Indians try to keep cases away from high court

Marcia Coyle
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The Supreme Court has not granted review of any Indian law cases in the current term, but you won't hear complaints from the Tribal Supreme Court Project.

Most lawyers work hard to keep their lower court victories out of the Supreme Court, but sometimes, fearing hostile justices, they look to avoid the high court even when they have lost.


Michigan State University College of Law 's Matthew Fletcher

That's the position in which the tribal project, a joint venture of National Congress of American Indians and the Native American Rights Fund, finds itself today as it painfully considers its zero-for-five record before the Roberts Court.

"We view this Court as not favorable on our issues," explained Richard Guest, senior staff attorney at the Native American Rights Fund.

Last term, recalled Guest, the justices granted review in three Indian law cases. "We had prevailed in the lower courts in all three and then lost all three in the Supreme Court," he said. "We did a little bit better than some folks — environmentalists lost five cases which they had won in the lower courts — but we are all batting zero."

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and was formed in 2001 in response to a series of negative decisions affecting tribal sovereignty in the mid-1990s, according to Guest.

"We had a winning percentage from 2001 to 2005 but now we're back to a situation where we are zero for five," he said.

There is a concern that certain justices have an agenda in Indian law cases, he added, noting that Chief Justice John Roberts Jr. has been quoted as asking what is so special about Indian tribes and their relationship to the United States.

"If this Court grants review, it appears to not only look to decide the case in front of it, but to extend any ruling to future cases," said Guest.

His concern gets some support from a 2009 empirical study done by Matthew Fletcher of Michigan State University College of Law: "Factbound and Splitless: Certiorari and Indian Law." From 1959, considered the beginning of the modern era of federal Indian law, to 1987, when the Supreme Court decided the major Indian gaming case, *California v. Cabazon Band of Mission Indians*, reported Fletcher, Indians and Indian tribes won nearly 60 percent of federal Indian law cases decided by the Supreme Court. But since *Cabazon*, tribal interests have lost more than 75 percent of their cases.

Fletcher, who studied more than 160 cert petitions filed between 1986 and 1994, concluded that the Court's certiorari process itself is a barrier to justice for tribes and individual Indians. Cert pool memos by the Court's law clerks showed, he reported, that clerks overstate the merits and importance of petitions filed by states against tribal interests, while understating the merits and importance of tribal petitions.

"Tribal petitions, often involving the interpretation of Indian treaties or complicated and narrow common law questions of federal Indian law, are readily deemed 'factbound' and 'splitless,'" explained Fletcher. "Conversely, the cert pool values and perhaps better understands the interests of state and state agency petitions, as well as the way the pool's audience (the Court) understands and values the interests of states. Thus, the pool's recommendations favor states and state agencies far more. The result, frankly, is that tribal petitions on a question will almost never be favored, whereas state petitions on the same question will often be favored."

Fletcher concluded, "While the admonition that tribal interests should do their very best to avoid the Supreme Court is not new, the findings of this study also demonstrate with increased force and clarity that Supreme Court adjudication is an extraordinarily hazardous process for tribal interests."

The Tribal Supreme Court Project, which tracks Indian law-related petitions in the high court, reports that 11 petitions

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for certiorari have been denied this term and five are pending.

The lack of grants this term is "a little unusual because generally speaking, an Indian law case or two does get granted every term," said Guest. "There were no grants in the 2007 term, I believe, but three in the following term."

The Court on Monday denied review in *Rosenberg v. Hualapai Indian Nation*. Steven Rosenberg had sought review of a state appellate court's dismissal of his lawsuit against the Hualapai River Runners, a tribally-owned, whitewater rafting business, for injuries suffered during a rafting accident.

The tribal project is watching closely two pending petitions, one filed by the United States in *U.S. v. Tohono O'Odham Nation*, and another, *Wolfchild v. U.S.*

In *Tohono O'Odham*, the government is appealing a ruling by the U.S. Court of Appeals for the Federal Circuit allowing the tribal nation to seek money damages in the U.S. Court of Federal Claims and equitable relief in federal district court for the government's alleged breach of fiduciary duty in managing the Nation's trust assets. The late Mark Levy of Kilpatrick Stockton won the appeal in March 2009. Roughly 35 cases with similar claims against the United States are pending in the district and claims courts.

In *Wolfchild*, two groups of individuals who claim to be descendants of the Mdewakanton Sioux are seeking reversal of the Federal Circuit's ruling that there was no breach of trust by the United States in its management of lands purchased for the benefit of the lineal descendants.

The project did get heavily involved in supporting Supreme Court review of the Washington Redskins trademark case, *Harjo v. Pro Football Inc.*, which the justices turned down in January.

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