Memorandum

Native American Rights Fund
1712 N Street, NW, Washington, DC 20036
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To:	Tribal Leaders and Tribal Attorneys
From:	Richard Guest, Staff Attorney
Date:	August 16, 2005
Re:	The Nomination of John G. Roberts to the U.S. Supreme Court - An Indian Law Perspective

EXECUTIVE SUMMARY

On July 19, 2005, President Bush nominated John G. Roberts to the Supreme Court of the United States**.** The Senate Judiciary Committee has scheduled confirmation hearings for begin on September 6, 2005**.** If the hearings run smoothly, Roberts could be confirmed by the full Senate and sworn in as a member of the Supreme Court as early as September 16, 2005. The Justices will meet in conference on September 26, 2005, to consider petitions for certiorari that have been filed during the summer recess. The opening date for the Supreme Court's new term is Monday, October 3, 2005, and the tribal motor fuel tax case, *Wagnon* (formerly *Richards*) *v. Prairie Band Potawatomi Nation,* No. 04-631, is scheduled for oral argument on that day.

Who is John G. Roberts? By all accounts, Roberts is a lawyer's lawyer – an accomplished legal advocate who has a reputation as a Washington insider. His legal credentials are flawless: graduated *magna cum laude* from Harvard Law School (1979); awarded two prominent federal judicial clerkships, including one with Associate Justice (now Chief Justice) William H. Rehnquist; hired as a Special Assistant to United States Attorney General(1981-82); appointed by President Reagan as the Associate Counsel to the President (1982-86); appointed by President Bush as Principal Deputy Solicitor General of the United States (1989-93); became a partner in a blue-chip law firm, Hogan & Hartson, with a successful appellate practice specializing in representing clients before the U.S. Supreme Court (1986-89; 1993-2003); and appointed by President Bush as a federal judge to the United States Circuit Court of Appeals for the District of Colombia (2003-present).

Does John G. Roberts have any experience in federal Indian law? There is little indication that Roberts had direct responsibility for any case involving Indian law as a judicial clerk or as an attorney with the federal government. Most of Roberts' limited experience with Indian law arose in private practice, representing the interests of the State of Alaska in *Alaska v. Native Village of Venetie,* 522 U.S. 520 (1998) (scope of Indian country) and *Katie John v. United States,* 247 F.3d 1032 (2001) (subsistence fishing rights in Alaska) and representing the State of Hawaii in *Rice v. Cayetano,* 528 U.S. 495 (2000) (status of Native Hawaiians). He participated in one Indian law case as a judge, *City of Roseville v. Norton,* 348 F.3d 1020 (2003) (land into trust).

In *Alaska v. Native Village of Venetie Tribal Government*, Roberts represented the State of Alaska before the U.S. Supreme Court. On behalf of the State, he argued that recognizing Indian country in Alaska would invite a "blizzard of litigation throughout the State as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country," asserting "claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land." In a unanimous opinion delivered by Justice Thomas, the Court held that the Tribe's land is not Indian country

In *Katie John v. United States*, Roberts represented the State of Alaska before the Ninth Circuit on a petition for hearing en banc. On behalf of the State, he argued against federal protection of Native subsistence rights, contending that "the basic question presented by this case is 'whether Alaska or the United States has control over *** Alaska's navigable waters.' Few matters are more central to a State's sovereignty than the authority to manage the natural resources within its borders." Although Roberts was successful in obtaining the rehearing en banc, the State of Alaska lost the case on the merits. The en banc panel reaffirmed the lower court decision that "public lands" include navigable waterways in and adjacent to federal lands in which the federal government has a reserved water right. The State of Alaska did not seek review by the U.S. Supreme Court.

In *Rice v. Cayetano,* Roberts represented the State of Hawaii before the U.S. Supreme Court against a challenge to the constitutionality of a voting scheme which excluded non-Native Hawaiians from voting in the election of trustees of the Office of Hawaiian Affairs, the state agency which has responsibility for administering programs and funds to benefit Native Hawaiians. On behalf of the State, Roberts argued that Native Hawaiians, similar to Native Americans in the lower 48 States and Alaskan Natives, have a special trust relationship with the United States as an indigenous people. Further, Roberts argued that the voting restriction did not violate the prohibition on racial classification since the Native Hawaiians are the beneficiaries of the trust and are the group to whom the trustees have fiduciary obligations and, therefore, are the appropriate group to decide who the trustees ought to be. In a 7-2 opinion delivered by Justice Kennedy, the Supreme Court held that the state statute which limited voters to those whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," violated the Fifteenth Amendment, using ancestry as proxy for race.

In *City of Roseville v. Norton,* 348 F.3d 1020 (2003), the only Indian law case in which Roberts participated as a judge, a group of cities challenged the Secretary of Interior's decision to take a parcel of land into trust for an Indian tribe to operate a casino. The dispute centered on the meaning of "restoration of lands," and its application when the land taken into trust for a restored tribe was different from the land the tribe had at the time of termination. Roberts joined an opinion filed by Judge Rogers which held that the Government's taking of land into trust for a terminated tribe that had been restored was "restoration of lands" within meaning of Indian Gaming Regulatory Act.

What is Roberts' judicial philosophy? His judicial temperament?

There are more questions than answers to the inquiry regarding what kind of Supreme Court Justice John Roberts would be if confirmed by the U.S. Senate. His two-years as a judge on U.S. Circuit Court of Appeals for the D.C. Circuit has not provided enough time to develop, or sufficient opportunities to evaluate, his judicial record. In Roberts own words, he does not have an "overarching, uniform" judicial philosophy. In responding to a question about judicial activism in the questionnaire provided by the Senate Judiciary Committee for the upcoming nomination hearings, Roberts stated that the "proper exercise of the judicial role in our constitutional system requires a degree of institutional and personal modesty and humility." According to Roberts, this "modesty and humility" is manifest when judges recognize their limited role under the Constitution, adhere to binding precedent and remain open-minded to the views of other judges.

By most accounts, Roberts role model was Judge Henry Friendly for whom he clerked on the U.S. Circuit Court of Appeals for the Second Circuit. Many legal scholars consider Judge Friendly to be one of the great appeals court judges of the modern era. Judge Friendly was not result-oriented, rather he carefully weighed the facts and the law, was deferential to precedent and had a reputation of being intellectually honest. To date, there is nothing in the Roberts' record, as a judge or as an attorney, to indicate that he is result-oriented or a political ideologue with a specific agenda.

Should Indian country support or oppose his nomination? John Roberts' record is mixed and inconclusive, but he is one of only two appellate judges mentioned in the "short lists" that have any appreciable Indian law experience. The positions Mr. Roberts took representing his clients are not necessarily representative of his views on Indian law. His views are an unknown factor. However, his advocacy and oral arguments at the Supreme Court demonstrate a familiarity with Indian law issues and an understanding of lands and resources issues, jurisdiction in Indian country, and the unique legal and political status of Native Americans.

In his article, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values,* David Getches writes that an intellectual leader among the Justices must emerge, one who "can assume the hard work of understanding Indian law, its historical roots, and its importance as a distinct field." Failing such an intellectual "rediscovery" of Indian law by the Court, "Indian policy will unravel further [and] Indian interests will suffer." Indian country should carefully consider Roberts' experience with cases involving issues of Indian law, and may well benefit by further research of his record with regard to federal power, states' rights and mainstream values.

MEMORANDUM

Who is John G. Roberts?

John Glover Roberts, Jr., was born on January 27, 1955, in Buffalo, New York. His father, John, Sr., was an executive in the steel industry; his mother, Rosemary, was a homemaker. When he was a boy, his family moved to Long Beach, Indiana, an all-white, predominantly Catholic community on Lake Michigan. He and his sisters attended Notre Dame Catholic School. He then attended La Lumiere, an all boys Catholic prep school in Indiana where he was co-captain of the football team, co-editor of the school newspaper and valedictorian of his class.

Roberts then attended Harvard College where he majored in history and graduated in 1976 at the top of his class. He spent the next three years at Harvard Law School where he served as managing editor of the Harvard Law Review and graduated *magna cum laude* in 1979. During his first summer in law school, he clerked at the law firm of Ice, Miller Donadio, & Ryan (now Ice Miller) in Indianapolis, IN. During his second summer, he clerked at the law firm of Carlsmith, Carlsmith, Wichman & Case (now Carlsmith Ball LLP) in Honolulu, HI.[1]

Following law school, Roberts clerked for Judge Henry J. Friendly, an Eisenhower appointee to the U.S. Court of Appeals for the Second Circuit, a well-respected appellate judge and a proponent of judicial restraint.[2] Next, Roberts clerked for then-Associate Justice (now Chief Justice) William H. Rehnquist of the Supreme Court from July 1980 to August 1981. Following his clerkships, Roberts served as Special Assistant to United States Attorney General William French Smith, although his direct boss was Kenneth Starr. In November 1982, President Reagan appointed Roberts to the White House Staff as Associate Counsel to the President where he distinguished himself as a an aggressive advocate for the administration's policies. His responsibilities as Associate Counsel to the President included advising the President regarding his constitutional powers and responsibilities, as well as other legal issues affecting the executive branch.

In May 1986, Roberts joined the law firm of Hogan & Hartson as an associate attorney and was elected as a general partner of the firm in October 1987. In 1989, he left Hogan & Hartson to serve as Principal Deputy Solicitor General of the United States under Kenneth Starr. In this capacity, he personally argued a number of cases before the Supreme Court and the federal courts of appeals on behalf of the United States. He had general substantive responsibility for cases arising from the Civil and Civil Rights Divisions of the Justice Department. In 1993, President George

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[1] The firm was founded in 1857 and describes itself as Hawaii's oldest and largest law firm with offices in Honolulu, Hilo, Kona, Maui, Kapolei, Guam, Saipan and Los Angeles.

[2] Judge Friendly frequently criticized the Warren Court for pushing rights that were not included in the Constitution. He was also known for his deference to the political branches of government.

H.W. Bush nominated Roberts for a federal judgeship to the U.S. Court of Appeals for the D.C. Circuit, but the Senate did not vote on his nomination before the Clinton administration took office.[3] As a result, Roberts returned to private practice with his old firm in January 1993 where he established a successful appellate practice and developed a Washington insider reputation as a "lawyer's lawyer."[4]

In 2001, President George W. Bush nominated Roberts for a federal judgeship to the U.S. Court of Appeals for the D.C. Circuit which was approved by the Judiciary Committee by a vote of 16-3 and then confirmed by the full Senate on May 8, 2003 without a roll call vote.

Does John G. Roberts have any experience with federal Indian law?

Although we continue to review his legal record, there is little indication that Roberts had direct responsibility for any case involving federal Indian law during his days as a judicial clerk or as an attorney with the federal government in the Reagan and Bush I administrations. However, it is important to note that during his clerkship for then-Associate Justice Rehnquist, one very important Indian law case was decided by the U.S. Supreme Court: *Montana v. United States* , 450 U.S. 544 (1981) (Indian tribes do not have civil jurisdiction over non-Indians on non-Indian owned fee lands within the reservation, except when there is a consensual relationship or when the non-Indian conduct threatens the political integrity, economic security, health or welfare of the tribe).[5] The nature and scope of tribal civil and regulatory authority over non-Indians on the reservation is an area of continuing controversy and litigation, as demonstrated by the Supreme Court's decisions in *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001); and *Nevada v. Hicks*, 533 U.S. 353 (2001).

Most of Roberts' experience with cases involving federal Indian law arose during his years

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[3] According to various reports, Roberts was crestfallen, disappointed that that his nomination languished in a standoff over judicial nominations at the end of Bush's term.

[4] On a personal note, Roberts married the former Jane Marie Sullivan, a partner at the law firm of Pillsbury Winthrop Shaw Pittman, in 1996. He and his wife reside in Bethesda, Maryland with their two adopted children, a boy and a girl, ages 4 and 5. The press has widely reported that Mrs. Roberts is a board member of an anti-abortion group Feminists for Life – an organization that opposes abortion as a reflection of a societal failure to meet the needs of women, not a moral failure of women.

[5] In addition, during the October 1980 Term, then-Justice Rehnquist issued a written dissent to a denial of certiorari in *Connecticut v. Mohegan Tribe*, 452 U.S. 968 (1981), a land claims case arising under the Non-Intercourse Act wherein he characterized the court of appeals decision as "unprecedented" making "millions of acres in the eastern United States vulnerable to Indian land title-claims." Justice Rehnquist would have had the Court decide the territorial applicability of the Non-Intercourse Act (*i.e.* how the Act applies to Indian lands in the original 13 colonies versus Indian lands in the rest of the States).

in private practice, as an attorney representing the interests of the State of Alaska in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) and *Katie John v. United States*, 247 F.3d 1032 (2001) and representing the State of Hawaii in *Rice v. Cayetano*, 528 U.S. 495 (2000). Each of these cases is summarized below.

1. *Alaska v. Native Village of Venetie Tribal Government* (Scope of Indian Country)

In 1986, Alaska entered into a joint venture agreement with a private contractor to construct a public school in the Village of Venetie using state funds. The Native Village of Venetie Tribal Government (the "Tribe") notified the contractor that it owed the Tribe approximately $161,000 in taxes for conducting business activities on its land and sought to enforce the tax in tribal court. The State filed an action in federal district court to enjoin the collection of the tax. The Federal District Court for the District of Alaska held that since the Tribe's lands were not "Indian country" under the Alaska Native Claims Settlement Act (ANCSA), the Tribe lacked the power to impose a tax upon nonmembers. On appeal, the U.S. Circuit Court of Appeals for the Ninth Circuit reversed, holding that the land meets the definition of "Indian country" under 18 U.S.C. § 1151(b) as a "dependent Indian community."

The State hired John G. Roberts to prepare and file a petition for certiorari to the U.S. Supreme Court. After the Court granted review, the State retained Roberts to prepare their brief on the merits and to provide oral argument on their behalf. Heather Kendall-Miller of the Native American Rights Fund represented the Tribe. In his brief, Roberts argued that Congress has plenary authority over Indian affairs, that Congress has spoken clearly through ANCSA and that the Court should abide by Congress' intent. Specifically, Roberts argued:

> Because of its unique history and geography, Alaska and its Natives were spared the reservation policy adopted by the federal governments in its relations with Indians in the lower 48 States. That policy has left in its wake a decidedly mixed legal legacy, including the notion of a "dependent Indian community" itself. As the ANCSA Congress recognized, Alaska – the Nation's last frontier – provided an opportunity for a new approach, one freed from outworn entanglements with an Indian policy formed for a different time and place. In seizing that opportunity, Congress made clear its intent that ANCSA land not be Indian country or, indeed, anything like it. This Court should give effect to that intent.
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> The Ninth Circuit decision below transforms the heretofore discrete "dependent Indian community" category of Indian country into a major form of Indian country nationwide. In one fell swoop, that decision makes the 44 million acres of land conveyed under ANCSA eligible for judicial designation as Indian country. In doing so, moreover, it makes the courts rather than Congress the principal arbiter of Indian country in Alaska, transferring from Congress to the courts the power to allocate the

> sovereign authority of the State of Alaska, federal government and hundreds of Indian tribes over vast areas of Alaska and indeed, of the United States.

Quoting the concurring opinion in the Ninth Circuit, Roberts argued that recognizing Indian country in Alaska would invite a "blizzard of litigation throughout the State as each and every tribe seeks to test the limits of its power over what it deems to be its Indian country," asserting "claims to freedom from state taxation and regulation, claims to regulate and tax for tribal purposes, assertions of sovereignty over vast areas of Alaska, and even assertions that tribes can regulate and tax the various corporations created to hold ANCSA land."

In a unanimous opinion delivered by Justice Thomas, the Court held that the Tribe's land is not Indian country:

> We therefore must conclude that in enacting § 1151(b), Congress indicated that a federal set-aside and a federal superintendence requirement must be satisfied for a finding of a "dependent Indian community" – just as those requirements had to be met for a finding of Indian country before 18 U.S.C. § 1151 was enacted .... The Tribe's ANCSA lands do not satisfy either of these requirements. After the enactment of ANCSA, the Tribe's lands are neither 'validly set apart for the use of the Indians as such,' nor are they under the superintendence of the Federal Government."

2. *Rice v. Cayetano*[6] (Status of Native Hawaiians)

In 1978, the State of Hawaii amended its constitution to establish the Office of Hawaiian Affairs ("OHA"), a public trust entity which administers programs to benefit the people of Hawaiian ancestry. Implementing statutes vested OHA with broad authority to administer two categories of funds: (1) a 20 per cent share of the revenue from the 1.2 million acres of lands granted by the United States to Hawaii "for the betterment of the conditions of native Hawaiians"; and (2) any state or federal appropriations or private donations that may be made for the benefit of "native Hawaiians" OHA is governed by a nine-member board of trustees which must be "Hawaiian" and elected by "Hawaiians." By statute, the term "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778" and the term "native Hawaiian" means "any descendant of not less than one-half part [blood] of the races inhabiting the Islands before 1778."

Harold Rice, a non-native citizen of Hawaii and a descendant of pre-annnexation residents

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[6] In the questionnaire provided by the Senate Committee on the Judiciary to Roberts to assist the Senators in the confirmation hearings process, Roberts lists *Rice v. Cayetano* as one the "ten most significant litigated matters" which he personally handled.

of the islands, brought suit in federal district court contesting his exclusion from voting in the elections for OHA trustees based on the equal protection clause of the 14th Amendment and the prohibition of the 15th Amendment (may not deny or abridge the right to vote on account of race) of the U.S. Constitution. The U.S. District Court for the District of Hawaii granted summary judgment to the State, finding that the Congress and the State of Hawaii have a guardian-ward relationship with the native Hawaiians, analogous to the relationship between the United States and Indian tribes. The District Court found that the electoral scheme was "rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of the Native Hawaiians" and held that the voting restriction did not violate the prohibition on racial classifications. The U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the State "may rationally conclude that Hawaiians, being the group to whom trust obligation run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."

After the U.S. Supreme Court granted certiorari, the State of Hawaii retained John G. Roberts to prepare their brief on the merits and to provide oral argument. On behalf of the State, Roberts argued that the classification drawn by the statute was not drawn on the basis of race.[7] Instead, the statute simply restricted the right to vote to the beneficiaries of the trusts. Rice had not challenged the validity of the trusts and it was rational for the State to limit voting to those most directly affected by the administration of the trusts. In addition, he argued that similar to Native Americans in the lower 48 States and Alaskan Natives, Congress has established a special trust relationship with Native Hawaiians as an indigenous people:

> Classifications based on Congress' decision to assume a special relationship with an indigenous people are not based on race, but rather the unique legal and political status that such a relationship entails. Congress has expressly provided that classifications involving indigenous Hawaiians should be treated the same as those involving American Indians, Alaska Natives, and the other indigenous people over whose aboriginal lands the United States has extended its domain. This Court has repeatedly reaffirmed that such judgments are peculiarly within Congress' prerogative to make. Centuries of jurisprudence, not to mention an entire title of the United States Code, are built on the understanding that such classifications are not

[7] Roberts discussed this case in an October 6, 1999 NPR Interview, Profile: Racial Discrimination Case in Hawaii. In the interview Mr. Roberts characterized Mr. Rice's claim that he was "as Hawaiian as anybody" as being "like the descendants of Myles Standish saying they're Native Americans because they've been here for a long time." In that interview he went on to say "The fact of the matter is, there was somebody else there when they arrived, and there was somebody else there when Mr. Rice's ancestors arrived in Hawaii, the aboriginal inhabitants. We give special treatment to Alaskan natives. We don't give special treatment to the Russian settlers who were there before that land was part of the United States …. Now if it is held to be racial discrimination to single out native Hawaiians, it's hard for me to see why it wouldn't also be racial discrimination to single out American Indians or Alaskan natives. And, of course, that takes place in countless laws in the US code."

race-based. This regime is fully applicable to indigenous Hawaiians.[8]

In a 7-2 opinion delivered by Justice Kennedy, the Supreme Court held that the state statute which limited voters to those persons whose ancestry qualified them as either a "Hawaiian" or "native Hawaiian," violated Fifteenth Amendment, using ancestry as proxy for race. The Court rejected the State's attempt to analogize Native Hawaiians to other Native Americans, reasoning that Congress has not dealt with Native Hawaiians as members of politically organized tribes. Further, the Court rejected the argument that the classification should be regarded as being based on beneficiaries of a trust rather than race. In dissent, Justices Stevens and Ginsburg argued that the state statute should be upheld in light of "the compelling history of the state of Hawaii" and the analogy to principles of federal Indian law.

3. *Katie John v. United States* (Subsistence Fishing Rights in the State of Alaska)

Unlike tribes in the lower 48 states, Native hunting and fishing rights in Alaska were never recognized through treaty. In 1971, Congress extinguished aboriginal claims to lands in Alaska through the Alaska Native Land Claims Settlement Act (ANCSA). In addition, ANCSA extinguished aboriginal hunting and fishing rights. Section 4(b) provided: "All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, . . . including any aboriginal hunting and fishing rights that may exist, are hereby extinguished. Despite this extinguishment, Congress made clear its intent to continue federal protection of Native hunting and fishing rights. In 1980, Congress passed the Alaska National Interest Lands Conservation Act (ANILCA) which granted rural subsistence users a priority to harvest fish and game on public lands whenever the resource was insufficient to accommodate all other consumptive users. An agreement was struck with the State, allowing the State to regulate fish and game on public lands as long as the State likewise adopted a preference for subsistence users analogous to ANILCA. At the State's insistence, Congress elected to adopt a rural, rather than purely Native, priority.

In *Alaska v. Babbitt*, 72 F.3d 698 (9th Cir. 1995) (*Katie John I*), the Ninth Circuit ruled in favor of Alaskan Natives who were denied their right to subsistence fishing by the State of Alaska and the federal government. The Ninth Circuit held that the federal government has the obligation to provide subsistence fishing priority on all navigable waters in Alaska in which the United States has a federally reserved water right. The Court instructed the Departments of Interior and Agriculture to identify those waters for the purpose of implementing federal, rather than state regulation of subsistence activities. After entry of final judgement by the district court in 2000, the

[8] As a strict constructionist, Roberts went on to argue that this "is true not only because Congress has said so, but because the Framers of the Constitution drew no distinctions among different groups of indigenous people in conferring power to deal with such groups on Congress, and the Framers of the Civil War Amendments never envisioned that those amendments would restrict the ability of Congress to exercise that power."

State of Alaska retained John G. Roberts to work with the Alaska Attorney General on its Petition Hearing En Banc.

On behalf on the State, Roberts argued that "the basic question presented by this case is 'whether Alaska or the United States has control over *** Alaska's navigable waters.' Few matters are more central to a State's sovereignty than the authority to manage the natural resources within its borders." Roberts wrote that the "divided panel decision in this case flouts a principle of judicial restraint that is deeply rooted in Supreme Court jurisprudence and vital to our federal structure: when construing a federal statute in a manner that 'would upset the usual constitutional balance of federal and state powers,' 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.'"

Although Roberts was successful in obtaining the rehearing en banc, the State of Alaska lost the case on the merits. In *Katie John v. United States*, 247 F.3d 1032 (9th Cir. 2001) (*Katie John II)*, the en banc panel reaffirmed the lower court decisions that "public lands" in ANILCA included navigable waterways in and adjacent to federal lands in which the federal government has a reserved water right. The State of Alaska did not seek review by the U.S. Supreme Court.

4. *City of Roseville v. Norton* (Land Into Trust)

During his two-year tenure on the U.S. Circuit Court of Appeals for the D.C. Circuit, Judge Roberts has sat on only one case involving the interests of an Indian tribe. In *City of Roseville v. Norton,* 348 F.3d 1020 (2003), a group of cities challenged the Secretary of Interior's decision to take a parcel of land into trust for an Indian tribe to operate a casino. The dispute centered on the meaning of "restoration of lands," and its application when the land taken into trust for a restored tribe was different from the land the tribe had at the time of termination.

Roberts joined Judge Silberman in an opinion filed by Judge Rogers which held that the Government's taking of land into trust for a terminated tribe that had been restored was "restoration of lands" within meaning of Indian Gaming Regulatory Act (IGRA). This taking of land into trust fit into the IGRA provision exempting restored lands from the requirement that the government consider any detriment to the surrounding community, and obtain concurrence of the state governor, before permitting gaming on land taken into trust after IGRA's effective date.

What is Roberts' Judicial Philosophy? His Judicial Temperament?

There are more questions than answers to the inquiry regarding what kind of Supreme Court Justice John Roberts would be if confirmed by the U.S. Senate. His two-years as a judge on U.S. Circuit Court of Appeals for the D.C. Circuit has not provided enough time to develop, or sufficient opportunity to evaluate, his judicial record. In Roberts own words, he does not have an

"overarching, uniform" judicial philosophy. In responding to a question about judicial activism in the questionnaire provided by the Senate Judiciary Committee for the upcoming nomination hearings, Roberts wrote:

> The proper exercise of the judicial role in our constitutional system requires a degree of institutional and personal modesty and humility. This essential modesty manifests itself in several ways: *First*, judges must be constantly aware that their role, while important, is limited. They do not have a commission to solve society's problems, as they see them, but simply to decide cases before them according to the rule of law. When the other branches of government exceed their constitutionally-mandated limits, the courts can act to confine them to the proper bounds. It is judicial self-restraint, however, that confines judges to their proper constitutional responsibilities. *Second*, a judge needs the humility to appreciate that he is not necessarily the first person to confront a particular issue. Precedent plays an important role in promoting the stability of the legal system, and a sound judicial philosophy should reflect recognition of the fact that the judge operates within a system of rules developed over the years by other judges equally striving to live up to the judicial oath. *Third*, a judge must have the humility to be fully open to the views of his fellow judges on the court. Collegiality is an essential attribute of judicial decision-making at the appellate level. This does not refer to personal friendliness, but instead an appreciation that fellow judges have read the same briefs, studied the same precedent and record, and participated in the same oral argument. Their views on the appropriate analysis or outcome accordingly deserve the most careful and conscientious consideration.

By most accounts, Roberts role model was Judge Henry Friendly for whom he clerked on the U.S. Circuit Court of Appeals for the Second Circuit. Many legal scholars consider Judge Friendly to be one of the great appeals court judges of the modern era. Judge Friendly was not result-oriented, rather he carefully weighed the facts and the law, was deferential to precedent and had a reputation of being intellectually honest. To date, there is nothing in the Roberts' record, as a judge or as an attorney, to indicate that he is result-oriented or a political ideologue with a specific agenda.