicus brief challenging whether subject matter jurisdiction exists for the Court to consider the states' broad attacks on the doctrine of tribal sovereign immunity and educating

the Court in relation to Congress' careful consideration of immunity in the wake of *Kiowa* and its decision to not curtail the doctrine in a manner suggested by the states. All of the briefs are available at http://sct.narf.org/caseindexes/michiganvbaymills.html.

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:

KNIGHT V THOMPSON (NO. 13-955) – On February 6, 2014, several Native American male inmates in the custody of the Alabama Department of Corrections (ADOC) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that ADOC carried its burden under the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to demonstrate that its hair-length policy is the least restrictive means of furthering its compelling governmental interests, including safety and security within the prison system. The ADOC requires all male prison inmates to wear a "regular haircut," defined as "off neck and ears," with no exemptions, religious or otherwise. The Native American male inmates seek a religious exemption based on wearing long hair as a central tenet of their religious faith. In the lower courts, the United States had intervened and filed an amicus brief in support of the Native American inmates. The Project is working with the attorneys for the prisoners to prepare and file a tribal amicus brief in support of the cert petition. The ADOC requested and was granted an extension of time to file their brief in opposition which is now due on April 14, 2014.

VILLAGE OF HOBART V. ONEIDA TRIBE OF INDIANS OF WISCONSIN (NO. 13-847) – On January 15, 2014, the Village of Hobart filed 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 that the Village of Hobart may not assess its stormwater management fees on parcels of land owned by the Tribe and held in trust by the United States. The Tribe's brief in opposition is due on March 20, 2014.

NATIVE WHOLESALE SUPPLY COMPANY V. STATE OF IDAHO (NO. 13-838) – On January 13, 2014, Native Wholesale Supply (NWS), an Indian retailer and cigarette wholesaler operating on the Seneca Reservation in New York, filed a petition seeking review of a decision by the Supreme Court of Idaho which held that the State can regulate the importation of cigarettes onto reservations located within Idaho. On January 16, 2014, the State of Idaho filed a waiver of its right to respond and the petition was scheduled for conference on February 21, 2014. However, on February 4, 2014, the Court requested a response which is due on March 6, 2014.

STATE OF ALASKA V. JEWELL (NO. 13-562) – On November 4, 2013, the State of Alaska filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the federal district court's decisions upholding the 1999 Final Rules promulgated by the Secretary of the Interior and the Secretary of Agriculture to implement part of the Alaska National Interest Lands Conservation Act concerning subsistence fishing and hunting rights. As threshold issues, the Ninth Circuit held that the Secretaries appropriately used notice and comment rulemaking, rather than adjudication, to identify whose waters are "public lands" for determining the scope of the Act's subsistence policy; and the Secretaries were entitled to "some deference" in construing the term "public lands." Further, the Ninth Circuit held that the Secretaries applied the federal reserved water rights doctrine in a principled manner and that it was reasonable for the Secretaries to decide: (1) that "public lands" subject to the Act's subsistence priority included the waters within and adjacent to federal reservations; and (2) reserved water

rights for Alaska Native Settlement allotments were best determined on a case-by-case basis. In its petition, the State of Alaska presents two questions for review:

> The State of Alaska, like all States, enjoys the sovereign "right to control and regulate navigable streams within [her borders]," *Coyle v. Smith*, 221 U.S. 559, 573 (1911), and to manage fish and game along those waters, *United States v. Alaska*, 521 U.S. 1, 5-6 (1997). In the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et seq., Congress gave rural Alaskans a priority over other residents for the "taking on public lands of fish and wildlife" for subsistence uses. *Id*. § 3114. "[P]ublic lands" are "[f]ederal lands"—i.e., "lands, waters, and interests therein"—"the title to which is in the United States." *Id*. § 3102(1)-(3). Although the definition does not mention navigable waters, the Ninth Circuit adopted the government's litigating position that ANILCA nevertheless covers any navigable waters in which the United States has an interest by virtue of the "reserved water rights doctrine." In the decision below, the Ninth Circuit applied that framework to uphold a 1999 Rule that transfers from Alaska to the United States authority to control of fishing and hunting along waterways in over half of the State. The questions presented are:
> 1. Whether the Ninth Circuit properly held—in conflict with this Court's decisions—that the federal reserved water rights doctrine authorizes the unprecedented federal takeover of Alaska's navigable waters sanctioned by the 1999 Rule.
> 2. Whether the Ninth Circuit properly proceeded on the premise—which also conflicts with this Court's decisions—that ANILCA could be interpreted to federalize navigable waters at all given Congress's silence on the Act's application to navigable waters.

On December 6, 2013, the Pacific Legal Foundation and the State of Colorado (joined by 13 other states) filed amicus briefs in support of the State of Alaska. On February 20, 2014, the United States and the Alaska Federation of Natives, Katie John, et al., filed their briefs in opposition.

MADISON COUNTY V. ONEIDA INDIAN NATION OF NEW YORK (NO. 12-604) – On November 12, 2004, Madison County and Oneida County 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 counterclaim that the Oneidas' reservation was disestablished. The question presented in the petition is: "Does the 300,000-acre ancient Oneida reservation in New York still exist, neither disestablished nor diminished, despite (1) the federal government's actions taken in furtherance of disestablishment (including, but not limited to, the 1838 Treaty of Buffalo Creek); (2) this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("Sherrill") that the Oneida Indian Nation of New York cannot exercise sovereignty over lands it purchases in the ancient reservation area; and (3) this Court's finding in that case that land in the ancient reservation area has not been treated as an Indian reservation by the federal, state or local governments for nearly two centuries?" Three amicus briefs in support of the petition have been filed by: the State of New York; Cayuga and Seneca Counties; and, the Citizens Equal Rights Foundation. The Tribe's brief in opposition was filed on January 16, 2012, and the petition was scheduled for conference on February 15, 2013. On February 19, 2013, the Court issued a CVSG, inviting the Solicitor General to file a brief expressing the views of the United States. In light of a Settlement Agreement reached by the parties in a lower court proceeding challenging recent land trust acquisitions, the petitioners filed letters with the Court on June 5, 2013, and on December 13, 2013. In essence, the Settlement Agreement resolves both the trust litigation in the lower court and resolves the tax foreclosure litigation in the Supreme Court. On March 4, 2014, the U.S. District Court for the Northern District of New York issued an order which dismissed various motions to intervene and approved the

Settlement Agreement in which the counties agreed to withdraw their petition for writ of certiorari and the State agreed to withdraw its amicus brief pending before the Supreme Court.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

WOLFCHILD V. UNITED STATES (NO. 13-794); ZEPHIER V. UNITED STATES (NO. 13-795) – On March 10, 2014, the Court denied petitions brought by two groups of individuals who claim to be descendants of the "loyal" Mdewakanton Sioux filed petitions seeking review of a second decision by the U.S. Court of Appeals for the Federal Circuit which rejected their new claims raised on remand. In 2009, the Federal Circuit first held that (1) the 1888, 1889 and 1890 Appropriation Acts enacted for the benefit of the loyal Mdewakanton Sioux and their lineal descendants which included lands, improvements to lands and monies as the corpus did not create a trust; and (2) if the referenced Appropriations Acts did create a trust (which they did not), the 1980 Act terminated that trust by giving the three Mdewakanton Indian communities beneficial ownership of the lands. After the U.S. Supreme Court denied review in 2010, the groups continued to pursue revenues derived from the lands based on new theories and new claims. The Federal Circuit held that "none of the new theories breathes life into this case because none supports an actionable claim for relief under governing law."

GRAND CANYON SKYWALK DEVELOPMENT LLC V. GRAND CANYON RESORT CORPORATION (NO. 13-313) – On December 16, 2013, the Court denied a petition filed by Grand Canyon Skywalk Development, a non-Indian corporation, seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the petitioner must exhaust its remedies in tribal court before it may proceed in federal court since the tribal court does not plainly lack jurisdiction over the action against tribal officials.

GRAND RIVER ENTERPRISES SIX NATIONS V. OKLAHOMA (NO. 13-266) – On December 2, 2013, the Court denied review of a petition filed by Grand River Enterprises Six Nations, a Canadian company owned by members of the Six Nations which manufactures tobacco products, seeking review of a decision by the Oklahoma Court of Appeals which held that the Escrow Statute enacted by Oklahoma pursuant to the Master Settlement Agreement extends to all on-reservation sales of cigarettes—including all sales by Indian tribes to tribal members.

ONONDAGA NATION V. NEW YORK (NO. 12-1279) – On October 15, 2013, the Court denied a petition filed by the Onondaga Nation seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that the Onondaga's lands claims are "equitably barred" as inherently disruptive of the settled expectations of the non-Indian landowners based on the Supreme Court's 2005 decision in *City of Sherrill*.

MATHESON V. STATE OF WASHINGTON (NO. 13-135) – On October 7, 2013 the Court denied review of a petition filed by a tribal member who is a licensed Washington cigarette wholesaler who sought review of a decision by the Court of Appeals of the State of Washington which held that even though she is correct that the state cannot tax interstate or on-reservation shipments: (1) she failed to demonstrate that the cigarettes were shipped to another tribal member or out-of-state; (2) by virtue of her voluntarily obtaining Washington cigarette wholesaler license, she has the requisite contacts with the state to qualify as a

taxpayer; and (3) contrary to the wholesaler's assertion, Indians who conduct business off-reservation are subject to generally applicable state law.

JAMES L. V DEVIN H. (NO. 13-49) – On October 7, 2013, the Court denied review of a petition filed by James L., an enrolled member of the Choctaw Nation, who sought review of a decision of the Court of Appeals Fifth District of Texas which held that the child custody dispute and proceeding did not qualify as a "foster care placement," and thus does not trigger the provisions of the Indian Child Welfare Act (ICWA).

TONASKET V. SARGEANT (NO. 12-1410) – On October 7, 2013, the Court denied review of a petition filed by a tribal member who is a smoke shop retailer who sought review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held: (1) the Colville Confederated Tribes did not implicitly waive its sovereign immunity by agreeing to dispute resolution procedures when it entered into a cigarette tax compact with the State of Washington; and (2) federal antitrust law did not explicitly abrogate tribal immunity, and the Sherman Antitrust Act was not a law of general applicability vis-à-vis the tribe.

NEBRASKA V. ELISE M. (NO. 12-1278) – On October 7, 2013, the Court denied review of a petition filed by the State of Nebraska (through the Lancaster County Attorney's Office) which sought review of a decision by the Nebraska Supreme Court which held that, under ICWA, a state court must treat foster care placement and termination of parental rights as separate proceedings for purposes of determining whether an Indian child case pending in state court has reached an "advanced stage" at the time a motion is made to transfer the case to tribal court. The court also clarified an earlier opinion and concluded that the best interest of the child is not a consideration for the threshold determination of whether there is "good cause" to not transfer jurisdiction to a tribal court.

NATIVE VILLAGE OF EYAK V. BLANK (NO. 12-668) – On October 7, 2013, the Court denied review of a petition filed by the Native Village of Eyak which sought review of an en banc decision of the U.S. Court of Appeals for the Ninth Circuit which held that the Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham do not possess aboriginal hunting and fishing rights in the areas of the Outer Continental Shelf they traditionally used.

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).