TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 15, 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.

On December 5, 2006, the U.S. Court of Appeals for the First Circuit unexpectedly granted the State of Rhode Island's petition for rehearing en banc in *Carcieri v. Norton (Kempthorne),* a case which began as a broad challenge to the Secretary's authority to take land into trust on behalf of Indians and Indian tribes. However, on appeal, this case has narrowed to two issues: (1) the State argues that the Indian Reorganization Act applies only to tribes that were "now under federal recognition" in 1934, and that the Narragansett Tribe and any other tribe recognized after 1934 is not eligible to take land into trust or to enjoy any other benefit of the IRA; and (2) the State also argues that the trust land must be restricted to preserve Rhode Island's civil and criminal laws and jurisdiction under the Rhode Island Settlement Act although the land is outside the settlement area. The Tribal Supreme Court Project has coordinated with the attorneys for the Narragansett Indian Tribe and the United States throughout the appeals process. The Project prepared and filed amicus briefs previously in this case on behalf of NCAI and a number of individual Indian tribes, and we are preparing an amicus brief in support of the United States for this rehearing en banc which is due on December 27, 2006. The Project has also secured time from the United States for oral argument which is scheduled for January 9, 2007. Significant tribal interests are at stake, yet no Indian tribe is a party to the litigation – it is solely between the State of Rhode Island and the Secretary of the Interior.

As mentioned in last month's update, for the first time in a number of years, the U.S. Supreme Court has not accepted any Indian law cases for review, and there are few likely candidates on the horizon. Nonetheless, the Project remains very busy, monitoring numerous cases at various stages of appeal within both state and federal courts and, when appropriate, 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 Indian law opinions this Term. However, the Court has issued one Indian law-related opinion:

BP AMERICA V. WATSON (NO. 05-669) – On Monday, December 11, 2006, the Supreme Court issued a unanimous opinion (7-0) written by Justice Alito which ruled against the oil and gas industry over how many years into the past the United States can reach to collect money for oil and gas leases on federal and Indian lands. The Court rejected the industry's argument that 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 payment orders by the Department of Interior's Minerals Management Service (MMS) for assessing royalty underpayments. The Court held that the "6-year statute of limitations in §2415(a) applies only to court actions and not to the administrative proceedings in this case." According to the Court, the industry's argument is "insufficient to overcome the plain meaning" of federal law. Chief Justice Roberts and Justice Breyer did not take part in the consideration or decision of the case.

The Jicarilla Apache Nation and the Southern Ute Indian Tribe filed an amicus brief in support of the United States which was joined by the State of New Mexico and the State of California. Although this was primarily a statutory construction case, the opinion does include good language about the trust duty of the United States to Indian tribes on oil and gas matters. Specifically, the Court recognized "Congress' exhortation that the Secretary of the Interior 'aggressively carry out his trust responsibility in the administration of Indian oil and gas,'" citing 30 U.S.C. §1701(a)(4).

PETITIONS FOR WRIT OF CERTIORARI GRANTED

The Court is reviewing one Indian law-related case which is of interest to Indian tribes and is 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 federal lands within the district such as 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 that 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 was filed on November 13, 2006. Oral argument is scheduled for January 10, 2007.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

NEW MEXICO V. ROMERO (06-765) – On November 28, 2006, the State of New Mexico filed a petition for cert seeking review of the decision by the New Mexico Supreme Court which held that the State lacked criminal jurisdiction to prosecute Indians for crimes committed on private, fees lands within exterior boundaries of Pueblos. Under the "Questions Presented" the State of New Mexico posits whether the New Mexico Supreme Court decision creates "an intolerable jurisdictional quagmire where no federal or state criminal jurisdiction may be invoked because certain lands within the original exterior boundaries of a Pueblo land grant are effectively prosecution-free zones." The brief in opposition is due January 3, 2007.

BURRELL V. ARMIJO (NO. 06-721) – On November 13, 2006, non-Indian lessees filed a petition for cert seeking review of the decision by the U.S. Court of Appeals for the Tenth Circuit which held that the Pueblo of Santa Ana was entitled to sovereign immunity in a lawsuit alleging racial discrimination in violation of the Indian Civil Rights Act and 42 U.S.C. §§ 1981, 1983 and 1985. The brief in opposition is due December 26, 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. Respondents filed their briefs in opposition on October 5, 2006.

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 not only resolve whether he can be subjected to the 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

DELAWARE NATION V. PENNSYLVANNIA (NO. 06-364) -- On November 27, 2006, the Court denied review of a decision by the U.S. Court of Appeals for the Third Circuit which affirmed the dismissal of

the Deleware Nation's complaint in their effort to regain possession of 315 acres of land based on two sources: (1) unextinguished fee title as evidenced by two land patents from the proprietaries of colonial Pennsylvania to one of their chiefs (as to whom Delaware Nation is the sole legitimate heir and successor in interest); and (2) unextinguished aboriginal title, having occupied the land from time immemorial.

NARRAGANSETT TRIBE V. RHODE ISLAND (NO. 04-1155) – On November 27, 2006, the Court denied review of 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 Narragansett 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.

NAFTALY V. KEWEENAW BAY INDIAN COMMUNITY (NO. 06-429) – On November 27, 2006, the Court denied review of the decision of the U.S. Court of Appeals for the Sixth Circuit which held that the State of Michigan could not tax the fee simple property of the Community or its members within the Reservation under the express terms of their 1854 Treaty with the United States.

MEANS V. NAVAJO NATION (NO. 05-1614) – On 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) – Also, on October 10, 2006, the Court also denied the petition for certiorari in *Morris v. Tanner* which sought 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 the decision by the U.S. Court of Appeals for the Tenth Circuit 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 the decision of the U.S. Court of Appeals for the Eighth Circuit 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.

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 November 2, 2006, the U.S. Court of Appeals for the D.C. Circuit heard oral argument in *San Manuel Indian Bingo and Casino v. NLRB*, an extremely important case in which the San Manuel Indian Tribe is challenging the unprecedented extension of the National Labor Relations Act (NLRA) to tribal businesses located on tribal lands. The NLRA generally exempts governmental employers from the provisions of the NLRA on collective bargaining, etc. In its September 30, 2005, decision and order, the National Labor Relations Board departed from its 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 Tribal Supreme Court Project, in close coordination with the Tribe's attorneys and attorneys throughout Indian country, 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 court should issue its opinion early next year.

CARCIERI V. NORTON (NO. 03-2647) – On December 5, 2006, the U.S. Court of Appeals for the First Circuit unexpectedly granted the State of Rhode Island's petition for rehearing en banc in *Carcieri v. Norton (Kempthorne)*, a case which began as a broad challenge to the Secretary's authority to take land into trust on behalf of Indians and Indian tribes. However, on appeal, this case has narrowed to two issues: (1) the State argues that the Indian Reorganization Act applies only to tribes that were "now under federal recognition" in 1934, and that the Narragansett Tribe and any other tribe recognized after 1934 is not eligible to take land into trust or to enjoy any other benefit of the IRA; and (2) the State also argues that the trust land must be restricted to preserve Rhode Island's civil and criminal laws and jurisdiction under the Rhode Island Settlement Act although the land is outside the settlement area.

In its December 5th Order, the First Circuit withdrew the September 13, 2005, opinion of the three-judge panel which rejected the State's argument that the IRA does not apply to any tribe that was not "now under federal jurisdiction" in 1934. The panel had also rejected the other constitutional arguments against the Secretary's land to trust authority as well as the application of state criminal and civil jurisdiction over

newly acquired trust lands. The Tribal Supreme Court Project has been in contact and has coordinated strategy with the attorneys for the Narragansett Indian Tribe and the United States throughout the appeals process. The Project prepared and filed amicus briefs previously in this case on behalf of NCAI and a number of individual Indian tribes, and we are preparing an amicus brief in support of the United States for this rehearing en banc which is due on December 27, 2006. The Project has also secured time from the United States for oral argument which is scheduled for January 9, 2007.

Highlighting the significance of this case, a group of Attorney Generals representing ten states previously submitted an amicus brief making arguments that could affect many tribes. This is clearly part of a coordinated strategy by these States to mount more significant legal challenges to the acquisition of trust land for the benefit of Indians and Indian tribes. Significant tribal interests are at stake, yet no Indian tribe is a party to the litigation – it is solely between the State of Rhode Island and the Secretary of the Interior.

GROS VENTRE TRIBE V. UNITED STATES (NO. 04-36167) – On November 13, 2006, the Ninth Circuit issued its opinion in a case which involves a breach of trust claim by the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation against the United States for permitting the operation of two cyanide heap-leach gold mines located adjacent to the Reservation that have had and continue to have devastating impacts on the Tribes' water and cultural resources. According to the three-judge panel opinion, Tribal claims for breach of trust, which arise from the treaties signed decades ago, must be raised in the context of other federal statutes. This is potentially very damaging as precedent. Further, the panel held that even if the Tribes do have a common law trust obligation that could be tied to a statutorily mandated duty, there is no affirmative duty here requiring the federal agency to regulate third parties to protect what the Court termed to be "non-Tribal" resources. The Tribal Supreme Court Project was contacted by the attorneys for the Tribes and is now coordinating a tribal amicus strategy in support of their petition for rehearing en banc by the Ninth Circuit which is due December 28, 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 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 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).