

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

MARCH 20, 2007

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.

The Project remains very busy developing strategy and coordinating resources in a number of recent Indian law cases where review by the U.S. Supreme Court has been sought or is being contemplated. In *Wright v. Colville Tribal Enterprise Corporation*, a non-Indian contractor has filed a petition for cert seeking review of a decision by the Washington Supreme Court reversing the lower appellate court and holding that tribal sovereign immunity protects a tribal governmental corporation from suit for activities outside the Reservation unless the Tribe or Congress have clearly and unequivocally waived its immunity. The Project is in contact with the attorneys representing the Tribe to assist with preparation of the brief in opposition which is due April 9, 2007. In *Doe v. Kamehameha Schools*, a non-native Hawaiian student has filed a petition for cert seeking review of the 8 to 7 decision by an en banc panel of the U.S. Circuit Court of Appeals for the Ninth Circuit which reversed a 3-judge panel decision and held that the admissions policy of the Kamehameha Schools, a private school established through a charitable trust for the education of Native Hawaiians, does not constitute unlawful race discrimination under 42 U.S.C. § 1981. The Native American Rights Fund prepared and filed an amicus brief on behalf of the National Indian Education Association in support of the petition for rehearing en banc in the Ninth Circuit.

On March 8, 2007, the Tribal Supreme Court Project hosted a conference call in response to a request by the Agua Caliente Band of Cahuilla Indians and its attorneys for assistance in determining whether the Tribe should file a petition for writ of certiorari to the U.S. Supreme Court to review the California Supreme Court's 4-3 decision in *Agua Caliente v. Superior Court of Sacramento County and Fair Political Practices Commission* (state's exercise of state sovereignty in the form of regulating its electoral process is protected under the Tenth Amendment and the guarantee clause of the U.S. Constitution and trumps doctrine of tribal sovereign immunity). As a result of the conference call, the Project is preparing a legal memorandum summarizing its findings, conclusions and recommendations. On March 2, 2007, the Project hosted a conference call in response to a request by the San Manuel Band of Mission Indians and its attorneys for assistance in determining whether to file a petition for rehearing/rehearing en banc asking the DC Circuit to review a disappointing decision by the 3-judge panel in *San Manuel v. National Labor Relations Board* (National Labor Relations Board may apply the National Labor Relations Act to employment at a tribal casino located on tribal lands within the Reservation). The Tribal Amicus Workgroup, in coordination with the Tribe and its attorneys, prepared a Draft Points for Consideration to outline the legal arguments and strategy for the petition for rehearing.

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) – On January 9, 2007, the Supreme Court heard oral arguments in a case involving the Federal Impact Aid Program, 20 U.S.C. § 7709, which was enacted by Congress 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.

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:

WRIGHT V. COLVILLE TRIBAL ENTERPRISE CORPORATION (NO. 06-1229) – On March 7, 2007, a non-Indian contractor filed a petition for cert seeking review of a decision by the Washington Supreme Court reversing the lower appellate court and holding that tribal sovereign immunity protects a tribal governmental corporation from suit for activities outside the Reservation unless the Tribe or Congress have clearly and unequivocally waived its immunity. The Tribe's brief in opposition is due April 9, 2007

DOE V. KAMEHAMEHA SCHOOLS (NO. 06-1202) – On March 1, 2007, a non-native Hawaiian student filed a petition for cert seeking review of the decision by an en banc panel of the U.S. Circuit Court of Appeals for the Ninth Circuit which held that the admissions policy of the Kamehameha Schools, a private school established through a charitable trust for the education of Native Hawaiians, does not constitute unlawful race discrimination under 42 U.S.C. § 1981. The Kamehameha Schools filed their brief in opposition on March 16, 2007.

DAVIDSON V. MOHEGAN TRIBAL GAMING AUTHORITY (NO. 06-9344) – On February 3, 2007, a former casino employee filed a petition for cert seeking review of the decision of the Appellate Court of Connecticut which affirmed the judgment of the trial court which dismissed claims against the Mohegan Tribal Gaming Authority and the Mohegan Sun Casino for lack of subject matter jurisdiction based on the Tribe's sovereign immunity from suit. On March 9, 2007, the Tribe filed a waiver of right to respond.

COBELL V. KEMPTHORNE (NO. 06-867) (INJUNCTION) – On December 19, 2006, attorneys for plaintiffs in the *Cobell* class action lawsuit filed a petition for cert seeking review of the decision of the U.S. Circuit Court of Appeals for the D.C. Circuit which reversed the judgment of the federal district court granting plaintiffs' requested injunctive relief, ordering the Department of Interior to disconnect many of its computers from the internet and internal computer networks in order to protect the integrity of the individual Indian trust data on Interior's computers. On February 21, 2007, the United States filed their brief in opposition. The briefs were distributed for conference on March 23, 2007.

COBELL V. KEMPTHORNE (NO. 06-868) (RECUSAL) – On December 19, 2006, attorneys for plaintiffs in the *Cobell* class action lawsuit filed a petition for cert seeking review of the decision of the U.S. Circuit Court of Appeals for the D.C. Circuit which directed the chief judge for the U.S. District Court for the District of Columbia to reassign the case to a different judge based on evidence to an objective observer "that the district court's professed hostility to Interior has become 'so extreme so as to display a clear

inability to render fair judgment.” On February 21, 2007, the United States filed their brief in opposition. The briefs were distributed for conference on March 23, 2007.

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

NEW MEXICO V. ROMERO (NO. 06-765) – On March 5, 2007, the Court denied review of a 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. The State of New Mexico had argued that the decision by the state’s highest court created “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.”

BURGESS V. WATTERS (NO. 06-8943) – On February 20, 2007, the Court denied review of a decision by the U.S. Court of Appeals for the Seventh Circuit in a case involving the involuntary commitment of Burgess, an enrolled tribal member, to a state mental health facility under the Wisconsin Sexually Violent Person Commitment Statute. Based on the Supreme Court’s distinction between “civil regulatory” versus “civil adjudicatory” authority in *Bryan v. Itasca County*, the Seventh Circuit held that the Wisconsin Supreme Court’s interpretation – that the Wisconsin Sexually Violent Person Commitment Statute falls within the state’s civil adjudicatory authority under P.L. 280 – is reasonable.

ALLEN V. GOLD COUNTRY CASINO (NO. 06-8562) – On February 20, 2007, the Court denied review of a decision of the U.S. Court of Appeals for the Ninth Circuit which affirmed the judgment of the federal district court which dismissed claims by a former casino employee against the Tyme Maidu Tribe of the Berry Creek Rancheria and its Gold Country Casino, holding that the casino is an arm of the Tribe and is entitled to sovereign immunity from suit.

BURRELL V. ARMIJO (NO. 06-721) – On January 16, 2007, the Court denied 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 brought by non-Indian lessees alleging racial discrimination in violation of the Indian Civil Rights Act and 42 U.S.C. §§ 1981, 1983 and 1985.

SAN CARLOS APACHE TRIBE V. ARIZONA (NO. 06-173) – On January 8, 2007, the Court denied 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.

DELAWARE NATION V. PENNSYLVANIA (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 Delaware 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 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 February 9, 2007, the U.S. Court of Appeals for the DC Circuit, in an extremely disappointing opinion written by Circuit Judge Janice Rogers Brown, denied the San Manuel Tribe's petition for review and held that the National Labor Relations Board may apply the National Labor Relations Act (NLRA) to employment at a tribal casino located on tribal lands within the Reservation. In reaching its determination, the DC Circuit made two broad and potentially damaging statements. First, in response to the Tribe's argument that ambiguities in a federal statute must be resolved in favor of Indians, the court found that this Indian canon of statutory construction only applies to laws "enacted specifically for the benefit of Indians or for the regulation of Indian affairs" and not for laws of "general applicability" such as the NLRA. Second, the court characterized tribal sovereignty as existing in American law "as a matter of respect for Indian communities ... [recognizing] the independence of these communities as regards internal affairs, thereby giving them latitude to maintain traditional customs and practices." In other words, the court views tribal sovereignty – not as an inherent power of an Indian tribe to govern – but merely as a means for Indian communities to preserve Indian culture. The Project continues to work closely with the Tribe and its attorneys in anticipation of a petition for rehearing or rehearing en banc, which is due March 26, 2007.

CARCIERI V. NORTON (NO. 03-2647) – On January 9, 2007, an en banc panel of the U.S. Court of Appeals for the First Circuit heard oral arguments in *Carcieri v. 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. The First Circuit focused on two issues: (1) whether the Rhode Island Settlement Act implicitly precludes the acquisition of any additional new trust lands by the Secretary in the State of Rhode Island, or implicitly restricts any such acquisition of trust lands to be subject to state civil and criminal laws and jurisdiction; and (2) whether section 5 of the Indian Reorganization Act applies only to tribes that were

“recognized Indian tribes now under federal recognition” in 1934, thus excluding the Narragansett Tribe and any other tribe administratively recognized after 1934 from the benefits of the IRA, including eligibility to have land taken into trust.

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 a supplemental brief in this case on behalf of NCAI and a number of individual Indian tribes. Ian Gershengorn, Jenner & Block, provided pro bono counsel on behalf of amici and effectively argued the case before the en banc panel of the First Circuit. 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 U.S. Court of Appeals for the Ninth Circuit issued its opinion in a case that 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 Project was contacted by the attorneys for the Tribes who assisted in the preparation of the petition for rehearing/rehearing en banc, and is now coordinating an amicus strategy in support of the Tribes’ petition. The United States filed its response to the petition for rehearing on January 29, 2007.

AGUA CALIENTE V. SUPERIOR COURT (NO. S123832) – On March 1, 2007, the California Supreme Court denied the Tribe’s petition for rehearing to review a 4 to 3 decision in which the court resolved the question of whether the Fair Political Practices Commission, a state agency with enforcement powers, can file a lawsuit against the Agua Caliente Band of Cahuilla Indians in state court for the Tribe’s alleged failure to comply with the reporting requirements for campaign contributions under state law governing state elections. The Tribe argued that, as a federally recognized Indian tribe, it was immune from suit under the doctrine of tribal sovereign immunity. The California Supreme Court held that, “[i]n light of evolving United States Supreme Court precedent and the constitutionally significant importance of the state’s ability to provide a transparent election process with rules that apply equally to all parties who enter the electoral fray,” the Tribe is not entitled to raise the defense of tribal sovereign immunity under the specific facts and narrow circumstances present in this case. The Court found that, although the doctrine of tribal sovereign immunity has long-standing application under federal law, the state’s exercise of state sovereignty in the form of regulating its electoral process is protected under the Tenth Amendment and the guarantee clause of the U.S. Constitution. On March 1, 2007, the court denied the Tribe’s petition for rehearing. The Tribal Supreme Court Project continues to work with the Tribe and its attorneys in relation to a petition for a writ of certiorari.

FORD MOTOR CO. V. TODECHEENE (NO. 02-17048) – On February 1, 2007, in response to a petition for rehearing filed by the Navajo Nation, the U.S. Court of Appeals for the Ninth Circuit found that, based on

the recent en banc opinion in *Smith v. Salish Kootenai College*, they “cannot say that the tribal courts in this case plainly lack jurisdiction over the dispute among Ford Motor Company, the Todecheenes and the Navajo Nation.” 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 in U.S. District Court challenging the Navajo court’s jurisdiction. The Ninth Circuit remanded the case to the district court with instructions to stay proceedings pending exhaustion of tribal court proceedings, including appellate review.

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).