

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

OCTOBER 20, 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 (<http://sct.narf.org>).

On Monday, September 26, 2016, the Court held its long conference during which the Justices considered nearly two-thousand petitions filed during its summer recess, including six petitions in Indian law cases. On Thursday, September 29, 2016, the Court issued an order granting review in *Lewis v. Clarke*, a case involving an individual-capacity suit against a tribal employee and the doctrine of tribal sovereign immunity. In short, the Connecticut Supreme Court held that a tribal employee who is acting within the scope of his employment falls within the sovereign immunity of the Tribe even though he is sued in his individual, not official, capacity (see below).

On Monday, October 3, 2016, the Court issued a second order list from the long conference and denied review in four other Indian law cases (see below). However, the Court has held over the petition in *Tunica-Biloxi Gaming Authority v. Zaunbrecher* in which the Louisiana Court of Appeals, in conflict with the holding by the Connecticut Supreme Court in *Lewis v. Clarke*, found that the doctrine of tribal sovereign immunity does not extend to a suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case:

LEWIS V. CLARKE (NO. 15-1500) – On September 29, 2016, the Court granted review of a petition seeking review of a decision of the Connecticut Supreme Court which held that doctrine of tribal sovereign immunity extends to an employee of the tribe who is acting within the scope of his employment. The petitioners—the Lewises—are a non-Indian couple who were rear-ended by a limousine owned by the Mohegan Tribal Gaming Authority on I-95 (outside the Tribe’s reservation). The petitioners sued the Tribal Gaming Authority and Mr. Clarke (the driver and an employee of the Tribal Gaming Authority) in state court for negligence. However, prior to the filing of the motion to dismiss based on tribal sovereign immunity, the petitioners dropped their suit against the Tribal Gaming Authority, and proceeded against Mr. Clarke in his individual capacity. The trial court, relying on *Maxwell v. San Diego* (9th Cir. 2013), held that the doctrine of tribal immunity does not apply when the Tribe is neither a party, nor the real party in interest because the remedy, and the damages sought will be

paid by the defendant himself, and not the Tribe. The Connecticut Supreme Court distinguished *Maxwell* (a case involving claims of gross negligence), reversed the trial court, and held that the doctrine of tribal sovereign immunity extends to the driver as an employee of a Tribe who was acting within the scope of his employment when the accident occurred.

The petitioners have specifically requested that the Court resolve this conflict among the lower courts. The question presented in the cert petition is: “Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.” The petitioners’ opening brief is due on November 14, 2016. The Tribe’s response brief is due on December 14, 2016. The Project is working directly with the attorneys representing Mr. Clarke and the interests of the Mohegan Tribe to develop an effective amicus brief strategy.

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:

PATCHAK V. JEWELL (NO. 16-498) – On October 11, 2016, David Patchak, a non-Indian landowner (who successfully argued before the Supreme Court in 2012 that he had prudential standing to bring an APA action challenging the acquisition of trust land for the benefit of the Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians/Gun Lake Tribe) filed a petition seeking review of a decision by the U.S. Court of Appeals for the D.C. Circuit which held that the Gun Lake Trust Land Reaffirmation of 2014, a stand-alone statute reaffirming the Department of the Interior’s decision to take the land in question into trust for the Gun Lake Tribe, was constitutionally sound and removed jurisdiction from the federal courts over any actions relating to that property. The United States brief in opposition is due on November 14, 2016.

R.P. V. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES (NO. 16-500) – On October 7, 2016, the non-Indian foster parents of Alexandria P. (“Lexi”) filed a petition seeking review of a decision by the Court of Appeal of the State of California which affirmed the lower court and held that the foster parents failed to prove by clear and convincing evidence that there was good cause to depart from the adoptive placement preferences set forth in the Indian Child Welfare Act (ICWA). The questions presented are: (1) whether ICWA applies where the child has not been removed from an Indian family or community; (2) whether ICWA’s adoptive placement preferences, 25 U.S.C. § 1915(A), require removal from a foster placement made under 1915(b), for the purpose of triggering the adoptive placement preferences contained in 1915(a); and (3) whether the state courts erred in holding that “good cause to depart from ICWA’s placement preferences must be proved by “clear and convincing evidence.” The brief in opposition is due on November 14, 2016,

WOLFCHILD V. REDWOOD COUNTY (NO. 16-286) – On August 31, 2016, lineal descendants of the loyal Mdewakanton filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that they did not have cause of action under federal common law for violation of possessory rights to aboriginal land, and that the 1863 Act that authorized the Interior Secretary to set apart land for loyal Mdewakanton did not create private remedy. The brief in opposition was filed on October 3, 2016, and the petition has been scheduled for conference on November 4, 2016.

TUNICA-BILOXI GAMING AUTHORITY V. ZAUNBRECHER (NO. 15-1486) – On May 26, 2016, a petition was filed seeking review of a decision by the Louisiana Court of Appeals which held that state courts

have subject matter jurisdiction over a tort suit against individual tribal employees for alleged acts of negligence in the course and scope of their employment with the Tribe at the tribal-owned casino located on tribal trust land. The brief in opposition was filed on July 11, 2016, and the petition was scheduled for conference on September 26, 2016, and the Court has not yet taken any action.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

PRO-FOOTBALL, INC. V. BLACKHORSE (NO. 15-1311) – On October 3, 2016, the Court denied the petition for writ of certiorari before judgment (by the Fourth Circuit) filed by Pro-Football. However, the Court did grant the petition filed by the United States in *Lee v. Tam*, No. 15-1293, in which it will review an en banc decision of the U.S. Court of Appeals for the Federal Circuit which held that the disparagement clause in § 2(a) of the Lanham Act is facially invalid under the free speech clause of the First Amendment.

KELSEY V. BAILEY (NO. 16-5120) – On October 3, 2016, the Court denied review of a petition filed by a member of the Little River Band of Ottawa Indians seeking review of a decision by the U.S. Court of Appeals for the Sixth Circuit which upheld his criminal conviction in tribal court for misdemeanor sexual assault against a tribal employee at the Band’s Community Center which is located on land owned by the Tribe but outside its reservation boundaries.

JONES V. NORTON (NO. 16-72) – On October 3, 2016, the Court denied the petition filed by the parents of Todd Murray, an enrolled member of the Ute Indian Tribe, seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the district court’s dismissal of their §1983 claims against state law enforcement officials for violation of his rights under the 1868 Ute Treaty which resulted in his death.

FLUTE V. U.S. (NO. 15-1534) – On October 3, 2016, the Court denied review of a petition filed by a group of Native Americans who are descendants of the victims of the 1864 Sand Creek Massacre seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that their action for an accounting of funds held by the federal government in trust for payment of reparations to their ancestors is barred by the doctrine of sovereign immunity.

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).