TRIBAL SUPREME COURT PROJECT
MEMORANDUM

JUNE 20, 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).

On June 11, 2018, an equally divided (4-4) Court affirmed the judgment of the Ninth Circuit Court of Appeals in *Washington v. U.S.* (17-269) (the "Culverts Case"). Additional background is summarized below. The Supreme Court's order leaves in place the Ninth Circuit's opinion, which held that the treaty right of taking fish secured to the western Washington tribes imposes a duty on the State repair its road culverts to allow for the safe passage of salmon back to their spawning grounds. Although this may land with some as an anti-climactic ending to a closely-watched case, the very strong opinion below – which, among other things, rebuked the State's position that it could block every salmon-bearing stream flowing into Puget sound without violating the treaty-preserved right of taking fish – is now precedent in the Ninth Circuit, and the State of Washington must comply with the remedial injunction issued by the district court. Therefore, the outcome here means a solid lower court decision on Indian treaty interpretation stands and the Stevens Treaty Tribes in western Washington – whose salmon harvest has dropped 75% in the past three decades – obtain much needed relief and protection for treaty resources.

Additionally, on May 21, 2018, the Supreme Court issued its opinion in *Upper Skagit Indian Tribe v. Lundgren* (17-387), which reverses and remands the case to the Washington Supreme Court. In a majority opinion authored by Justice Gorsuch, the Court held that the Washington Supreme Court erred when it relied on *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), for the proposition that Tribes lack sovereign immunity in an *in rem* action. Justice Gorsuch wrote: "*Yakima* did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887." However, the Lundgrens also advanced a new argument at the U.S. Supreme Court, asserting that at common law sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. The majority pointed out that this line of argument "appeared only when the United States filed an amicus brief in this case–after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe's other *amici* had their say." Accordingly, the Court remanded to the Washington Supreme Court to decide this issue in the first instance.

Chief Justice Roberts filed a concurring opinion, joined by Justice Kennedy, which expressed concern over a property owner's lack of a remedy in a case such as this. "I do not object to the Court's determination to forgo consideration of the immovable-property rule at this time. But if it turns out that

the rule does not extend to tribal assertions of rights in non-trust, non-reservation property, the applicability of sovereign immunity in such circumstances would, in my view, need to be addressed in a future case."

Justice Thomas filed a dissenting opinion, joined by Justice Alito. The dissent argues that the case should not be remanded because the immovable property exception is a "predicate to an intelligent resolution of the question presented," which the Court is obliged to resolve. The dissent then explains why, in its view, the immovable property exception should bar the Tribe from asserting sovereign immunity in this case.

The full opinion is available at: https://sct.narf.org/documents/upper_skagit_v_lundgren/opinion.pdf.

Also, the United States responded to the Call for the Views of the Solicitor General ("CVSG") issued in *Washington State Dep't of Licensing v. Cougar Den* (16-1498) and *Herrera v. Wyoming* (17-532). The United States recommended that the Court grant review in both cases, which are summarized below.

The Court has completed oral arguments for the October 2017 Term and decisions have been issued in all the Indian law cases argued in this term. The Court has already granted one Indian law case for its October 2018 Term, *Royal v. Murphy* (17-1107), which is summarized below. The Court will continue considering petitions for review during its June conferences and 7 Indian law petitions are scheduled for conference prior to the Court's recess. Any petitions granted at this point will be argued in the October 2018 Term.

INDIAN LAW CASES DECIDED BY THE SUPREME COURT

WASHINGTON V. U.S. (17-269) – On June 11, 2018, the Court issued a per curiam order that affirmed the Ninth Circuit's judgment in favor of the Tribes. This case is the latest chapter in litigation over treaty fishing rights in Washington dating back more than a century, and which has occasioned seven prior Supreme Court decisions. In 2001, twenty-one Tribes and the United States initiated a sub-proceeding in *U.S. v. Washington*, requesting a determination that the State of Washington was in continuous violation of the Stevens Treaties by building and maintaining culverts that prevented passage of mature salmon upstream to their spawning grounds and prevented juvenile salmon from moving downstream and out to sea. The district court found that the State violated its obligations under the treaties by building and maintaining culverts that diminished salmon runs and entered an injunction that compelled the State to correct barrier culverts. In affirming the district court, the Ninth Circuit rejected the State's arguments that the Tribe's treaty rights were waived by conduct of the United States and that "equitable" and federalism principles weighed in the State's favor. Accordingly, the Supreme Court's per curium affirmance leaves in place a lower court decision that adheres to time-honored approaches to Indian treaty interpretation and is a very important victory for the Tribes.

UPPER SKAGIT INDIAN TRIBE V. LUNDGREN (17-387) – On May 21, 2018, the Court reversed and remanded the case to the Washington Supreme Court. In a majority opinion authored by Justice Gorsuch, the Court held that the Washington Supreme Court erred when it relied on *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), for the proposition that Tribes lack sovereign immunity in an *in rem* action. However, the Court remanded for the Washington Supreme Court to consider whether the "immovable property exception" to common law sovereign immunity applied in this case. Additional details on the Court's opinion are provided above.

This case arose out of a property dispute between the Upper Skagit Indian Tribe and adjacent property owners. In 2013, the Tribe bought property in Skagit County, Washington, and received a statutory

warranty deed. Subsequently, the adjacent property owners filed an *in rem* 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. On appeal, the Washington Supreme Court decision held that tribal sovereign immunity did not bar an *in rem* action against real property of the Upper Skagit Indian Tribe.

The full opinion is available at https://sct.narf.org/documents/upper_skagit_v_lundgren/opinion.pdf.

PATCHAK V. ZINKE (16-498) – On February 27, 2018, the Court issued its opinion, affirming the U.S. Circuit Court of Appeals for the District of Columbia and holding that the Gun Lake Trust Reaffirmation Act of 2014 did not violate Article III of the U.S. Constitution.

This lawsuit was brought by David Patchak, a non-Indian landowner, who successfully argued before the Supreme Court in 2012 ("*Patchak I*") 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. Subsequently, while summary judgement briefing was underway before the district court on remand, Congress passed the Gun Lake Trust Land Reaffirmation Act of 2014 (the Gun Lake Act), which reaffirmed the Department of the Interior's decision to take the land in question into trust for the Tribe, and removed jurisdiction from the federal courts over any actions relating to that property. Mr. Patchak challenged the Gun Lake Act as an unconstitutional infringement by Congress on the judicial power that Article III of the U.S. Constitution vests exclusively in the judiciary. The district court issued summary judgement for the United States and the court of appeals affirmed.

In a plurality opinion written by Justice Thomas (and joined by Justices Breyer, Alito, and Kagan), the Supreme Court held that the Gun Lake Act did not violate the separation of powers. The Court explained that while Congress may not exercise judicial power, it may make laws that apply retroactively to pending lawsuits, even when that legislation ensures that one side will win. The dividing line is that Congress acts impermissibly when it "compel[s] . . . findings or results under old law," while it acts permissibly when it simply "changes the law." The Court then explained that Congress has authority to change the law to withdraw the jurisdiction of federal courts by enacting a "jurisdiction-stripping statute," and it may do so with regard to a specific class of cases. The Court concluded that Congress had enacted such a jurisdiction-stripping provision in § 2(b) of the Gun Lake Act, which requires any lawsuit "relating to" the specific tract of property at issue in this case "shall be promptly dismissed."

Three Justices authored concurring opinions. Justice Breyer's concurrence emphasized the broader context prompting passage of the Gun Lake Act and that in § 2(a) Congress reaffirmed, ratified, and confirmed the Secretary of the Interior's actions in taking the Tribe's land into trust. Thus, Justice Breyer concluded, Congress "used its jurisdictional power to supplement, without altering, action that no one has challenged as unconstitutional."

Justice Ginsburg's opinion concurring in the judgment, which was joined by Justice Sotomayor, agreed that the decision of the court of appeals should be affirmed, but on the grounds that the United States is immune from this lawsuit. Justice Ginsburg writes that *Patchak I* held that the waiver of sovereign immunity in the Administrative Procedures Act allowed Mr. Patchak's suit to go forward. However, Justice Ginsburg concluded that the Gun Lake Act withdrew the United States waiver of sovereign immunity: "Notably, the language Congress employed in the Gun Lake Act (any 'action . . . relating to the [Bradley Property] . . . shall be promptly dismissed') is the mirror image of the APA's immunity

waiver, which instructs that suits "against the United States" for declaratory or injunctive relief "shall *not* be dismissed" (emphasis added by Justice Ginsburg). Thus, "[n]o action concerning the trust status of that property is currently attended by the sovereign's consent to suit."

In a separate opinion concurring in the judgment, Justice Sotomayor writes that she "agree[s] with the dissent that Congress may not achieve through jurisdiction stripping what it cannot permissibly achieve outright, namely, directing entry of judgment for a particular party. I also agree that an Act that merely deprives federal courts of jurisdiction over a single proceeding is not enough to be considered a change in the law and that any statute that portends to do so should be viewed with great skepticism." However, Justice Sotomayor differs with the dissenting justices insofar as she concludes that the Gun Lake Act is not jurisdiction-stripping, but instead is a restoration of the federal government's sovereign immunity.

Chief Justice Roberts authored a dissenting opinion, which was joined by Justices Kennedy and Gorsuch. The dissent would have found the Gun Lake Act unconstitutional on the grounds that it "dictates the disposition of a single pending case" – authority they contend is vested solely in the judiciary. Recognizing that the language of the statute (any action "relating to" the property) could suggest broader application, the dissent concluded that the practical effect of the provision was to extinguish only Mr. Patchak's suit. Moreover, the dissent cited the lack of any express statutory language indicating that the Gun Lake Act was jurisdictional. And even if the statute were jurisdiction-stripping, the dissent would forbid Congress from manipulating jurisdiction in order to decide a particular case's the outcome.

The full opinion is available at: https://sct.narf.org/documents/patchak_v_jewell/opinion.pdf.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case that has not been decided by the Court:

ROYAL, ET AL. V. MURPHY (17-1107) – On May 21, 2018, the Court granted a petition filed by the State of Oklahoma seeking review of a U.S. Tenth Circuit Court of Appeals decision in a habeas corpus action, which reversed the District Court and held that the State of Oklahoma was without jurisdiction to prosecute and convict a member of the Muscogee (Creek) Nation because the crime for which he was accused occurred in Indian country, within the boundaries of the Muscogee (Creek) Reservation. After Mr. Murphy was convicted of murder in Oklahoma State court and exhausted his appeals, he filed a habeas corpus petition in federal district court asserting that because the crime occurred within the Muscogee (Creek) Nation's reservation boundaries, and because he is Indian, the state court had no jurisdiction. The federal district court denied his petition, holding that Oklahoma possessed jurisdiction because the Muscogee (Creek) Reservation was disestablished. On appeal, the Tenth Circuit Court of Appeals utilized the three-factor *Solem* reservation disestablishment analysis and not only found that Congress did not disestablish the Muscogee (Creek) Reservation, but also that statutes and allotment agreements showed that "Congress recognized the existence of the Creek Nation's borders." Likewise, the court held that the historical evidence did not indicate a Congressional intent to disestablish the Muscogee (Creek) reservation, nor a contemporaneous understanding by Congress that it disestablished the reservation. Accordingly, the court concluded that (1) Mr. Murphy's state conviction and death sentence were invalid because the crime occurred in Indian Country and the accused was Indian, (2) the Oklahoma Court of Criminal Appeals (OCCA) erred by concluding the state courts had jurisdiction, and (3) the federal district court erred by concluding the OCCA's decision was not contrary to clearly established federal law.

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:

CITIZEN POTAWATOMI NATION V. OKLAHOMA (17-1624) – On May 30, 2018, the Citizen Potawatomi Nation (the "Tribe") filed a petition seeking review of a Tenth Circuit Court of Appeals decision, which reversed and remanded to the district court with instructions to vacate an arbitration award. The dispute arose over the sale and taxation of liquor at one of the Tribe's casinos. When the state's Alcoholic Beverage Laws Enforcement Commission and the Oklahoma Tax Commission initiated administrative proceedings, the Tribe invoked the arbitration provision of the tribal-state gaming compact and prevailed in the arbitration proceedings. At the Tribe's request, a federal district court entered an order enforcing the arbitration award. On appeal, the Tenth Circuit agreed with the district court that the de novo review provision of the compact's binding arbitration clause was legally invalid, but found that provision to be a material aspect of the arbitration clause and, accordingly, held that the entire arbitration clause must be severed from the compact. The brief in opposition is due July 2, 2018.

MAKAH INDIAN TRIBE V. QUILEUTE INDIAN TRIBE, ET AL. (17-1592) – On May 21, 2018, the Makah Indian Tribe filed a petition seeking review of the Ninth Circuit Court of Appeals decision regarding a subproceeding of *U.S. v. Washington*. The subproceeding was initiated by the Makah Indian Tribe and sought a court determination of the usual and accustomed fishing grounds of two other tribes. The Ninth Circuit described "the crux of this appeal" as "whether the term 'fish' in the [Treaty of Olympia] includes whales and seals," and held that the district court did not clearly err when it determined that the word "fish" as used in that treaty included sea mammals. The brief in opposition is due July 25, 2018.

COUNTY OF AMADOR, CALIFORNIA V. U.S. DEP'T OF THE INTERIOR (17- 1432) – On April 11, 2018, a California county government filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court's summary judgement in favor of the Department of the Interior ("DOI") and Intervenor Ione Band of Miwok Indians (the Tribe). Amador County sued DOI, challenging a record of decision announcing its intention to take land into trust for benefit of the Tribe pursuant to the Indian Reorganization Act (IRA) and allowing Tribe to build a casino on that land. The Tribe intervened as a defendant. On appeal, the Ninth Circuit held that: (1) the phrase "recognized Indian tribe now under Federal jurisdiction" in the IRA includes all tribes that are "recognized" at the time of the relevant decision and that were "under Federal jurisdiction" at the time the IRA was passed; (2) DOI set forth the best interpretation of the phrase "under Federal Jurisdiction" in the IRA, which defines an "Indian" entitled to IRA's benefits; (3) DOI's determination that tribe was "under Federal jurisdiction" when IRA was passed was not arbitrary and capricious; and (4) a grandfathering provision in the DOI regulation implementing the "restored tribe" exception in the Indian Gaming Regulatory Act ("IGRA") was in accordance with IGRA. The Tribe filed a response to the petition, but the United States waived its right to respond. On June 12, 2018, the Court requested a response from the United States, which is due July 12, 2018.

LUMMI TRIBE OF THE LUMMI RESERVATION, ET AL., V. UNITED STATES (17-1419) – On April 5, 2018, an Indian Tribe and three Tribal housing entities filed a petition seeking review of a United States Court of Appeals for the Federal Circuit decision, which held that the Native American Housing Assistance and Self Determination Act ("NAHASDA") was not a money-mandating statute and, therefore, the Federal Court of Claims was without subject matter jurisdiction over a suit seeking damages for grant funds

withheld by the Department of Housing and Urban Development ("HUD"). The Tribe and Tribal housing entities sued HUD under the Tucker Act and Indian Tucker Act, claiming that HUD illegally reduced their NAHASDA grant funds in order to recapture allegedly improper payments previously paid by the agency. The brief in opposition is due July 11, 2018.

FORT PECK HOUSING AUTHORITY, ET AL., V. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL. (17-1353) – On March 22, 2018, several Indian Tribes filed a petition seeking review of a Tenth Circuit Court of Appeals decision, which affirmed in part and reversed in part the District Court. The dispute arises out of the Department of Housing and Urban Development ("HUD") attempting to recapture alleged overpayments made to the Tribes under an affordable housing program. The Tenth Circuit affirmed the District Court's holding that HUD lacked the authority to recapture alleged overpayments via administrative offset. However, it reversed the District Court's order to repay the Tribes, holding that it was in the nature of money damages, which is precluded by sovereign immunity. The brief in opposition is due July 11, 2018.

SHARP IMAGE GAMING, INC. V. SHINGLE SPRINGS BAND OF MIWOK INDIANS (17-330) – On March 19, 2018, a casino management company filed a petition seeking review of a California Court of Appeal decision, which reversed the trial court and held a trial court lacked subject matter jurisdiction over a breach of contract suit brought by the company against the Tribe stemming from a deal to develop a casino on the Tribe's land. The state trial court denied the Tribe's motion to dismiss for lack of subject matter jurisdiction and motion for summary judgement. The matter proceeded to trial, and a jury found in favor of the company on the breach of contract claim. The California Court of Appeal, however, concluded that a promissory note at issue was a collateral agreement to a management contract that required approval by the National Indian Gaming Commission and, therefore the contractual claims brought by the company were preempted by the Indian Gaming Regulatory Act and the state trial court lacked subject matter jurisdiction to adjudicate the claims. The petition is scheduled for the June 21, 2018, conference.

HARVEY, ET AL., V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, ET AL. (17-1301) – On March 7, 2018, a petition was filed seeking review of a Utah Supreme Court decision, which affirmed the state trial court's conclusion that the plaintiffs must first exhaust tribal court remedies before proceeding in state court. The dispute arose from the Ute Tribe Employment Rights Office's revocation of the plaintiff companies' licenses to operate on Tribal lands for failure to comply with a tribal ordinance. An individual and two corporations brought action against the Tribe, tribal officials, companies owned by the tribal officials, and other private companies, alleging state law causes of action as well as federal claims that the tribe and tribal officials exceeded their jurisdiction. The plaintiffs did not file an action in tribal court, but went directly to Utah state court. The state trial court dismissed the case against the tribe and tribal officials on several bases, and stated that the plaintiffs' claim that the tribal officials exceeded their jurisdiction or acted outside the scope of their authority under tribal law must be addressed by the tribe's courts. The Utah Supreme Court affirmed the trial court's holding of tribal court exhaustion and remanded to the trial court to determine whether the case should be dismissed or stayed pending tribal adjudication. The petition is scheduled for the June 21, 2018, conference.

OSAGE WIND, LLC, ET AL. V. UNITED STATES (17-1237) – On March 2, 2018, a petition was filed seeking review of a Tenth Circuit Court of Appeals decision, which reversed the district court and held that (1) the Osage Minerals Council was entitled to appeal district court's grant of summary judgment to wind energy company, even though it had not intervened in the district court; and (2) the activity of Osage Wind (a private company not affiliated with the Tribe) constituted "mining" under the Osage Act and the

Department of the Interior's implementing regulations, thus requiring them to obtain a federally approved lease. The United States, as trustee for the Osage Nation, filed suit to enjoin excavation work being done by Osage Wind as part of the construction of a wind farm and on land where the Tribe owned the subsurface oil, gas, and mineral rights. The district court, in granting summary judgement for Osage Wind, concluded that the company's activities were not "mining" under applicable regulations and, therefore, no federally approved mineral lease was required. The United States did not appeal, but the Osage Minerals Council moved to intervene after summary judgement and filed an appeal. In reversing the trial court, the Tenth Circuit found ambiguities in the relevant regulatory definition of "mining" and, utilizing the Indian canon of construction, construed the term in the Tribe's favor. On May 14, 2018, the Court called for the views of the Solicitor General.

EASTERN SHOSHONE TRIBE V. WYOMING, ET AL. (17-1164); NORTHERN ARAPAHO TRIBE V. WYOMING, ET AL. (17-1159) – On February 21 and 22, 2018, a pair of petitions were filed seeking review of a Tenth Circuit Court of Appeals decision, which held that the that the Wind River Reservation boundaries were diminished by Congress in 1905. In 2008, the Eastern Shoshone and Northern Arapaho Tribes applied to the Environmental Protection Agency ("EPA") for joint authority to administer certain non-regulatory programs under the Clean Air Act on the Reservation (which is occupied by both Tribes). The State of Wyoming and others submitted comments to EPA claiming that some of the land included in the application was no longer within the reservation because Congress diminished the reservation in 1905. EPA determined that the reservation was not diminished by the 1905 Act and granted the application. The State of Wyoming and the Farm Bureau appealed directly to the Tenth Circuit and the Tribes intervened as respondents. The Tenth Circuit majority concluded that the language used in the 1905 Act is the same type of language where the Supreme Court has found reservation diminishment in past cases. The petitions are scheduled for the June 21, 2018, conference.

POARCH BAND OF CREEK INDIANS, ET AL. V. WILKES, ET AL. (17-1175) – On February 16, 2018, the Poarch Band of Creek Indians ("Tribe") filed a petition seeking review of an Alabama Supreme Court decision, which reversed a state lower court and held that the Tribe was not entitled to sovereign immunity from a tort claim brought by a non-member in state court. Two non-members of the Tribe sued the Tribe in Alabama state court seeking compensation for injuries they received in an automobile accident that occurred off tribal land and was caused by an employee of the Tribe's casino. The state trial court granted the Tribe's motion for summary judgement based on the Tribe's sovereign immunity. The Supreme Court of Alabama reversed, holding that "the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members." The Respondents waived their right to respond, and the petition was scheduled for the Court's April 13, 2018, conference, and the Court requested a response, which was filed on June 8, 2018.

BEARCOMESOUT V. UNITED STATES (16-30276) – On November 14, 2017, a Native American defendant in a criminal case filed a petition seeking review of a Ninth Circuit Court of Appeals decision, which affirmed the district court and held that the Double Jeopardy Clause of the Fifth Amendment does not bar federal court prosecution subsequent to a conviction for the same offense in tribal court. The Petitioner was charged with homicide in tribal court for the killing of another Indian on the Northern Cheyenne Reservation. She reached a plea agreement and served two consecutive one-year sentences in tribal custody. Near the end of her sentence, she was indicted on federal homicide charges. She moved to dismiss the federal indictment on Double Jeopardy grounds, which was denied by the federal district court and the Ninth Circuit affirmed. The United States waived its right to respond to the petition, and it was scheduled for the January 5, 2018, conference, but was rescheduled twice. The petition has been

subsequently held over eight more times, and was most recently scheduled for the June 21, 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 Bighorn 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, and on May 22, 2018, the United States filed its brief recommending that the Court grant the petition. The petition is scheduled for the June 21, 2018, conference.

WASHINGTON STATE DEPARTMENT OF LICENSING V. COUGAR DEN (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, and on May 15, 2018, the United States filed a brief recommending that the Court grant the petition. The petition was scheduled for the June 14, 2018, conference and was relisted to the June 21, 2018 conference.

PETITIONS FOR A WRIT OF CERTIORARI DENIED

PUBLIC SERVICE COMPANY OF NEW MEXICO V. BARBOAN, ET AL. (17-756) – On April 30, 2018, the Court denied 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."

TINGLE, ET AL. V. PERDUE (17-807); KEITH MANDAN V. PERDUE (17-897) – On March 26, 2018, the Court denied a pair of petitions filed by individual class members 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 (the Keepseagle case) 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, which was

ultimately settled for over $680 million. At the conclusion of the claims process, $380 million remained in the settlement fund. Over the objections of the Petitioners, the District Court approved a modification of the settlement agreement negotiated by the parties that provided for supplemental distributions to class members and a modified *cy-pres* distribution.

R.K.B. ET AL., V. E.T. (17-942) – On March 26, 2018, the Court denied a petition filed by a non-Indian adoptive couple seeking review of a Utah Supreme Court decision, which reversed the trial court, and held that the Indian birth father was a "parent" under the Indian Child Welfare Act (ICWA) and had right to notice and to intervene in the adoption proceedings. In construing the term "parent", the Utah Supreme Court examined what actions constituted acknowledgement of paternity under ICWA, and rejected the argument that statutory terms should be given meaning by reference to Utah state family law, but instead concluded that Congress intended to codify a reasonability standard in ICWA. Applying this standard, the Utah Supreme Court concluded that the birth father satisfied the requirements for acknowledging paternity under ICWA, and was therefore a "parent" under the statute and was entitled to intervene in the adoption proceeding.

TAVARES V. WHITEHOUSE (17-429) – On March 26, 2018, the Court denied a petition filed by a member of the United Auburn Indian Community seeking review of 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.

NORTON, ET AL. V. UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, ET AL. (17-855) – On February 20, 2018 the Court denied a petition filed by several non-Indian local police officers and deputy sheriffs seeking review of a 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 a trespass claim against the officers. The Tenth Circuit further held that the bad faith exception from exhaustion of tribal court remedies was not available as to a trespass claim against nonmember police officers.

RENTERIA, ET AL. V. SUPERIOR COURT OF CALIFORNIA, TULARE COUNTY, ET AL. (17-789) – On February 20, 2018 the Court denied a petition filed by California residents Efrim and Talisha Renteria 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.

ALASKA V. ROSS (17-118) On January 22, 2018, the Court denied a petition filed by the State of Alaska 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.

LEWIS TEIN, P.L., ET AL. V. MICCOSUKEE TRIBE OF INDIANS OF FLORIDA (17-702) – On January 16, 2018, the Court denied a petition filed by a law firm and its partners 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.

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 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 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 a petition filed by two tribally-owned lenders seeking review of 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 a petition filed by the State of Kansas seeking review of 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 (17-40 AND 17-42) – On November 27, 2017, the Court denied 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 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 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 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 (16-1324) – On October 2, 2017, the Court denied 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: Kurt Sodee, 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).**