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VIA EMAIL AND FIRST-CLASS MAIL **08-AP-007**

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Rules_Comments@ao.uscourts.gov
Washington, D.C. 20544

Re: Proposed Federal Rule of Appellate Procedure 1(b)

Dear Mr. McCabe·

This letter provides a comment on the proposed revision of the Federal Rules of Appellate Procedure, as stated in the July 29, 2008 revised Report of the Advisory Committee on Appellate Rules. While I recognize that the comment period for this rulemaking ended on February 17, 2009, I only learned of this proposed amendment since then, and so submit my comments now. I hope that the Committee will consider this comment. In particular, I am submitting this comment to propose that new Rule 1(b), which will define the term "state" for purposes of the Appellate Rules, be revised to include federally recognized Indian tribes As explained below, federal law broadly and consistently recognizes that Indian tribes are sovereigns like states, Indian tribes should be treated at least the same as territories, which are already included in the proposed Rule, and Indian tribes should be expressly included in the definition of "state" under the Appellate Rules.

Federal Law Recognizes that Indian Tribes are Sovereigns like States.

The commerce clause of the Unites States Constitution recognizes Indian tribes as sovereign entities alongside the states. U.S. Const. art. I, § 8, cl. 3. And each branch of the federal government likewise recognizes that Indian tribes are sovereign governments. For example, the U S. Supreme Court has consistently recognized that Indian tribes are "domestic dependent nations," *Cherokee Nation v Georgia*, 30 U.S. 1, 17 (1831), with "retained sovereignty," *United States v Wheeler*, 435 U.S. 313, 328 (1978), and the "capacity of a separate sovereign." *United States v Lara*, 541 U.S. 193, 210 (2004). Moreover, Indian tribal sovereignty is inherent and pre-constitutional, it inheres in Indian tribes themselves, and it does not flow from the United States Constitution or from any delegation of federal authority. *Wheeler*, 435 U.S. at 322-23; *Talton v. Mayes*, 163 U.S. 376, 380-84 (1896); *Worcester v Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832).

Congress also recognizes tribes as sovereign governments. Numerous examples abound in Title 25 of the United States Code, which wholly concerns Indians, including the recognition of tribal powers of self-government in the Indian Civil Rights Act, 25 U.S C. §§ 1301-1303. Congress also has recognized the status of tribal governments more generally, such as the requirement that "[e]ach agency . . . develop an effective process to permit elected officers of State, local, and *tribal governments* . . . to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." 2 U.S.C. § 1534(a) (emphasis added).

The executive branch also recognizes that Indian tribes constitute sovereign governments. For example, Executive Order 13175 entirely mandates "Consultation and Coordination with Indian Tribal *Governments*." 65 Fed. Reg. 67,249 (Nov. 6, 2000) (emphasis added). And Executive Order 13,336 specifically reaffirmed "the unique political and legal relationship of the Federal Government with tribal governments" and that '[t]his Administration is committed to continuing to work with these Federally recognized tribal governments on a government-to-government basis . . ." 69 Fed. Reg. 25,295 (May 5, 2004). Altogether, these judicial decisions, congressional enactments, and executive policy pronouncements support classification of federally recognized Indian tribes as "states" along with the District of Columbia, federal territories, commonwealths, and possessions.

Indian Tribes Should be Treated at Least the Same as Territories.

The current proposed revision to Appellate Rule 1(b) defines "state" to include "the District of Columbia and any United States commonwealth or territory." Whether a given political entity "comes within a given congressional act applicable in terms to a 'territory' depends upon the character and aim of the act." *People of Puerto Rico v Shell Co (Puerto Rico), Ltd*, 302 U.S. 253, 258 (1937). Thus, for a congressional enactment, it is not enough that Congress did not consider the situation at issue; rather, courts must determine whether Congress would have varied the statutory language if Congress had foreseen it. *Id* at 257. Courts addressing this issue accordingly must go beyond the statutory words themselves and consider "the context, the purposes of the law, and the circumstances under which the words were employed." *Id* at 258. Moreover, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v Blackfeet Tribe*, 471 U.S. 759, 766 (1985)

Under this analysis, both federal and state courts have found tribes to qualify as "territories" under various statutes. *See, e.g , United States ex rel Mackey v Coxe*, 59 U.S. 100, 103-04 (1855) (finding Cherokee Nation to be a territory under federal statute governing recognition of estate administrators); *National Labor Relations Board v. Pueblo of San Juan*,

276 F.3d 1186, 1198 (10th Cir. 2002) (en banc) (treating Indian tribes as states and territories under the National Labor Relations Act); *Tracy v Superior Court of Maricopa County*, 810 P.2d 1030, 1035-46 (Ariz. 1991) (holding that tribes qualify as territories under the Uniform Act to Secure the Attendance of Witnesses); *Jim v CIT Financial Services Corp.*, 533 P.2d 751, 752 (N.M. 1975) (holding that tribes constitute territories under the federal full faith and credit statute). Indian tribes therefore should be accorded the same status under proposed Appellate Rule 1(b).

Indeed, the Supreme Court has expressly recognized that Indian tribes have a greater status than territories. *Wheeler*, 435 U.S. at 321-23. Specifically, while Indian tribes retain "'inherent powers of a limited sovereign which has never been extinguished[,]" territorial governments are "'entirely the creation of Congress'" and not "an independent political community like a State, but . . 'an agency of the federal government.'" *Id.* at 321, 322. This distinction readily supports inclusion of Indian tribes within the definition of "state" alongside "territories" under the Appellate Rules.

Indian Tribes Should Be Included in the Definition of "State" under the Appellate Rules.

Each of the references to "state" in the Appellate Rules properly should encompass Indian tribes. As noted in the Advisory Committee report, these references include Appellate Rules 22, 29, 44, and 46. First, Rule 22 concerns federal "habeas corpus proceeding[s] in which the detention complained of arises from process issued by a state court[.]" Fed. R. App P. 22(b)(1). This certainly should encompass Indian tribes, since the Indian Civil Rights Act expressly recognizes that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303.

Next, Rule 29 provides that "a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of the court." Fed. R. App. P. 29(a). The failure to expressly include Indian tribes within the scope of this rule is the main reason for my submission of this comment. Like states, Indian tribes often find the need to submit amicus briefs in important cases affecting their sovereign interests. *See, e g , Amoco Production Co v Watson,* 410 F.3d 722 (D.C. Cir. 2005) (Jicarilla Apache Nation and Southern Ute Indian Tribe, amici curiae); *Independent Petroleum Assoc. of America v Dewitt,* 279 F.3d 1036 (D.C. Cir. 2002) (same); *South Dakota v United States Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), *cert granted, vacated, & remanded,* 519 U.S. 919 (1996) (Jicarilla Apache Nation, Pueblo of Laguna, and Pueblo of Santa Ana, amici curiae). Unfortunately, because Indian tribes are not expressly included within the terms of Rule 29(a), they must seek consent of parties and obtain leave of the court out of an abundance

of caution, even as they assert that they properly should qualify under the Rule. Imposition of these additional requirements is unwarranted given the sovereign governmental status of Indian tribes. Instead, the classification of Indian tribes along with other governments under the Appellate Rules is especially warranted given the further disclosure requirements that the proposed revision to Rule 29 will impose on nongovernmental amicus briefs.

Next, Rule 44 provides for notice to the court clerk and certification to a state attorney general if a party questions the constitutionality of a state statute in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity. Fed. R. App. P. 44(b). It would be very appropriate and valuable for Indian tribes to be included in the notice and certification provided for in this Rule since the Supreme Court has recognized that federal constitutional proscriptions do not apply to Indian tribes, *Talton*, 163 U.S. at 384; *Santa Clara Pueblo v Martinez*, 436 U.S. 49, 56 & n.7 (1978), and expressly held that analogous claims against Indian tribes under the Indian Civil Rights Act are barred by their sovereign immunity from suit, except for habeas corpus claims as referenced above, *Martinez*, 436 U.S. at 59. Existing Supreme Court authority and the sovereign governmental status of Indian tribes warrants according them the same level of process in this regard as the proposed rule revision would provide to the District of Columbia and federal territories, commonwealths, and possessions.

Finally, Rule 46 provides as follows:

> An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and is admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

Fed. R. App. P. 46(a)(1). Indian tribes should be included within the scope of this Rule because the Supreme Court has recognized that "[t]ribal courts play a vital role in tribal self-government . . . and the Federal Government has consistently encouraged their development." *Iowa Mut Ins Co v LaPlante*, 480 U.S. 9, 14-15 (1987); *see also* Indian Tribal Justice Act, 25 U.S.C. §§ 3601-31; Indian Tribal Justice Technical & Legal Assistance Act, 25 U.S.C. §§ 3651-81; Sandra Day O'Connor, *Lessons from the Third Sovereign*, 33 Tulsa L.J. 1 (1997).

In particular, more than 140 Indian tribes currently have tribal courts, which often are structured similar to state courts. Cohen's Handbook of Federal Indian Law (Nell Jessup Newton ed. 2005), § 4.04[3]c][iv], at 265, 270. These tribal courts typically provide for

admission to practice by attorneys based in large part on documented prior admission and good standing before the highest court or the bar of a state or the District of Columbia. *See, e.g.*, Blackfeet Tribal Law & Order Code § 9-10; Cherokee Nation Supreme Court Rule 132; Hopi Indian Tribe Law & Order Code § 1.9.3.2; Jicarilla Apache Nation Code § 2-9-7(A); Nez Perce Tribal Code § 1-1-36(b); Winnebago Tribal Code § 1-402(1). Accordingly, an attorney admitted to practice before the highest court of an Indian tribe is almost necessarily already admitted to practice before the highest court of a state. Therefore, given the status of Indian tribes relevant to territories as discussed above, tribally licensed attorneys should be entitled to the same eligibility as attorneys who are admitted to practice solely in a territory, such as Guam, the Northern Mariana Islands, or the Virgin Islands.

In conclusion, numerous considerations support inclusion of federally recognized Indian tribes within the definition of a "state" in the proposed revision of Appellate Rule 1(b).

Thank for your you attention to this matter.

Very truly yours,

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