TRIBAL SUPREME COURT PROJECT MEMORANDUM

JANUARY 25, 2006

UPDATE OF 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 accepting a case for review.

During 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 confirmation hearings for her replacement, Judge Samuel Alito of the U.S. Court of Appeals for the Third Circuit, are currently underway. It is noteworthy that Chief Justice Roberts cited his experience with federal Indian law to demonstrate his qualifications for the Supreme Court. In contrast, our review of Judge Alito's record in the Third Circuit reveals that he has had very little exposure to federal Indian law and minimal experience dealing with issues important to Indian country.

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

GONZALES V. O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (NO. 04-1084) – On November 1, 2005, the Supreme Court heard oral arguments in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (the "UDV"). The UDV is a religious organization that is 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 the U.S. Department of Justice on the equal protection issue. A decision is expected in the near future.

CASES RECENTLY DECIDED BY THE U.S. SUPREME COURT

WAGNON (FORMERLY RICHARDS) V. PRAIRIE BAND POTAWATOMI NATION (NO. 04-631) – On December 6, 2005, the Supreme Court issued a very disappointing decision in *Wagnon v. Prairie Band Potawatomi Nation.* In this extremely important case for tribal taxing authority, the Tenth Circuit had held that state taxation of motor fuel is precluded where the Tribe 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."

In the majority opinion (7-2) written by Justice Thomas, the Supreme Court reversed the Tenth Circuit ruling and held that because the Kansas tax is a non-discriminatory tax imposed on the off-reservation receipt of motor fuel by a non-Indian fuel distributor, the tax does not implicate tribal sovereignty and is a valid tax. Justice Thomas began his analysis by noting that "under our Indian tax immunity cases, the 'who' and the 'where' of the challenged tax have significant consequences." The decision upheld the Kansas tax because the state law places the duty to pay the tax on the fuel distributor, a non-Indian located off-reservation, and because the tax was imposed on the distributor's receipt of fuel off the reservation. The Court rejected the argument that it should apply the *White Mountain v. Bracker* balancing test, reasoning that this was a purely off-reservation tax that does not implicate tribal sovereignty. The Court declined to look beyond formal statutory placement of the tax at the actual consequences of dual taxation, finding this was "ultimately a complaint about the downstream consequences of the Kansas tax." Finally, the Court rejected the argument that the tax was discriminatory because it exempted from taxation fuel delivered to other sovereigns (including States and foreign countries), concluding that Kansas provides roads services to the Nation that it does not provide to those other sovereigns.

Justice Ginsburg wrote a lengthy dissent joined by Justice Kennedy. In her view, even if the legal incidence of the tax was on the off-reservation distributor, the relevant taxable event was the sale and delivery of the fuel to the reservation. Because that sale and delivery clearly occurred on the reservation, the validity of the tax should be determined by balancing the federal, state, and tribal interests at stake. Justice Ginsburg would have struck that balance in favor of the Prairie Band because the Tribe was not marketing a tax exemption, but was instead collecting a tax to meet important transportation needs not addressed by the State. She noted that the Court's holding was particularly troubling because it would reduce the likelihood of states and tribes resolving tax disputes through the use of state-tribal tax agreements, which she recognized as "the most beneficial means to resolve conflicts of this order."

The impact of this decision is likely to be limited to motor fuel and tobacco taxes because these are generally the only taxes where the point of collection is shifted up the distribution chain. Many tribes and states have entered into tax agreements or other arrangements on these taxes, so the effects may not be widely felt outside Kansas. However, there is the possibility that some states will read the decision as

new authority to impose taxes on reservations. We are very interested in monitoring the reaction to this case and we urge tribal leaders and attorneys to contact us if conflicts or problems should arise.

In working on this case, the Tribal Supreme Court Project worked closely with the attorneys representing the Prairie Band and attorneys from throughout Indian country, coordinating four tribal amicus briefs on behalf of NCAI, the Intertribal Transportation Alliance, the National Intertribal Tax Alliance, the other Kansas tribes, and more than 30 individual Indian tribes. The Project also worked closely with the Prairie Band in persuading the U.S. Solicitor General's Office to support the Tribe.

WAGNON V. PRAIRIE BAND POTAWATOMI NATION (NO. 04-1740) – On December 12, 2005, the Supreme Court issued a "GVR" in *Wagnon v. Prairie Band Potawatomi Nation* – a case involving whether federal law bars Kansas from refusing to permit the use of motor vehicle registrations and titles (tribal car tags) 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. The Court granted cert, vacated the favorable ruling of the Tenth Circuit, and remanded the case for further consideration in light of its recent decision in *Wagnon (formerly Richards) v. Prairie Band Potawatomi Nation*, No. 04-631 (motor fuel tax case).

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 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.

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:

DOE V. MANN (NO. 05-815) – On December 19, 2005, Mary Doe filed a petition for cert to seek review of the Ninth Circuit decision 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).

PETITIONS FOR WRIT OF CERTIORARI DENIED

PEABODY WESTERN COAL COMPANY V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (NO. 05-353) – On January 23, 2006, the Court declined to review the Ninth Circuit holding that the Equal Employment Opportunity Commission (EEOC) may involuntarily join the Navajo Nation as a defendant under Fed.R.Civ.P. 19 (joinder of necessary parties), despite EEOC's inability to bring direct suit against the Navajo Nation pursuant to Title VII of 1964 Civil Rights Act. The EEOC is prosecuting a claim against Peabody Western Coal for complying with the terms of its mining lease with the Navajo Nation. The lease requires the company to extend a preference in employment to members of the Navajo Nation. This tribal preference in employment is also a requirement under the Navajo Preference in Employment Act.

SKOKOMISH INDIAN TRIBE V. TACOMA PUBLIC UTILITIES (NO. 05-434) – On January 9, 2006, the Court declined to review the Ninth Circuit holding that an Indian tribe does not have a cause of action for money damages under its Treaty with the United States against a non-signatory party. In this case, the Tribe had brought a claim against a municipality alleged to have knowingly and without authorization taken nearly one-half of water flowing through the reservation, resulting in destruction of a substantial portion of the off- and on-reservation treaty-protected fisheries.

WYOMING SAWMILLS, INC. V. U.S. FOREST SERVICE (NO. 04-1175) – On October 3, 2005, the Court declined to review a Tenth Circuit case which held that a 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 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 (NO. 02-6111) -- On June 28, 2005, 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.

On August 28, 2005, the Tribes and the United States filed petitions for rehearing and/or rehearing en banc. NCAI, through the Tribal Supreme Court Project, submitted an amicus brief in support of the petition for rehearing due to the potentially disastrous implications of this decision for all tribal claims. In short, 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. On September 9, 2005, the Second Circuit denied the petition for rehearing. The Cayuga Nation, Seneca Cayuga Nation and the United States will be filing their petitions for a writ certiorari to the Supreme Court on February 3, 2006. The Tribal Supreme Court Project will be assisting in coordinating amicus briefs in support of the petitions.

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 NLRA 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 NLRA, while "traditional" governmental activities are not.

The San Manuel Band of Mission Indians filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit on October 6, 2005. The Tribe's opening brief is due on February 21, 2006. Given the high level of tribal interest in this issue, the Project is assuming a role in coordinating a tribal amicus brief strategy. Under Rule 29 of the DC Circuit rules, the Tribes and tribal organizations can only file one amicus brief in support of the San Manuel Band. The tribal amicus brief is due on March 2, 2006.

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 ("IRA") apply to the Narragansett 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 that 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 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.

NARRAGANSETT TRIBE V. RHODE ISLAND (NO. 04-1155) – 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 which was prepared pro bono by the Nordhaus Law Firm. The First Circuit heard oral arguments on December 6, 2005, and during oral arguments invited the parties to submit supplemental briefing regarding the Supreme Court's opinion in *Wagnon (formerly Richards) v. Prairie Band Potawatomi Nation* handed down earlier that day.

MEANS V. NAVAJO NATION (NO. 01-17489) – 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). On October 12, 2005, Means filed a petition for rehearing and/or rehearing en banc. On December 12, 2005, without additional briefing or argument, the Ninth Circuit filed an amended opinion affirming its earlier opinion.

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 seek review by the Supreme Court.

SMITH V. SALISH KOOTENAI COLLEGE (NO. 03-35306) – On January 10, 2006, an en banc panel of the Ninth Circuit issued its decision holding that the tribal court has civil jurisdiction over a 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 en banc opinion reversed the three-judge panel opinion. The Tribal Supreme Court Project prepared and filed an amicus brief in support of the petition for rehearing en banc, supporting the college and the Tribe's position.

FORD MOTOR CO. V. TODECHEENE (NO. 02-17048) – On January 11, 2005, the Ninth Circuit issued its decision in a case involving 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 U.S. 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 the 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. The case has been fully briefed and awaits a decision from the Ninth Circuit on the petition for rehearing.

U.S. V. BECERRA-GARCIA; U.S. V. TERRY – In *Becerra-Garcia*, the 9th Circuit 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).