

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

FEBRUARY 24, 2016
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 big news at the Supreme Court of the United States has been and continues to be the death of Justice Antonin Scalia on February 13, 2016, and the partisan battle brewing in Washington, D.C, over his replacement. With his confirmation in 1986, Justice Scalia replaced Chief Justice Warren Burger and, combined with Justice Thomas's replacement of Thurgood Marshall in 1991, shifted the Court strongly in a conservative direction. If his replacement is nominated by President Obama, or a subsequent Democrat Administration, the 5-4 balance of the Court could dramatically shift in a liberal or progressive direction which may have a positive impact for Indian law cases.

However, Justice Scalia's absence will likely affect many of the major cases currently pending before the Court. If a tie vote (4-4) occurs among the Chief Justice and the other seven remaining justices, there are several potential outcomes: (1) an evenly divided Court results in affirmance of the lower court decision with no opinion issued by the Court; (2) the Court could schedule the case for re-argument next term (in anticipation that Justice Scalia's replacement would be confirmed by that time); or (3) the Court could issue a decision on narrow or procedural grounds to avoid setting precedent. In what is proving to be one of its busiest terms for cases involving the interests of Indian tribes, there are three important Indian law cases yet to be decided.

In *Dollar General v. Mississippi Band of Choctaw Indians*, Justice Scalia's comments at argument regarding tribal court jurisdiction over a non-Indian business appeared unfavorable to tribes. The Fifth Circuit decided in favor of the Tribe, so a 4-4 split in this case would affirm the lower court's opinion which would be a victory for Indian tribes. In *Nebraska v. Parker*, Justice Scalia may have been an important ally on the question of statutory interpretation and the use of subsequent history to determine whether reservation boundaries have been diminished. The Eighth Circuit ruled in favor of the Tribe, so a 4-4 split would again be a victory for Indian tribes. And in *United States v. Bryant*, which will not be argued until April 2016, Justice Scalia's absence in a case involving whether an uncounseled tribal court conviction can be used as a predicate for a federal offense seems less likely to affect the final result. More than likely, the Court will strive to overcome the actual conflict between the Ninth Circuit, the Eighth Circuit and the Tenth Circuit to provide uniformity to the lower courts on this question.

The Project has been actively engaged on each and every one of these cases as summarized below.

PETITIONS GRANTED

UNITED STATES V. BRYANT (NO. 15-420) – On December 14, 2015, the Court granted review of a petition filed by the United States seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that tribal court criminal convictions for domestic violence may be used in federal court prosecutions as a habitual offender under 18 USC §117 only if the tribal court guarantees a right to counsel. The Ninth Circuit concluded that it is constitutionally impermissible to use uncounseled convictions to establish an element of the offense in a subsequent prosecution under § 117(a), which created a direct conflict with the Eighth and Tenth Circuits. The case presents an extremely important issue for the safety of Native victims of domestic violence, and raises the question of indigent counsel in tribal court systems.

The opening brief of the United States was filed on January 28, 2016, and the response brief is due on February 29, 2016. The Project worked with the Solicitor General's office and prepared three amicus briefs in support of the United States: (1) Amicus Brief of the National Congress of American Indians on discussing the reliability of tribal court decisions and deference to Congress; (2) Amicus Brief of the National Indigenous Women's Resource Center focused on the severe problem of escalation of repeat domestic violence offenders; and (3) Amicus Brief of former U.S. Attorneys supporting the need for the habitual domestic violence statute as an important prosecutorial tool to protect Indian women and children within Indian country. The Court has not yet scheduled this case for oral argument.

NEBRASKA V. PARKER (NO. 14-1406) – On January 20, 2016, the Court heard oral argument in review of a decision by the U.S. Court of Appeals for the Eighth Circuit which affirmed the decision of the U.S. District Court for the District of Nebraska and held that an 1882 Act of Congress did not diminish the Omaha Indian Reservation. The State of Nebraska and the Village of Pender are challenging whether the establishments in Pender which serve alcoholic beverages are subject to the Omaha Tribe's liquor licensing and tax regulations. In its Question Presented, Nebraska asserts:

In *Solem v. Bartlett*, this Court articulated a three-part analysis designed to evaluate whether a surplus land act diminished a federal Indian reservation. The Court found that the “statutory language used to open the Indian lands,” “events surrounding the passage of a surplus land Act,” and “events that occurred after the passage of a surplus land Act” are all relevant to determining whether diminishment has occurred. Later, in *Hagen v. Utah*, this Court explained that the diminishment inquiry requires courts “examine all circumstances surrounding the opening of a reservation.” This Court has also reiterated after *Solem* that “[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character . . . *de facto*, if not *de jure*, diminishment may have occurred.” *South Dakota v. Yankton Sioux*. The questions presented for review are: (1) Whether ambiguous evidence concerning the first two *Solem* factors forecloses any possibility that diminishment could be found on a *de facto* basis; and (2) Whether the original boundaries of the Omaha Indian Reservation were diminished following passage of the Act of August 7, 1882. (citations omitted).

Two amicus briefs were filed in support of the State: (1) Amicus Brief of the Village of Hobart Wisconsin, joined by Pender Public Schools; and (2) Amicus Brief of Citizens Equal Rights Foundation. Both the United States and the Omaha Tribe are respondents on the merits. The Project worked with the Tribe and prepared two amicus briefs in support: (1) Amicus Brief of the National Congress of American Indians (joined by two intertribal organizations and twenty Indian tribes) focused on the negative impacts

of a *de facto* diminishment rule; and (2) Amicus Brief of Historical and Legal Scholars clarifying the legal and historical circumstances surrounding treaty-making and allotment statutes.

STURGEON V. MASICA (NO. 14-1209) – On January 20, 2016, the Court heard argument in review of an Indian-law related decision of the U.S. Court of Appeals for the Ninth Circuit which held that the Alaska National Interest Lands Conservation Act of 1980 did not prevent the National Park Service from imposing its generally applicable regulations on non-federal lands within conservation system units in Alaska. The Question Presented is: “Whether Section 103(c) of the Alaska National Interest Lands Conservation Act of 1980 prohibits the National Park Service from exercising regulatory control over State, Native Corporation, and private Alaska land physically located within the boundaries of the National Park System.” A reversal of the Ninth Circuit could have a significant negative impact on the *Katie John* Native subsistence rights case. See *State of Alaska v. Jewell* (No. 13-562 – cert denied March 31, 2014).

MENOMINEE INDIAN TRIBE OF WISCONSIN V. UNITED STATES (NO. 14-510) – On January 25, 2016, the Court issued its decision in *Menominee Indian Tribe v. United States* to resolve a conflict between the U.S. Courts of Appeals for the DC Circuit and the Federal Circuit regarding the appropriate standard for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service for unpaid contract support costs. In a unanimous opinion, the Court held that equitable tolling is not available to preserve contract claims that were not timely presented to a federal contracting officer because there were no extraordinary circumstances beyond the tribe’s control.

Background: On June 30, 2015, following the recommendation of the United States to grant cert, the Court granted review of a decision by the U.S. Court of Appeals for the District of Columbia 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 (ASNA)*. In its response, the United States recommended that the Court grant cert to address “the uncertainty created by the Federal Circuit’s erroneous decision in *ASNA*—and the increasing volume of untimely claims inspired by it—[which] have con-founded the government’s attempts to achieve orderly resolution of the ongoing litigation over tribal contract support costs. . . . This Court’s review is warranted to resolve that conflict, as well as to ensure that the proper equitable tolling framework is applied to Contract Disputes Act claims generally.”

DOLLAR GENERAL CORPORATION V. MISSISSIPPI BAND OF CHOCTAW INDIANS (NO. 13-1496) – On December 7, 2015, the Court heard oral argument in *Dollar General v Mississippi Band of Choctaw Indians* which challenges Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation doing business on trust lands leased from the Tribe. The Question Presented is: “Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.” During argument, the scope of tribal inherent sovereign authority over non-Indians and the source of Congress’ authority over Indian affairs were taken up by the Court where at least four Justices openly questioned the protections in place for non-Indians in tribal courts, and the source of Congress’ authority in these matters under the U.S. Constitution. It is difficult to discern from oral argument how the Justices may vote and ultimately decide this case, but the outcome has significant implications for all of Indian country.

Background: On June 15, 2015, contrary to the recommendation of the U.S. Solicitor General to deny cert, the Court granted review. The Dollar General store is located on tribal trust land within the reservation. The store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the youth program and his parents brought an action in Tribal court alleging that the young man was sexually assaulted by the store's manager. The Supreme Court of the Mississippi Band of Choctaw Indians, the U.S. Federal District Court for the Southern District of Mississippi, and the U.S. Court of Appeals for the Fifth Circuit had all upheld the Tribal Court's jurisdiction over the tort claims against Dollar General.

Petitioner Dollar General filed its opening brief on August 31, 2015. Four amicus briefs were filed in support of Dollar General: (1) Amicus Brief of the State of Oklahoma (joined by Wyoming, Utah, Michigan, Arizona and Alabama); (2) Amicus Brief of the Association of American Railroads; (3) Amicus Brief of the Retail Litigation Center, Inc.; and (4) Amicus Brief of the South Dakota Bankers' Association. Dollar General and its amici aggressively attack the fairness of tribal courts and tribal law to non-Indians and are asking the Court to ignore its precedent, reverse the lower courts, and establish either: (i) an *Oliphant*-style civil jurisdiction rule (*i.e.*, no tribal civil jurisdiction over non-Indians); or (ii) a rule that Tribes have no civil jurisdiction over torts committed by non-Indians; or (iii) a rule requiring "express and unequivocal" consent by a non-Indian to the jurisdiction of the Tribal court or Congressional authorization of such jurisdiction.

The Project worked closely with the attorneys for the Tribe to develop and coordinate a robust amicus brief strategy in support of Tribal court jurisdiction. The Tribe filed its response brief on October 15, 2015, and eight amicus briefs in support of the Tribe were filed on October 22, 2015: (1) Amicus Brief of the United States; (2) Amicus Brief of the State of Mississippi (joined by Colorado, New Mexico, North Dakota, Oregon and Washington); (3) Amicus Brief of NCAI (joined by USET, ITAA, CTAG, and 58 federally-recognized Indian tribes); (4) Amicus Brief of National American Indian Court Judges Association (joined by numerous Tribal and Inter-tribal Court Systems); (5) Amicus Brief of the Oklahoma Tribes; (6) Amicus Brief of the National Indigenous Women's Resource Center (joined by over 100 Domestic Violence and Sexual Assault Organizations); (7) Amicus Brief of Historical and Legal Scholars; (8) Amicus Brief of the American Civil Liberties Union. Each amicus brief is focused on its own unique message, with an overall presentation to the Court of the inherent nature of Tribal sovereignty and the scope of Tribal governing authority over non-Indians within the reservation. Copies of the briefs are available on the Project webpage (http://sct.narf.org/caseindexes/dollar_general_v_choctaw.html).

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, 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:

SOARING EAGLE CASINO RESORT V. NLRB (NO. 15-1034) – On February 12, 2016, the Saginaw Chippewa Tribe filed a petition seeking review of a decision of the U.S. Court of Appeals for the Sixth Circuit, issued twenty-two days after a different panel's decision in *Little River Band*, which concluded that even though it disagreed with the result in *Little River Band* it was bound by circuit precedent and affirmed the NLRB's jurisdiction over the Casino. The two questions presented are: "(1) Does the National Labor Relations Act abrogate the inherent sovereignty of Indian tribes and thus apply to tribal operations on Indian lands? (2) Does the National Labor Relations Act abrogate the treaty-protected

rights of Indian tribes to make their own laws and establish the rules under which they permit outsiders to enter Indian lands?” The United States’ brief in opposition is due on March 18, 2016.

LITTLE RIVER BAND OF OTTAWA INDIANS V. NLRB (NO. 15-1024) – On February 12, 2016, the Little River Band filed a petition seeking review of a 2-1 decision by the U.S. Court of Appeals for the Sixth Circuit which adopted the *Tuscarora-Coeur d’Alene* framework, held that the National Labor Relations Act applies to the Tribe’s casino, and upheld the NLRB’s order for the Tribe to rescind its labor laws. The question presented is “Whether the National Labor Relations Board exceeded its authority by ordering an Indian tribe not to enforce a tribal labor law that governs the organizing and collective bargaining activities of tribal government employees working on tribal trust lands. The United States’ brief in opposition is due on March 17, 2016.

KNIGHT V. THOMPSON (NO. 15-999) – On February 2, 2016, a group of Native American inmates filed a petition seeking review a decision of the U.S. Court of Appeals for the Eleventh Circuit which, on remand, simply affirmed its prior decision 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. Last term, the Court had issued a “GVR” (petition granted, judgment vacated and case remanded) in *Knight* for further consideration in light of its unanimous decision in *Holt v. Hobbs* (Arkansas violated the Religious Land Use and Institutionalized Persons Act 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). The State of Alabama’s brief in opposition is due on April 6, 2016.

CROW ALLOTTEES V. UNITED STATES (NO. 15-779) – On December 14, 2015, Crow Indian Allottees filed a petition seeking review of a decision by the Montana Supreme Court which dismissed their objections to the Crow Water Compact and denied their motion to stay proceeding pending federal court review of the federal questions raised by the individual Allottees. The United States brief in opposition is due on March 17, 2016.

CITIZENS AGAINST CASINO GAMBLING V. CHAUDHURAI (NO. 15-780) – On December 14, 2015, Citizens Against Casino Gambling in Erie County (New York) filed a petition seeking review of a decision of the U.S. Court of Appeals for the Second Circuit which affirmed the district court dismissal of their complaint. The Second Circuit held that under the Seneca Nation Settlement Act, Congress intended the Buffalo Parcel to be subject to tribal jurisdiction, and upheld the decision of the Department of the Interior and the National Indian Gaming Commission that the Buffalo Parcel is eligible for class III gaming under the Indian Gaming Regulatory Act. On January 15, 2016, the United States filed its waiver of response and the petition was scheduled for conference on February 19, 2016. On February 8, 2016, the Court requested a response from the United States which is due on March 9, 2016.

ZEPEDA V. UNITED STATES (NO. 15-675) – On November 19, 2015, Damien Zepeda, a criminal defendant, filed a petition seeking review of an en banc opinion of the U.S. Court of Appeals for the Ninth Circuit which held that under the Indian Major Crimes Act, the federal government must prove Indian status by demonstrating that the defendant: (1) has some quantum of Indian blood; and (2) is a member of, or is affiliated with, a federally recognized tribe. The Ninth Circuit held further that a defendant must have been an Indian at the time of the charged conduct, and that, under the second prong, a tribe’s federally recognized status is a question of law to be determined by the trial judge. The Question Presented is: “Whether, as construed by the Ninth Circuit, Section 1153 impermissibly discriminates on the basis of race.” The United States brief in opposition is due on March 21, 2016.

WASATCH COUNTY V. UTE INDIAN TRIBE (NO. 15-640); UINTAH COUNTY V. UTE INDIAN TRIBE (NO. 15-641) – On November 13, 2015, Wasatch County and Uintah County filed separate petitions seeking review of a decision by U.S. Court of Appeals for the Tenth Circuit which reversed the district court and held that the Tribe is entitled to a preliminary injunction to enjoin county officials from prosecuting tribal members for crimes committed within the undiminished portions of the reservation in conformity with the Supreme Court’s 1994 decision in *Hagen v. Utah*. The Tribe filed its brief in opposition on February 16, 2016.

LA CUNA DE AZTLAN V. UNITED STATES DEPARTMENT OF THE INTERIOR (NO. 15-826) – On October 22, 2015, La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court and dismissed their claim under Religious Freedom Restoration Act. The petitioners’ lawsuit challenges the federal government’s actions in connection with a major solar-electricity generation project located on federal public lands in California. The Ninth Circuit held that the petitioners failed to demonstrate that denial of access to the site “substantially burdens” the exercise of their religion. On January 21, 2016, the United States filed a waiver of its right to respond and the petition was scheduled for conference on February 19, 2016. On January 28, 2016, the Court requested a response from the United States which is due on February 29, 2016.

ALASKA V. ORGANIZED VILLAGE OF KAKE (NO. 15-467) – On October 12, 2015, the State of Alaska filed a petition seeking review of an Indian law-related en banc decision (6-5) by U.S. Court of Appeals for the Ninth Circuit which held that, under the Administrative Procedures Act, the U.S. Department of Agriculture must provide a reasoned explanation for its 2003 decision to reverse its earlier determination that exempting the Tongass National Forest from the 2001 Roadless Rule (limiting road construction and timber harvesting in national forests) “would risk the loss of important roadless area [ecological] values.” The United States brief in opposition is due on February 19, 2016.

JENSEN V EXC INC. (NO. 15-64) – On July 13, 2015, the Jensen/Johnson family, all enrolled members of the Navajo Nation, filed a petition seeking review of the a decision by the U.S. Court of Appeals for the Ninth Circuit which held that, under *Strate v. A-1 Contractors*, the Navajo Nation Tribal Courts may not exercise adjudicatory jurisdiction over a highway accident that occurred on an Arizona state highway within the exterior boundaries of the Navajo Reservation. On July 21, 2015, EXC Inc. filed a waiver of its response, and the petition was scheduled for conference on September 28, 2015. However, on August 10, 2015, the Court requested a response from EXC, Inc. which was filed on October 7, 2015. The petition was scheduled for conference on November 6, 2015, but no action was taken by the Court. The petition is likely being held over by the Court as it considers *Dollar General v. Mississippi Band of Choctaw Indians*.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

WHITE V. REGENTS OF THE UNIVERSITY OF CALIFORNIA (NO. 15-667) – On January 25, 2016, the Court denied review of a petition filed by three scientists at the University of California seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which dismissed their claims under the Native American Graves Protection and Repatriation Act based on their inability to join the Kumeyaay Cultural

Repatriation Committee (consortium of 12 tribes) as a “required party” under Rule 19 of the Federal Rules of Civil Procedure based on the doctrine of tribal sovereign immunity.

TWO SHIELDS V. WILKINSON (NO. 15-475) – On December 14, 2015, the Court denied review of a petition filed by individual Indian allottees—victims of an alleged scheme by certain private individuals and businesses to induce the United States to approve below-market oil and gas leases—seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which dismissed their case based on their failure to join the United States as a “required party” under Rule 19 of the Federal Rules of Civil Procedure (inability to join based on sovereign immunity).

WISCONSIN V HO-CHUNK NATION (NO. 15-114) – On October 5, 2015, the Court denied review of a petition filed by the State of Wisconsin seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which reversed the federal district court, found that the state did not criminalize non-banked poker and held that the Indian Gaming Regulatory Act does not permit the state to interfere Class II poker on tribal land.

TORRES V. SANTA YNEZ BAND OF CHUMASH INDIANS (NO. 14-1521) – On October 5, 2015, the Court denied review of a petition filed by a non-Indian contractor seeking review of an unpublished decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court’s finding that the bankruptcy court did not abuse its discretion in denying the contractor’s motion for sanctions after concluding that the Santa Ynez Band of Chumash Indians did not act in bad faith by filing a proof of claim in his bankruptcy proceedings.

SAC AND FOX NATION V. BOROUGH OF JIM THORPE (NO. 14-1419) – On October 5, 2015, the Court denied review of a petition filed by the Sac and Fox Nation, William Thorpe and Richard Thorpe (the sons of Jim Thorpe) seeking review of a decision by the U.S. Court of Appeals for the Third Circuit which reversed the U.S. District Court for the Middle District of Pennsylvania. The Third Circuit had concluded that although the Borough of Jim Thorpe technically meets the definition of “museum” under NAGPRA, “Congress could not have intended the kind of patently absurd result that would follow from a court resolving a family dispute by applying NAGPRA to Thorpe’s burial in the Borough under the circumstances here.”

OKLAHOMA V. HOBIA (NO. 14-1177) – On October 5, 2015, the Court denied review of a petition filed by the State of Oklahoma seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that, in light of *Bay Mills*, the State has failed to state a valid claim for relief against the Kialegee Tribal Town under IGRA and a state-tribal gaming compact. The question presented was: “Does *Michigan v. Bay Mills*, 134 S.Ct. 2024 (2014), require dismissal of a State’s suit to prevent tribal officers from conducting gaming that would be unlawful under the Indian Gaming Regulatory Act and a state-tribal gaming compact when (1) the suit for declaratory and injunctive relief has been brought against tribal officials - not the tribe; (2) the gaming will occur in Indian country on the land of another tribe; and (3) the state-tribal compact’s arbitration provision does not require arbitration before filing suit?”

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).