TRIBAL SUPREME COURT PROJECT MEMORANDUM

OCTOBER 21, 2005

UPDATE ON RECENT CASES

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). 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 to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of petition for certiorari, prior to the Supreme Court's acceptance of review.

Now at the beginning of the October 2005 Term, the Supreme Court is in a period of significant transition with the recent death of Chief Justice William H. Rehnquist and the confirmation of his replacement - Chief Justice John G. Roberts. Justice Sandra Day O'Connor has tendered her resignation, and the President has nominated White House Counsel Harriet Miers to replace her. It is noteworthy that both Roberts and Miers have cited their experience with federal Indian law to demonstrate their qualifications for the Supreme Court.

The Project remains very busy, monitoring numerous cases at various stages of appeal within both state and federal courts, while directly participating in the preparation of amicus briefs in the U.S. Supreme Court and the U.S. Circuit Courts of Appeals. You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org).

CASES PENDING BEFORE THE U.S. SUPREME COURT

WAGNON V. PRAIRIE BAND POTAWATOMI NATION (NO. 04-631) – On Monday, October 3, 2005, the Supreme Court heard oral argument in *Wagnon v. Prairie Band Potawatomi Nation* -- an extremely important case for tribal taxing authority. In *Wagnon,* the Tenth Circuit held that state taxation of motor fuel is precluded where the Prairie Band charges a tax equal to the state tax and builds and maintains the roads on its reservation. The Tenth Circuit found that the Prairie Band is not "marketing a tax exemption" but instead the tax revenues from the gas station are "reservation generated value." The State of Kansas is asking the Supreme Court to overturn the Tenth Circuit's decision to invalidate the Kansas motor fuel tax.

During oral argument, the Justices focused largely on questions related to the "incidence" of the tax. Kansas argued that the tax is collected on the off-reservation distributor, while the Prairie Band maintained that the impact of the tax falls directly in Indian country. The questions indicated a good bit of skepticism of the tribal position, but some of this skepticism was also trained on the State of Kansas. As always it is difficult to predict the outcome of the case, but we are likely to see a decision within two to three months.

The Tribal Supreme Court Project, working closely with the attorneys representing the Prairie Band and many other tribes, coordinated four tribal amicus briefs: (1) the NCAI brief which focuses on the major tax principles in federal Indian law; (2) the Intertribal Transportation Association brief which discusses the importance of motor fuel taxes to Indian tribes due to the poor quality of road systems in Indian country; (3) the National Intertribal Tax Alliance brief which provides the Court with an overview of the numerous tax compacts entered into by tribes and states; and (4) the Kansas Tribes' brief which discusses the violation by Kansas of its Act for Admission and state abandonment of prior state-tribal tax agreements. In all, over 30 individual Indian tribes signed on to the tribal amicus briefs. The Project also worked closely with the Prairie Band in persuading the U.S. Solicitor General's Office to file a brief and argue in support of the tribal position.

GONZALES V. O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (NO. 04-1084) – On April 18, 2005, the Supreme Court granted certiorari in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (the "UDV"). The UDV is a religious organization, an outgrowth of a church in Brazil which uses a hallucinogenic called *hoasca* in religious ceremonies. UDV filed suit against the U.S. Attorney General challenging the confiscation of its *hoasca* under the Controlled Substances Act. The UDV claims that (1) the government's interpretation of the Controlled Substances Act violates the Religious Freedom Restoration Act ("RFRA"), and (2) if its members are not allowed access to *hoasca* for religious uses, the U.S. exemption for the religious use of peyote by Indians who are members of the Native American Church ("NAC") denies their members' constitutional rights to Equal Protection of the laws under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The federal district court granted and the 10th Circuit upheld UDV's request for an injunction on the basis of its RFRA claims, but denied their equal protection claim. In denying the equal protection claim, the District Court relied on the trust relationship between the United States and Indian tribes, and the government's obligation to protect Indian culture and religion as an attribute of sovereignty and the trust relationship. The Supreme Court has granted review of the issuance of the preliminary injunction at the request of the U.S. Attorney General. Although the equal protection issues are not squarely before the Supreme Court, the Tribal Supreme Court Project is closely monitoring the issue due to our concerns that the Court could revisit *Morton v. Mancari* in this context. The Native American Rights Fund is working closely with the attorneys representing the Native American Church and is consulting with the U.S. Solicitor General's Office and U.S. Department of Justice on the equal protection issue. Oral argument is scheduled for November 1, 2005.

CASES RECENTLY DECIDED BY THE U.S. SUPREME COURT

CITY OF SHERRILL V. ONEIDA NATION OF NEW YORK (NO. 03-855) - On March 28, 2005, the U.S. Supreme Court issued its decision in *City of Sherrill v. Oneida Indian Nation of New York*, a case that has been closely followed by many Indian tribes for its impact on tribal land claims and its application of a number of important principles of federal Indian law. In a difficult loss for Indian country, the Supreme Court ruled against the Oneida Nation, holding that while the Nation maintains a valid claim for damages for reservation lands sold in violation of the Nonintercourse Act, it may not assert tax immunity on repurchased lands within the reservation boundaries until those lands are placed into trust by the Secretary of Interior.

Justice Ginsburg wrote the opinion in the 8-1 decision against the Nation, stating: "Given the longstanding distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in

seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders."

The Court's decision invoked the equitable doctrine of laches – that the long passage of time and the Oneida's inaction during that time prevents the Nation from asserting its tax immunity. The Court made clear that it was not invalidating the land claim, but only one of the remedies available for the claim. The Court's reliance on this doctrine, which was never presented or briefed by the parties, betrayed a deep lack of understanding of the legal and historical realities that prevented many tribes from being able to vindicate their rights until recent decades. While the decision should be construed as a narrow decision regarding the remedies that are available for land claims under the Nonintercourse Act, it raises concerns that states will try to use the laches doctrine to diminish the remedies available in other tribal claims. (See discussion of *Cayuga and Seneca Cayuga v. New York* in pending cases below.)

The Court based its decision on concerns of "disruptive practical consequences." The Court specifically noted that other tribes in New York had already sought to invalidate local zoning and land use laws to build a bingo hall "located within 300 yards of a school." The decision shows again that that the presentation of the facts and equitable issues to the Court is extremely important and often outweighs reliance on longstanding principles of law. Also important to the opinion, the Court found that Congress has provided a mechanism for reasserting tribal jurisdiction over lands through 25 U.S.C. §465, the Secretarial land to trust acquisition process. Essentially, this finding by the Court reaffirms the validity and purposes of the land to trust statute and regulations – a subject of considerable litigation in the lower courts.

CHEROKEE NATION CASES (NOS. 02-1472 AND 03-853) – On March 1, 2005, in a significant victory for Indian tribes, a unanimous U.S. Supreme Court held that Indian self-determination contracts are "legally binding" agreements – enforceable promises by the federal government similar in nature to other procurement contracts. The United States had taken the position that Indian tribes are not entitled to the same protections afforded other government contractors, and self-determination contracts are merely "governmental funding arrangements."

This was the first opportunity for the U.S. Supreme Court to review and consider the enforceability of the Indian Self Determination Act. In the first case, C*herokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Thompson*, the Tenth Circuit Court of Appeals had held that the federal government was immune from any liability for its failure to pay full contract support costs to Indian tribes, during a period in the mid 1990's in which Congress did not place a statutory cap on the amounts the Indian Health Service (IHS) could pay tribal contractors. In the second case, *Thompson v. Cherokee Nation of Oklahoma*, the Federal Circuit Court of Appeals had reached the opposite conclusion, awarding the Cherokee Nation $8.5 million in damages for the failure to fully pay contract support costs. NCAI, through the Tribal Supreme Court Project, prepared an amicus brief in support of Cherokee Nation and Shoshone Paiute.

The Supreme Court affirmed the judgment of the Federal Circuit, reversed the judgment of the Tenth Circuit and remanded the cases for the further proceedings consistent with their opinion. Justice Breyer, delivering the opinion for the unanimous Court, accepted the view of "the Tribes and their *amici* . . . that as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the government cannot normally back out of a promise to pay on the grounds of 'insufficient appropriations,'

even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made" (emphasis in original). In usual fashion, Justice Scalia, while largely joining the opinion, wrote separately to repeat his dislike for the use of legislative history, but the other seven Justices (Rehnquist did not participate in the proceedings) found the legislative history, which was the subject of our amicus brief, worth of note. A copy of the opinion is available at http://doc.narf.org/sc/okvthompson/opinion.pdf.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Below is a sample of petitions for a writ of certiorari which have been filed and are being monitored by the Tribal Supreme Court:

Peabody Western Coal Company v. Equal Employment Opportunity Commission (No. 05-353) – Petitioners seek review of Ninth Circuit holding that Equal Employment Opportunity Commission (EEOC) may involuntarily join Navajo Nation as a defendant under Fed.R.Civ.P. 19 requiring joinder of necessary parties despite EEOC's inability to bring direct suit against Navajo Nation under Title VII of 1964 Civil Rights Act.

Wagnon v. Prairie Band Potawatomi Nation (No. 04-1740) -- whether federal law bars Kansas from refusing to permit the use of motor vehicle registrations and titles issued by an Indian tribe located within the State, when Kansas permits the use of registrations and titles issued by other states, foreign countries and even out-of-state Indian tribes.

Skokomish Indian Tribe v. Tacoma Public Utilities (No. 05-434) -- Whether congressionally-ratified treaty allows cause of action for damages against municipality alleged to have knowingly and without authorization taken nearly one-half of water flowing through reservation and thus destroyed substantial portion of off- and on-reservation treaty-protected fisheries.

Lummi Nation v. Samish Indian Tribe (No. 05-445) -- Lummi Nation et. al. appeal holding of Ninth Circuit that federal recognition of Samish Indian Tribe entitles Samish Tribe to share of treaty fishing rights.

PETITIONS FOR WRIT OF CERTIORARI DENIED

Wyoming Sawmills, Inc. v. U.S. Forest Service (No. 04-1175) – Timber industry plaintiff does not have standing to challenge U.S. Forest Service's decision to manage the Medicine Wheel National Historic Landmark as an important traditional cultural property, in recognition of its cultural, historic and religious importance of the to many Native Americans as a violation of the Establishment Clause of the First Amendment.

PENDING CASES BEFORE THE U.S. COURTS OF APPEAL AND OTHER COURTS

CAYUGA AND SENECA CAYUGA V. NEW YORK -- On June 28, the Second Circuit issued a sweeping decision dismissing the longstanding land claims of the Cayuga Nation and Seneca Cayuga Nation against the State of New York. In the decision, the panel relied on an extremely broad reading of the Supreme Court's decision in *City of Sherrill v. Oneida Nation* to hold that the doctrine of laches can be used to bar tribal claims that are "disruptive." Laches is a legal concept that prevents parties from unjustified delay in asserting their rights in a way that disadvantages the adverse party. The defense of laches has not been

commonly upheld against tribal claims because of the longstanding legal and practical impediments to tribal enforcement of their rights.

NCAI submitted an amicus brief in support of the tribal petition for rehearing because of our concern about the potentially disastrous implications of this decision for all tribal claims. The panel's decision denies tribes any relief for violations of their rights to land. This ruling not only threatens to extinguish tribal land claims in the Second Circuit, but could be used by other courts to fashion a new legal doctrine that the substantive rights of Indian Tribes to their lands and resources are unenforceable wherever the court finds that their recognition would seriously disrupt the *status quo*. This could affect other tribal treaty claims regarding land, water, hunting and fishing rights or related claims. We anticipate that Cayuga and Seneca Cayuga will petition for certiorari to the Supreme Court and that there will be a role for the Supreme Court Project in coordinating amicus briefs in support of the petition.

SAN MANUEL INDIAN BINGO AND CASINO AND HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES INTERNATIONAL UNION ET. AL. (345 NLRB 79 and 341 NLRB 138) – On September 30, 2005, the National Labor Relations Board issued a decision and order finalizing its earlier May 2004 ruling that held that the National Labor Relations Act (NLRA) applies to tribal businesses on tribal lands. The NLRA generally exempts governmental employers from the provisions of the Act on collective bargaining, etc. The Board departed from longstanding precedent and created a new doctrine not found in the statute -- that tribal government "commercial" activities are subject to the Act, while "traditional" governmental activities are not.

The San Manuel Band of Mission Indians filed a petition for review in the DC Circuit Court of Appeals on October 6. Given the high level of tribal interest in this issue, we anticipate that there will be a need for coordination among tribes on amicus briefs. The Tribal Supreme Court Project plans to work in support of the San Manuel Band as the case moves forward.

CARCIERI V. NORTON (NO. 03-2647) – On September 13, 2005, the U.S. Court of Appeals for the First Circuit announced its decision in response to the State of Rhode Island's petition for rehearing or rehearing en banc. The court had directed the parties to provide supplemental briefing on two issues: (1) whether the provisions of the Indian Reorganization Act apply to the Narrangansett Tribe (federally recognized in 1983); and (2) if additional land were taken into trust on behalf of the Narragansetts, whether the trust must be restricted to preserve Rhode Island's civil and criminal laws and jurisdiction.

The First Circuit granted the petition for rehearing and issued a new panel opinion in which the court, once again, rejected the state's argument that the IRA does not apply to any tribe was not "now under federal jurisdiction" in 1934. A significant number of tribes could have been hurt by the opposite ruling. Second, the court, once again, rejected the broad arguments that Section 5 is an unconstitutional delegation of legislative authority and that taking land into trust diminishes state sovereignty in violation of the Tenth Amendment, the Enclave Clause, and the Admissions Clause, and exceeds the authority of Congress under the Indian Commerce Clause of the U.S. Constitution. The new panel opinion included a limited dissent by Judge Howard who concluded that, pursuant to the Rhode Island Settlement Act, the Secretary can only take land into a "restricted" trust for the Narrangansett Tribe that provides for the state's continued criminal and civil jurisdiction over the land.

The Tribal Supreme Court Project coordinated the writing of amicus briefs in the case with the attorneys for the Narragansett Indian Tribe and the United States throughout the appeals process. NCAI was represented pro bono by Ian Gershengorn and Sam Hirsh of Jenner & Block and Riyaz Kanji of Kanji &

Katzen. This case is an important victory for Indian tribes because of the significance of the IRA and the Secretary's land to trust authority. Once again, we anticipate an appeal by the State of Rhode Island.

DOE V. MANN (NO.04-15477) – On July 19, 2005, a unanimous 3-judge panel of the Ninth Circuit issued a 60-page opinion affirming the district court's opinion denying tribal exclusive jurisdiction over a child custody decision involving an Indian child within the boundaries of an Indian reservation. The Ninth Circuit 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). The Tribal Supreme Court Project worked to encourage the preparation of several amicus briefs in support of the tribal position and continues to monitor new developments in this case. On August 23, 2005, attorneys representing Mary Doe, the mother of the Indian child, filed a petition for rehearing or rehearing en banc.

NARRAGANSETT TRIBE V. RHODE ISLAND – On May 12, 2005, the 1st Circuit issued its decision on the Narragansett Tribe's request for relief from the State's violent efforts to close down a tribal smoke shop – forcibly serving a search warrant, seizing unstamped cigarettes, and arresting tribal officials. Narragansett is subject to a unique federal statute that gives full civil and criminal jurisdiction to the State. The 1st Circuit held that the Narragansett Tribe is obligated to comply with the State's cigarette tax laws as they apply to non-Indian consumers. However, the State exceeded its authority in imposing a warrant on the Narragansett tribal government because the Tribe retains its sovereign immunity and the State had less intrusive means available to enforce its laws. On June 6, 2005, the State of Rhode Island filed a petition for rehearing en banc.

On July 14, 2005, the First Circuit issued an order granting the state's petition for rehearing en banc on the questions of whether, to what extent, and in what manner the state may enforce its civil and criminal laws with respect to the operation of the tribal smokeshop. The order vacated the May 12, 2005 judgment and directed the parties to submit supplemental briefs on the enforcement questions, "including the effect (if any) of tribal sovereign immunity." The Project has been working with the attorneys representing the Tribe and NCAI submitted an amicus brief in support of the Tribe prepared pro bono by the Nordhaus Law Firm. The First Circuit will hear oral arguments on December 6, 2005.

MEANS V. NAVAJO NATION – In *U.S. v. Lara*, the U.S. Supreme Court upheld tribal criminal jurisdiction over nonmember Indians, holding that the Duro amendment is an affirmation of tribal inherent authority. However, the *Lara* Court expressly declined to answer the question of whether the tribal criminal prosecution of a nonmember Indian would violate the Due Process and Equal Protection clauses of the Fifth Amendment of the U.S. Constitution.

On August 28, 2005, the Ninth Circuit issued its decision holding that under the 1990 amendments to the Indian Civil Rights Act (the *Duro* amendments), the Navajo Nation may exercise misdemeanor criminal jurisdiction over a person who is not a member of the tribe, but who is an enrolled member of another Indian tribe. First, relying on *Morton v. Mancari,* the court concluded that "the weight of established law requires us to reject Means's equal protection claim" on the basis that Indian tribal identity is political rather than racial. Second, the court found that Means's "facial due process challenge has no force" in light of the fact that the Indian Civil Rights Act confers all the protections Means would receive under the U.S. Constitution except the right to grand jury indictment (which is not available in a misdemeanor prosecution) and the right to appointed counsel (which is provided in the Navajo Bill of Rights).

In a related case, *Morris v. Tanner,* the Ninth Circuit issued an unpublished memorandum opinion affirming the district court's grant of summary judgment in favor of the Tribe, simply relying on the

holding of *Means.* The issue of tribal criminal jurisdiction over nonmember Indians is of critical importance to Indian country. We anticipate that both Means and Morris will file petitions for rehearing or rehearing en banc.

SMITH V. SALISH KOOTENAI COLLEGE – This case addresses whether an Indian tribe has civil jurisdiction over tort action that arose as a result of a traffic accident on a public highway within the Reservation which involved a non-member Indian who was a student at the tribal college and who was driving the vehicle as part of a vocational program at the college. The Ninth Circuit held that, under these facts, neither of the two *Montana* exceptions applies, and the tribal court does not have adjudicatory authority over this matter. On May 13, 2005, the Ninth Circuit issued an order granting en banc review. The Tribal Supreme Court Project prepared and filed an amicus brief in support of the college and the Tribe. NCAI was represented pro bono by attorney Mary Smith. Oral arguments were heard on June 23, 2005.

FORD MOTOR CO. V. TODECHEENE – This case involves the scope of tribal civil jurisdiction over a products liability action arising out of an accident on the Navajo Reservation on a road wholly owned by the Nation. The Todecheene family filed a wrongful death action in Navajo tribal court, and Ford filed a complaint in US District Court challenging the Navajo court's jurisdiction. In an expansion of Strate v. A-1 Contractors, the 9th Circuit ruled that the Montana analysis applies even when on Indian land and ruled against tribal jurisdiction. On February 10, 2005, the Navajo Nation, in coordination with Tribal Supreme Court Project, filed a petition for rehearing or rehearing en banc. On February 15, 2005, the court issued an order directing Ford Motor Company to file a response to the petition for rehearing.

ATKINSON TRADING COMPANY V. MANYGOATS – This case involves the scope of tribal civil jurisdiction over non-Indian employers located on the Navajo Reservation. In this case, Manygoats filed a wrongful termination complaint with Navajo Nation Labor Commission. Atkinson filed a complaint in US District Court claiming that the Navajo Nation lacks civil regulatory jurisdiction over its employment practices. The U.S. District Court granted summary judgment in favor of Atkinson, finding that neither Montana exception applied. Currently, the case has been appealed to the Ninth Circuit and referred to a mediator.

U.S. V. BECERRA-GARCIA; U.S. V. TERRY – In *Becerra-Garcia*, the 9th Cir. refused to suppress evidence found by tribal rangers who detained a non-Indian, ruling that inherent tribal sovereignty includes the power to exclude trespassers and "necessarily entails investigating potential trespassers." Similarly in *U.S. v. Terry*, the 8th Cir. upheld the tribal arrest and detention of a non-Indian while waiting to turn the defendant over to state authorities. On July 27, 2005 the court denied the petition for rehearing and the petition for rehearing en banc.

CONTRIBUTIONS TO SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. 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 Senior Staff Attorney, 202-785-4166 (richardg@narf.org).