# TRIBAL SUPREME COURT PROJECT MEMORANDUM

## AUGUST 24, 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 the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review.

Currently, the Supreme Court stands in recess until the first Monday in October (October 2, 2006) when its new term will begin. At present, the Court has not granted review in any case involving Indian law for the October 2006 Term. However, the Court has granted certiorari in one case of interest to many Indian tribes – *BP America v. Watson* (see below) – a case involving the Mineral Leasing Act and the leasing of federal and Indian lands for development of oil and gas resources. In addition, several significant Indian law cases are pending on petitions for writ of certiorari and have been scheduled for the opening conference of September 25, 2006, including *Morris v. Tanner* (challenging tribal criminal jurisdiction over non-member Indians), *Utah v. Shivwitz Band of Paiute Indians* and *South Dakota v. Department of the Interior* (challenging the authority of Secretary to take land into trust for Indians) (see below).

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/sct/index.html).

## CASES RECENTLY DECIDED BY THE U.S. SUPREME COURT

The Supreme Court stands in recess until Monday, October 2, 2006 and has not issued any recent opinions since *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (No. 04-1084) on February 21, 2006, and *Wagnon v. Prairie Band Potawatomi Nation* (No. 04-631) on December 6, 2005. The opinions and briefs in these cases are available under the 2005 CASES link on the Tribal Supreme Court Project webpage.

## PETITIONS FOR WRIT OF CERTIORARI GRANTED

Currently, no petitions for writ of certiorari have been granted in any Indian law cases. However, the Court has granted review in one case involving the Mineral Leasing Act which of interest to several Indian tribes and is summarized below.

**BP AMERICA V. WATSON (NO. 05-669)** – The question presented in this case is whether the six-year limitations period of 28 U.S.C. 2415(a) (which applies to claims by the United States in an "action for money damages" founded upon a contract) governs the issuance of orders by the Minerals Management Service (MMS) for payment of royalties under oil and gas leases on federal and Indian lands. From 1989 to 1996, Amoco (a predecessor in interest to BP America) extracted coalbed methane gas under various federal leases in the San Juan Basin in New Mexico. Under the Mineral Leasing Act, Amoco was required to pay royalties in the amount of 12.5% of the "amount or value of the production removed or sold from the lease." 30 U.S.C. 226(b)(1)(A). The Interior Department's regulations define the "value of production" to be the "gross proceeds" accruing to the lessee and have prohibited lessees from deducting from their gross proceeds the costs of placing gas in marketable condition. 30 C.F.R. 206.152 (h) and (i).

When the State of New Mexico conducted an audit of Amoco's royalty calculations in 1996, it determined that Amoco had not included in its gross proceeds the cost of conditioning gas for market by removing excess carbon dioxide ($CO_2$), which has no energy content and reduces the value of the gas. After the State sent letters to Amoco concerning that matter, Amoco responded and argued that removal of excess $CO_2$ should not be considered a cost of placing the gas in marketable condition. Based on the State's audit and Amoco's response, MMS issued an order to pay on May 27, 1997, having determined that Amoco erred by excluding the costs of removing excess $CO_2$ from its gross proceeds and ordered Amoco to pay additional royalties of $4,117,607 for the leases and years audited by the State. Because the audit uncovered a "consistent and systematic error in Amoco's accounting, MMS also ordered Amoco to perform a restructured accounting for all of its leases in the San Juan Basin producing coalbed methane for the period January 1989 through August 1996.

BP America seeks review of the decision by the U.S. Court of Appeals for the D.C. Circuit which affirmed the decision of the District Court and the Assistant Secretary of MMS which held that gas produced in the San Juan Basin in New Mexico was not in marketable condition until excess $CO_2$ was removed and rejected BP America's contention that the six-year limitations period of 28 U.S.C. 2415 applies to administrative proceedings. An amicus brief was filed on behalf of the Jicarilla Apache Nation and the Southern Ute Indian Tribe. Oral argument has been scheduled for Wednesday, October 4, 2006.

## PETITIONS FOR A WRIT OF CERTIORARI PENDING

As noted above, petitions for a writ of certiorari have been filed and are pending before the Court in several important Indian law cases:

**SAN CARLOS APACHE TRIBE V. ARIZONA (NO. 06-173)** – On August 1, 2006, the San Carlos Apache Tribe filed a petition for cert seeking review of the decision by the Arizona Supreme Court which held that the Tribe's claims for additional water from the Gila River mainstem are precluded by a 1935 consent decree entered into in federal district court by the United States as trustee for the Tribe. The Arizona Supreme Court found that under the principles of comity, the Tribe must present its defenses to *res judicata* in the federal district court which entered the consent decree.

**MEANS V. NAVAJO NATION (NO. 05-1614)** – 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 Equal Protection component and the Due Process clause of the Fifth Amendment of the U.S. Constitution.

On June 16, 2006, a petition for certiorari was filed in *Means v. Navajo Nation* seeking review of the Ninth Circuit's decision which held 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). The Project is in contact with the attorneys for the Navajo Nation and the United States (which intervened as a defendant at the Ninth Circuit). The United States filed its brief in opposition on August 21, 2006. The Navajo Nation sought and was granted an extension to file its brief in opposition which is now due on September 5, 2006.

**MORRIS V. TANNER (NO. 05-1285) –** On April 6, 2006, a petition for certiorari was filed in *Morris v. Tanner* seeking review of the Ninth Circuit's unpublished memorandum opinion affirming the district court's grant of summary judgment in favor of the Confederated Salish & Kootenai Tribes and its courts based on its published decision in *Means v. Navajo Nation* (see above). The Project worked with the attorneys representing the Tribes and the United States who filed their briefs in opposition on June 9, 2006. On June 16, 2006, the Mountain States Legal Foundation filed an amicus brief in support of the petitioners, arguing that "[t]his case presents this Court with an opportunity to remove the confusion that surrounds this Court's Indian law jurisprudence by declaring that Congress may not subject American citizens to prosecution by tribal courts that are not constrained by the United States Constitution, whether on the basis of race, political affiliation, or for any other reason." The case has been scheduled for conference on September 25, 2006.

**UTAH V. SHIVWITZ BAND OF PAIUTE INDIANS (NO. 05-1160) –** On March 9, 2006, the State of Utah filed its petition for cert to seek review of the U.S. Court of Appeals for the Tenth Circuit decision which upheld the Secretary of the Interior's authority to take land into trust on behalf of Indians and Indian tribes, pursuant to 25 U.S.C. § 465 (§ 5 of the Indian Reorganization Act), rejecting the state's argument that § 5 is an unconstitutional delegation of the legislative power. At present, three Circuits have rejected this argument by various states. *See Carcieri v. Norton* (1st Cir. No. 03-2647); and *South Dakota v. United States Department of the Interior* (8th Cir. 04-2309). The Tribe filed its brief in opposition on May 12, 2006 and the United States' filed its brief in opposition on June 12, 2006. In addition, 15 states joined an amicus brief filed by the States of Connecticut and Rhode Island in support of Utah's petition for cert. The case is now scheduled for conference on September 25, 2006.

**SOUTH DAKOTA V. UNITED STATES (NO. 05-1428) –** On May 8, 2006, the State of South Dakota filed its petition for cert to seek review of the U.S. Court of Appeals for the Eighth Circuit decision which also upheld the Secretary of the Interior's authority to take land into trust on behalf of Indians and Indian tribes. The Eighth Circuit held that 25 U.S.C. § 465 is not an unconstitutional delegation of legislative authority when viewed in the light of statutory goals and the legislative history of the Indian Reorganization Act. The United States filed their brief in opposition which on July 12, 2006, and the case is now scheduled for conference on September 25, 2006. The Project has in contact with the U.S.

Solicitor General's Office in relation to both cases challenging the Secretary's authority to take land into trust.

**MURPHY V. STATE (NO. 05-10787) –** On June 26, 2006, the Supreme Court issued an order requesting that the U.S. Solicitor General submit a brief expressing the views of the United States in a death penalty case arising from a decision of the Oklahoma Court of Criminal Appeals regarding the definition of Indian country. Specifically, the petition for cert asks the Court to review (1) whether an Indian allotment is "Indian country" if mineral interests, but no surface interests, remain under restriction; and (2) whether congressional allotment of tribal lands causes the disestablishment of an Indian reservation and thereby removes all lands within tribal boundaries from the definition of "Indian country" as defined by 18 U.S.C. § 1151(a). According to the petitioner, answers to these questions will resolve not only whether he can be subjected to death penalty, but will define the scope of state criminal jurisdiction over Indian lands that are of critical economic importance to Indian tribes in Oklahoma and elsewhere.

## PETITIONS FOR WRIT OF CERTIORARI DENIED

**SMITH V. SALISH KOOTENAI COLLEGE (NO. 05-10357) –** On June 19, 2006, the Court denied review in *Smith v. Salish Kootenai College* which sought review of a favorable decision issued by an en banc panel of the Ninth Circuit. In *Smith,* the Ninth Circuit held that under the *Montana* test, 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 Tribal Supreme Court Project prepared and filed an amicus brief in support of the petition for rehearing en banc, supporting position of the college and the Tribes. The Project also worked directly with the attorneys representing the college and the Tribes to coordinate the drafting and review of the briefs in opposition to cert.

**MATTAPONI INDIAN TRIBE V. VIRGINIA (NO. 05-1141)** – On June 12, 2006, the Court denied review of the Virginia Supreme Court decision which held that the issues relating to the Mattaponi Indian tribe's treaty arise under state law, not federal law, because the treaty was signed before the American Revolution and not created "under the authority of the United States." Therefore, in applying state common law, the court held that the State of Virginia is immune from suit. In 1677, representatives of colonial Virginia, on behalf of the British Crown, signed a peace treaty with Indian tribes, including the Mattaponi Indian Tribe. In the litigation below, the Mattaponi asserted that the State of Virginia violated the terms of the treaty by authorizing the construction of a reservoir that would encroach on the Tribe's lands and interfere with the Tribe's fishing rights. The question presented to the Court is whether the obligations imposed by an Indian treaty with a prior sovereign should be enforceable as a matter of federal law under the Supremacy Clause. The Tribal Supreme Court Project coordinated the preparation of a tribal amicus brief on behalf of NCAI in support to the petition for cert which was filed on May 10, 2006 with the pro bono assistance of (name of law firm).

**CAYUGA AND SENECA CAYUGA V. NEW YORK (NOS. 05-982 AND 978) –** On May 15, 2006, in a disappointing and somewhat surprising result, the Court denied petitions for cert challenging the decision of the United States Court of Appeals for the Second Circuit to dismiss the land claims of the Cayuga Nation against the State of New York. In its June 2005 decision, relying on the Supreme Court's decision last term in *Sherrill*, the Second Circuit held that the doctrine of laches can be used to bar tribal claims that are "disruptive," even when those claims are for only money damages. 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 had not been commonly applied against tribal claims because of the longstanding legal and practical impediments to tribal enforcement of their rights.

The Second Circuit's 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. The Tribal Supreme Court Project coordinated three tribal amicus briefs in support of the petitions for cert based on our concern about the implications for other tribal claims regarding land, water, or hunting and fishing rights given the Second Circuit's broad and harmful reading of *Sherrill*.

In the wake of the Court's decision to deny cert, it is likely that the laches defense will be asserted more frequently against tribal claims, and tribal attorneys will need to prepare both factual and legal responses to a laches defense. Some tribes will face difficult strategy questions about whether to bring claims now in order to avoid any further delay – or to wait for a more favorable legal climate or relief from Congress. To assist the Tribes, the Project has formed a "Laches Workgroup" comprised of tribal attorneys and law professors who will be developing strategies and coordinating resources in order to effectively rebut the laches defense in pending and future cases.

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

**SAN MANUEL INDIAN BINGO AND CASINO V. NATIONAL LABOR RELATIONS BOARD (NO. 05-1392)** – 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 was filed on March 21, 2006. The Tribal Supreme Court Project, in close coordination with the Tribe's attorneys and attorneys throughout Indian country, has prepared a tribal amicus brief which argues: (1) the Board's new interpretation is inconsistent with the historical context of the NLRA and with established rules that safeguard tribal self-government; and (2) the Board's new construction is unworkable and would, if accepted, abrogate tribal sovereignty. The tribal amicus brief was filed on April 7, 2006. The NLRB filed their response brief on June 5, 2005, and the Tribe filed its reply brief on August 4, 2006. At present, no date for oral argument has been set.

**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. In granting the petition for rehearing, the First Circuit 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. The State filed a petition for rehearing en banc on November 7, 2005.

**NARRAGANSETT TRIBE V. RHODE ISLAND (NO. 04-1155)** – On May 24, 2006, the U.S. Court of Appeals for the First Circuit issued its en banc decision holding that, under the language and intent of the Rhode Island Indian Claims Settlement Act, state officers are authorized to execute a search warrant against the Tribe and to arrest tribal members incident to the enforcement of the State's civil and criminal laws. The Narragansett Tribe's had sought relief in the federal courts 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. The en banc panel reversed the three-judge panel's finding that the State exceeded its authority in imposing a warrant on the Narragansett tribal government, holding that the Tribe's sovereign immunity had been waived by Congress under terms of the Settlement Act.

The Project worked 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 Project is in contact with the attorneys representing the Tribe which has indicated an intention to seek review before the U.S. Supreme Court. The Tribe was granted an extension to file its petition for cert which is now due on September 21, 2006

**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.

## 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).**