TRIBAL SUPREME COURT PROJECT MEMORANDUM

OCTOBER 16, 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.

In an important victory for Indian country, on Tuesday, October 10, 2006, the U.S. Supreme Court declined review in both *Means v. Navajo Nation* and *Morris v. Tanner* – two closely monitored cases which sought review of the Ninth Circuit's favorable decisions which affirmed the authority of Indian tribes to exercise misdemeanor criminal jurisdiction over non-member Indians. The Court has also declined review in *South Dakota v. U.S.* and *Utah v. Shivwitz* – two cases that upheld the Secretary of Interior's authority to take land into trust. For the first time in a number of years there are no Indian law cases that have been accepted by the Court and few likely candidates on the horizon. This is perhaps a result of the work that Tribal leaders, attorneys and the Supreme Court Project have done over the last five years to carefully review tribal law cases and to improve our coordination on certiorari opposition.

In its opening conference, held on Monday, September 25, 2006, the Court did grant review in one case with a relationship to Indian tribes – *Zuni Public School District v. Department of Education* – a case involving federal Impact Aid which may significantly impact funding for school districts within Indian country (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 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

The Court is reviewing two cases which are of interest to Indian tribes and summarized below.

ZUNI PUBLIC SCHOOL DISTRICT V. DEPARTMENT OF EDUCATION (NO. 05-1508) – The Federal Impact Aid Program, 20 U.S.C. § 7709, was enacted to assist local school districts that have a federal lands within the district such Indian Reservations or military bases where they are unable to collect taxes on federal lands. The Impact Aid Program prohibits the State from including these federal payments as part of an impacted district's budget when the State allocates operational funds to the local districts, unless the State's operational funding to districts throughout the State is "equalized" under a formula. If the State's operational funding is determined to be "equalized," the State can reduce operational funding to an impacted district by the amount of the Impact Aid subsidy.

In 1994, Congress established an equalization formula by statute and repealed the equalization formula previously created by the Secretary of Education by regulation. However, in 1996, the Secretary, by regulation, reinstated his repealed and conflicting equalization formula and refused to follow Congress' equalization formula. Under Congress' formula, New Mexico is not "equalized" and the intended beneficiaries receive the Impact Aid. Under the Secretary's formula, New Mexico is deemed "equalized" and the Impact Aid is taken from the impacted districts. The impacted districts are losing approximately $50,000,000 per year in Impact Aid, which include the Zuni Public School District which is located entirely within the Zuni Reservation and the Gallup McKinley School District which incorporates much of the Navajo reservation in New Mexico.

The question presented to the Court in this case is whether the Secretary of Education has the authority to create and impose a formula over the one prescribed by Congress and through this process certify New Mexico's as "equalized," thereby diverting the Impact Aid subsidies to the State and away from school districts which serve Indian reservations. In an en banc ruling, the Tenth Circuit split 6 to 6 on the question, leaving the Secretary's formula in effect. The Petitioners' opening brief is due on November 13, 2006.

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 coal bed 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 coal bed 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 arguments were heard on Wednesday, October 4, 2006.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Petitions for a writ of certiorari have been filed and are pending before the Court in several important Indian law cases:

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.

NAFTALY V. KEWEENAW BAY INDIAN COMMUNITY (NO. 06-429) – On September 21, 2006, the State of Michigan filed a petition for certiorari asking the Court to review the decision of the U.S. Court of Appeals for the Sixth Circuit which held that the State could not tax the fee simple property of the Community or its members with the Reservation under the express terms of their 1854 Treaty with the United States. The Tribe's brief in opposition is due on October 26.

NARRAGANSETT TRIBE V. RHODE ISLAND (NO. 04-1155) – On September 21, 2006, the Narragansett Tribe filed its petition for certiorari asking the Court to review the en banc decision of the U.S. Court of Appeals for the First Circuit which held that, under 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 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. In a sharply divided 4-2 decision, the en banc panel held that the Tribe's sovereign immunity had been waived by Congress under terms of the Settlement Act, and reversed the three-judge panel's finding that the State exceeded its authority in imposing a warrant on the Narragansett tribal government, and. The State's brief in opposition is due October 23, 2006.

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.

PETITIONS FOR WRIT OF CERTIORARI DENIED

MEANS V. NAVAJO NATION (NO. 05-1614) – On Tuesday, October 10, 2006, the Court denied the petition for cert in *Means v. Navajo Nation* which sought review of the Ninth Circuit's decision which held that 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. In *U.S. v. Lara*, the U.S. Supreme Court recently 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.

The Ninth Circuit, relying on *Morton v. Mancari*, 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. The Ninth Circuit 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).

MORRIS V. TANNER (NO. 05-1285) – On Tuesday, October 10, 2006, the Court also denied the petition for certiorari was 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). IN both cases, the Project worked with the attorneys representing the Tribes and the United States in relation to their briefs in opposition. This is an important victory for Indian tribes. The Mountain States Legal Foundation had 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."

UTAH V. SHIVWITZ BAND OF PAIUTE INDIANS (NO. 05-1160) – On October 2, 2006, the Court denied the State of Utah's petition for cert to review of the U.S. Court of Appeals for the Tenth Circuit decision to uphold 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). The Tenth Circuit rejected the state's argument that § 5 is an unconstitutional delegation of the legislative power. Fifteen states had joined an amicus brief filed by the States of Connecticut and Rhode Island in support of Utah's petition for cert. At present, there is only one remaining challenge in the Circuit Courts involving the authority of the Secretary to take land into trust. *See Carcieri v. Norton* (1st Cir. No. 03-2647).

SOUTH DAKOTA V. UNITED STATES (NO. 05-1428) – On October 2, 2006, the Court also denied the State of South Dakota's petition for cert to review of the U.S. Court of Appeals for the Eighth Circuit decision which 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.

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.

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 and the 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 NLRB filed their response brief on June 5, 2005, and the Tribe filed its reply brief on August 4, 2006. The court has scheduled oral arguments for November 6, 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 First Circuit issued a new panel opinion in which the court again rejected the state's argument that the IRA does not apply to any tribe that was not "now under federal jurisdiction" in 1934. The court also rejected other constitutional arguments against the Secretary's land to trust authority.

The Supreme Court Project coordinated the writing of amicus briefs in the case with the attorneys for the Narragansett Indian Tribe and the United States. 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 Secretary's land-to-trust authority. The State filed a petition for rehearing en banc on November 7, 2005, but, the court has not taken any action on the petition.

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 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 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, 202-255-7042 (jdossett@ncai.org) or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 (richardg@narf.org).