



July 16, 2010

**GENERAL MEMORANDUM 10-094**

**Tohono O'odham Nation Files Amicus Brief in  
Suit Challenging Arizona Immigration Law, SB 1070**

On July 14, 2010, the Tohono O'odham Nation (the "Nation") filed an amicus brief in *Friendly House, et al v. Michael Whiting, et al.*, No. CV10-1061-PHX-SRB (D.AZ filed May 17, 2010). The case, which was originally filed by prominent civil rights and humanitarian groups challenging Arizona's controversial anti-immigration law, has garnered many amici. The Tohono O'odham's brief supported the motion by plaintiff civil rights groups for a preliminary injunction, and argues that SB 1070 will result in Tohono O'odham being victims of civil rights violations because the law circumvents the controls and training proscribed by the Federal scheme of immigration law, and its implementation using the reasonable suspicion standard would increase the likelihood of racial profiling of O'odham members by State police. Additionally, the Nation argued that SB 1070 violates the Indian Commerce Clause's guarantee of the Nation's right to self-governance.

The Nation noted that a state highway bisects the reservation, SR 86. State and county officers currently patrol the highway and enforce state law on SR 86 within the reservation. If State officers enforce SB 1070 on the reservation, and detain suspects based on the undefined term "reasonable suspicion," the Nation fears that O'odham members on SR 86 within their own homeland are likely to be subjected to unconstitutional arrests and mistreatment by state and county officers. The Nation cited a 2008 study of racial profiling by Arizona Department of Public Safety (AZ-DPS) officers on Arizona interstate highways by the American Civil Liberties Union of Arizona, *Driving While Black or Brown, an Analysis of Racial Profiling in Arizona*, (ACLU of Arizona, 2008). The study showed that Native Americans stopped by AZ-DPS along Arizona interstate highways were 3-4 times more likely than whites to be searched, a rate that on some roadways constituted the highest in the study. Notably, according to this study, despite this disparate treatment, the rates of actual contraband seizures from Native American searches were lower than those for whites.

However, Nation members do more than drive on the highway. Many walk or hitchhike on the highway. The Nation points out that its members share physical characteristics with many persons from south of the border, which may result in their being detained for taking a walk in their homeland. As the Nation noted,

if these individuals are not carrying the documents which create a presumption of lawful presence (a tribal enrollment card, an Arizona driver license, or an Arizona nonoperating identification license), they may be questioned as to

citizenship and lawful presence in the United States. Individuals who are not carrying a birth certificate, or do not have a birth certificate, will be at risk of being referred to federal authorities and of being deported. All of this would be happening in their own homeland, on land that their family may have lived on for generations.

The Nation also argued that SB 1070 "runs afoul of a wholly different, and higher, federal authority: the Indian Commerce Clause of the U.S. Constitution, Art. 1, § 8, cl. 3," Brief at 7, as well as interfering with the ability of members to exercise their Tribal Constitutional rights. The Nation argued that preemption applies to state authority that infringes "on the right of reservation Indians to make their own laws and be ruled by them." Brief at 8, *citing White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) and *Williams v. Lee*, 358 U.S. 217 (1959). In such circumstances, "[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest." Brief at 8, *citing Bracker*, 448 U.S. at 144. As a result of this preemption, the Nation argued, SB 1070's impact on the Nation's interests requires the law's invalidation, at least to the extent that it may be applied within the Nation's reservation.

As for the Nation's Constitution, it guarantees members freedom of movement to "go into any district to live or beneficially use the lands [of the Tohono O'odham Nation] in accordance with the customary procedures of the district." Constitution of the Tohono O'odham Nation, Art. XVI, Sec. 3.7. Thus, the Nation argued, "SB 1070 ... strikes at the core of the Nation's right to self-governance: its ability to ensure that its members remain unmolested in their exercise of tribal Constitutional rights." Brief at 8.

In conclusion, the Nation argued that even if SB 1070 was otherwise held valid, it "must not be allowed to intrude upon the Nation's sovereign rights within its reservation." Brief at 9. The Nation cited *Williams v. Lee*, 358 U.S. 219, 223 (1959), for the proposition that "[t]he exercise of State jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."

Arguments are scheduled for July 22, 2010, on the Motion for a Preliminary Injunction, as well as three motions to dismiss filed in the case.

###

Inquiries may be directed to:

S. Bobo Dean ([bdean@hobbsstrauss.com](mailto:bdean@hobbsstrauss.com))

Tony Davis ([tdavis@hobbsstrauss.com](mailto:tdavis@hobbsstrauss.com))