TRIBAL SUPREME COURT PROJECT
MEMORANDUM

APRIL 19, 2004

UPDATES ON RECENT CASES

The Tribal Supreme Court Project is a part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians and the Native American Rights Fund. 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 improved strategy on litigation that may affect the rights of all tribes. The Project is improving communications and monitoring of cases in the federal and state courts. We especially encourage tribes and their attorneys to coordinate their efforts at the time of petition for certiorari, prior to the Supreme Court's acceptance of review. We are also expanding to become more involved in amicus briefs in the federal circuit courts.

United States v. Lara – Please see the preceding memo on today's important victory for tribal sovereignty in the U.S. Supreme Court.

Cherokee v. Thompson - On March 22, 2004 the U.S. Supreme Court accepted for review two contract support cost cases which yielded opposite outcomes. In *Cherokee Nation and Shoshone Paiute Tribes v. Thompson*, the Tenth Circuit Court of Appeals held that the federal government is immune from any liability for their failure to pay full contract support costs to Indian tribes in the mid-1990s, a period during which Congress did not place a statutory cap on the amounts the Indian Health Service could lawfully pay tribal contractors. However, in *Thompson v. Cherokee Nation*, the Federal Circuit Court of Appeals reached the opposite conclusion, awarding the Cherokee Nation $8.5 million in damages for the Indian Health Service's failure to fully pay contract support costs during this period. The cases have been consolidated for an anticipated November 2004 oral argument.

NCAI and NARF, through the Tribal Supreme Court Project, are working together with the attorneys representing Cherokee Nation and Shoshone Paiute to ensure that the U.S. Supreme Court will rule that Indian tribes are entitled to enforce their contracts in federal court when federal agencies breach the terms of those contracts. The cases are critically important to all Indian tribes since every tribe in the country has one or more self-determination contracts or self-governance compacts with the Indian Health Service and the Bureau of Indian Affairs, and this is the first opportunity for the U.S. Supreme Court to review and consider the enforceability of the Indian Self Determination Act. Ensuring the proper interpretation of the ISDA also protects the foundation of modern federal Indian law.

NCAI is retaining a lawyer who is a Supreme Court specialist who is also well-known by the Court, and coordinating with tribes and tribal attorneys. In order to develop and submit this amicus brief, we are seeking $30,000 in tribal contributions. If your tribe is interested in contributing to this important case, please send contributions to "Tribal Supreme Court Project-Cherokee Nation case", NCAI, Attn: Sharon Ivy, 1301 Connecticut Avenue NW, Suite 200, Washington DC, 20036.

South Florida Water Management District v. Miccosukee Tribe of Indians - On March 23, 2004, the United States Supreme Court delivered the opinion. The South Florida Water Management District

operates a pumping facility that transfers water from a canal into a reservoir. The Miccosukee Tribe and the Friends of the Everglades (FOE) brought a citizen suit under the Clean Water Act contending that the pumping facility is required to obtain a discharge permit under the National Pollutant Discharge Elimination System. The district court and eleventh circuit found for the Tribe and FOE concluding that the canal and reservoir were two different bodies of water. The Supreme Court found for the Miccosukee Tribe that the Clean Water Act applies to a transfer of polluted water from one body of water to another, but remanded to further develop the factual record on whether the canal and reservoir are two different bodies of water. NARF filed an amicus brief on behalf of the National Tribal Environmental Council and the National Congress of American Indians.

City of Sherrill v. Oneida Indian Nation of New York – The City of Sherrill petitioned for Supreme Court review on December 11, 2003, in a case unique to New York addressing whether properties reacquired by the Oneida Indian Nation of New York are subject to taxation by the City of Sherrill. On February 23, 2004, the Supreme Court requested that the United States express its views on whether the case should be accepted for review. The Supreme Court Project has done some consulting with attorneys for the Oneida Nation.

U.S. v Santee Sioux and U.S. v. Seneca-Cayuga - On March 1, 2004, the U.S. Supreme Court denied the federal government's petitions for certiorari in *U.S. v. Santee Sioux Tribe* and *U.S. v. Seneca-Cayuga Tribe et. al.* These are important victories for tribes because the two cases safeguard the viability of Class II gaming as a source of governmental revenue for Indian tribes, and they enhance the viability of Class II gaming as an option for tribes if a state refuses to negotiate a Class III gaming compact. Specifically, both cases held that tribes may use electronic pull tab readers as a "technologic aid" to Class II gaming. This is extremely important for tribes in the remaining states that have not yet negotiated Class III compacts, such as Nebraska, Oklahoma, Wyoming and Florida. Congratulations are due to the Santee Sioux Tribe, and to the Seneca-Cayuga Tribe, the Fort Sill Apache Tribe, the Northern Arapahoe Tribe, and Diamond Game Enterprises. NCAI and the Tribal Supreme Court Project worked closely with the attorneys for the Santee Sioux Tribe on the opposition to certiorari brief, and coordinated with the National Indian Gaming Association on the overall strategy for both cases. These cases underscore that we can have far more positive impact by focusing resources early, before the Supreme Court has accepted cert. NCAI has raised $2,500 to help the Santee Sioux Tribe pay for Supreme Court legal expertise, and we are seeking additional donations to complete that effort.

Inyo County v. Bishop Paiute Tribe – On May 19, 2003, the Supreme Court issued an opinion in an important case involving tribal government immunity from state issued search warrants. The Supreme Court avoided the major issue regarding tribal sovereign immunity but did limit the ability of tribal governments to assert a §1983 claim that their constitutional rights had been violated -- because a tribe is a government and not a "person" under §1983. In a victory for tribes, the Court avoided any major shifts in Indian law by remanding the case. This victory has been sealed by the dismissal of the case at the Tribe's request by the federal district court on March 12, 2004. (The Supreme Court's decision does leave an open question about tribes' ability to use the federal courts to enforce tribal sovereign rights from state intrusion.) The Tribal Supreme Court Project's efforts on this case demonstrate how strong coordination can improve the tribal advocacy on Supreme Court cases. The Supreme Court Project put together a terrific team effort in support of Bishop Paiute, collecting hundreds of tribal-state law enforcement agreements for a fact-based amicus brief, and convincing four state Attorney Generals to submit an amicus brief in support of tribal sovereignty.

Carcieri v. Norton - The U.S. Court of Appeals for the First Circuit is considering a case that broadly challenges the authority of the Secretary of Interior to take land into trust for a tribe under Section 5 of the

Indian Reorganization Act (IRA). The case is on appeal from a district court decision in favor of the Secretary's acquisition of land in trust for the Narragansett Tribe. *Carcieri v. Norton* 290 F.Supp.2d 167 (D.R.I. 2003).

Highlighting the significance of this case, a group of ten state Attorneys General have submitted an amicus brief making arguments that could affect many tribes. This is clearly part of a coordinated strategy by these states to mount more significant legal challenges to trust land acquisition First, the ten states lead with a novel argument that the Indian Reorganization Act does not apply to any tribe not "under federal jurisdiction" in 1934. Second, in an effort to stop all land to trust, the states push a very broad argument that Section 5 is an unconstitutional delegation of legislative authority. Third, the states argue that taking land into trust violates both the Enclave Clause and the 10th Amendment under the U.S. Constitution. The Tribal Supreme Court Project has coordinated with the Narragansett Tribe and organized the drafting of a tribal amicus brief that focuses on the first two issues – eligibility to participate in the IRA and the nondelegation argument. The Mississippi Band of Choctaw is submitting a separate brief that covers the states' third argument.

Doe v. Mann - On September 29, 2003, the Federal District Court for the Northern District of California issued an opinion denying tribal exclusive jurisdiction over a child custody decision involving an Indian child within the boundaries of an Indian reservation. The district court held that under the Indian Child Welfare Act, tribes that fall under Public Law 280 do not have the "exclusive jurisdiction" provided by ICWA Section 1911(a). This decision is being appealed to the Ninth Circuit Court of Appeals, and NCAI and NARF are working to coordinate the preparation of a tribal amicus brief with the attorneys for the child's mother. This is likely to be a very important case for the applicability of the Indian Child Welfare Act in P.L. 280 states.

Maine v. Michael Leavitt and Penobscot Nation et al. v. EPA - These are consolidated petitions in the First Circuit for review of the EPA's decision concerning Maine's application to the EPA to administer the Clean Water Act within the territories of the Penobscot Nation and the Passamaquoddy Tribe. Notwithstanding an opinion from the Department of the Interior concluding that Maine lacked adequate authority to take over the administration of the Clean Water Act within the Penobscot and Passamaquoddy territories, the EPA issued a decision granting Maine that authority with the exception of two small wastewater treatment plants managed by the tribes within their reservations. In the First Circuit, the State of Maine seeks to overturn the EPA's decision to retain NPDES authority over the Tribes' wastewater treatment plants. The Tribes seek to overturn the EPA's decision to grant Maine NPDES authority over other discharges within or affecting their reservation waters. The discharging paper companies have moved to intervene as parties. The parties have proposed a briefing schedule that would require the Tribes and any supporting amici to file briefs by mid-September.

Contributions to Supreme Court Project: As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. We do a lot of work behind the scenes monitoring federal Indian law cases and offering support and advice to tribes at every stage of litigation. Please send any general contributions to NCAI, attn: Sharon Ivy, 1301 Connecticut Ave., NW, Suite 200, Washington, DC 20036.

Please contact us if you have any questions or if we can be of assistance. John Dossett, NCAI General Counsel, 503-248-0783 (jdossett@ncai.org) or Richard Guest, NARF Staff Attorney, 202-785-4166 (richardg@narf.org).