TRIBAL SUPREME COURT PROJECT MEMORANDUM

JUNE 5, 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.

To date, no Indian law cases have been accepted by the U.S. Supreme Court for review during this term. Nonetheless, 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. On May 11, 2007, in a surprising development, the petition for cert in *Doe v. Kamehameha Schools* (06-1202) was withdrawn by agreement of the parties. Although the terms of the settlement agreement will not be disclosed, the agreement does leave in place the 8-to-7 decision of an en banc panel of the Ninth Circuit which held that the admissions policy of the Kamehameha Schools (which gives preference to Native Hawaiians) does not constitute unlawful race discrimination under 42 U.S.C. § 1981. The Project was closely monitoring this case based on the belief that this petition for cert had a reasonable chance of being granted, having potential implications for the racial-versus-political distinction drawn by the Court in *Morton v. Mancari* (1974) in relation to American Indians and Alaska Natives. The Court had held over the petition for cert for three separate conferences (perhaps awaiting the issuance of the opinions in the two school racial-integration cases argued in December which have not yet been issued) and were scheduled to consider the petition a fourth time when they were notified by the parties of the settlement agreement.

In a similar development in another closely monitored case, the parties in *Wright v. Colville Tribal Enterprises Corporation* (06-1229) reached a settlement agreement and filed a stipulation to withdraw the petition for cert which was subsequently dismissed on May 11, 2007. The facts in *Wright* raised concerns regarding the doctrine of tribal sovereign immunity since the case involved a lawsuit by a non-Indian former employee who alleged racial discrimination and harassment under state law against a tribally-chartered corporation doing business off-the-Reservation. The settlement agreement leaves in place the decision by the Washington Supreme Court which holds that a tribal corporation, as an arm of the tribal government, is entitled to the defense of tribal sovereign immunity in a lawsuit involving its activities outside the Reservation unless the Tribe or Congress has clearly and unequivocally waived its immunity.

On May 10, 2007, the Tribal Supreme Court Project hosted a conference call to discuss a potential petition for cert in *Gros Ventre Tribes v. U.S.*, 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 Ninth Circuit 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. 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 petition for cert, if filed, is currently due on June 14, 2007.

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 two Indian law-related opinions:

ZUNI PUBLIC SCHOOL DISTRICT V. DEPARTMENT OF EDUCATION (NO. 05-1508) – On April 17, 2007, the Court issued a 5-to-4 decision that ruled against the Zuni Public School District (located entirely within the Zuni Reservation) and the Gallup McKinley School District (incorporates much of the Navajo reservation in New Mexico). This case involved statutory interpretation of 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 a 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. In 1994, Congress established an equalization formula by statute which was subsequently interpreted and implemented the Secretary of Education by regulation. Under the Secretary's interpretation, New Mexico has been deemed "equalized" and the Impact Aid is taken from the impacted districts which are losing approximately $50,000,000 per year in funding.

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 as "equalized," thereby diverting the Impact Aid subsidies to the State and away from school districts that serve Indian reservations. In the majority opinion written by Justice Breyer, the Court upheld the Secretary's interpretation, finding that, based on the legislative history and the purpose of the statute, the language of the equalization formula is ambiguous. Based on that finding, the majority held that the Secretary's interpretation of the equalization formula is reasonable and entitled to *Chevron* deference. In a strong dissent, Justice Scalia, joined by Chief Justice Roberts, and Justices Thomas and Souter, argued that, under the plain language doctrine, the Court is required to adhere to strict interpretation of the text.

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 owed by 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

At present, the Court has not granted review for any Indian law, or Indian law-related case.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

LEBEAU V. UNITED STATES (NO. 06-1427) – On April 24, 2007, lineal descendants of the Sisseton-Wahpeton Tribe of Mississippi filed a petition for cert seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which denied their claims for damages against the Secretary of the Interior for the unreasonable delay in distributing judgment funds as required by the 1972 Distribution Act to which the lineal descendants are beneficiaries. The Federal Circuit held that when Congress passed the 1998 amendments to the Distribution Act, the unpaid shares of the lineal descendents were reallocated and any liability of the United States was extinguished because the lineal descendants never acquired vested rights in their share of those judgment funds. The response of the United States is due May 29, 2007.

PETITIONS FOR WRIT OF CERTIORARI DENIED

MURPHY V. STATE (NO. 05-10787) – On June 4, 2007, the Court denied review of the decision of the Oklahoma Court of Criminal Appeals in a death penalty case regarding the definition of Indian country, specifically: (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). The United States filed an amicus brief in opposition to the petition for cert.

WRIGHT V. COLVILLE TRIBAL ENTERPRISE CORPORATION (NO. 06-1229) – On May 11, 2007, the Court dismissed this case pursuant to a stipulated agreement by the parties to withdraw the petition for cert pursuant to Rule 46. This case involved a lawsuit by a non-Indian employee who alleged racial discrimination and harassment against a tribally chartered corporation doing business off-the-Reservation. The settlement agreement leaves in place the decision by the Washington Supreme Court which holds that tribal sovereign immunity protects a tribal corporation from a lawsuit for its activities arising outside the Reservation unless the Tribe or Congress has clearly and unequivocally waived its immunity.

DOE V. KAMEHAMEHA SCHOOLS (NO. 06-1202) – On May 11, 2007, the petition for cert in *Doe v. Kamehameha Schools* was withdrawn by agreement of the parties pursuant to Rule 46. The Project was concerned that this petition for cert had a reasonable chance of being granted. In fact, the Court had held over the petition for three separate conferences to consider whether to grant review and were scheduled to consider it a fourth time when they were notified by the parties of their stipulated agreement. Although the terms of the settlement agreement will not be disclosed, the agreement does leave in place the 8-to-7 decision of an en banc panel of the Ninth Circuit which held that the admissions policy of the Kamehameha Schools (which gives preference to Native Hawaiians) does not constitute unlawful race discrimination under 42 U.S.C. § 1981.

DAVIDSON V. MOHEGAN TRIBAL GAMING AUTHORITY (NO. 06-9344) – On April 16, 2007, the Court denied review of the decision of the Appellate Court of Connecticut, which affirmed the judgment of the trial court which dismissed a former employee's 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.

COBELL V. KEMPTHORNE (NO. 06-867) (INJUNCTION) – On March 26, 2007, the Court denied 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 and 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.

COBELL V. KEMPTHORNE (NO. 06-868) (RECUSAL) – On March 26, 2007, the Court denied 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 Colombia 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.'"

NEW MEXICO V. ROMERO (NO. 06-765) – On March 5, 2007, the Court denied 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 fee 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 the 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 the 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. PENNSYLVANNIA (NO. 06-364) -- On November 27, 2006, the Court denied review of the 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 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 seeking review of 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 seeking review of 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) – In response to the April 2, 2007, order issued by the U.S. Court of Appeals for the DC Circuit, the United States and intervenor, UNITE-HERE, filed their response briefs to the Tribe's petition for rehearing en banc on April 24, 2007. The Tribe is asking for rehearing by a panel of all ten judges to review the February 9, 2007, 3-judge panel decision written by Judge Janice Rogers Brown which held that a gaming enterprise, owned and operated by the San Manuel Band, was an "employer" within the scope of the National Labor Relations Act ("NLRA") and therefore must not interfere with a union's efforts to organize tribal casino employees or other union activity protected by the NLRA. In reaching this holding, the court distinguished "commercial" activities conducted by tribal governments from their traditional "governmental" activities, specifically finding that application of the NLRA to tribal commercial activities – in this case, gaming – would not impair tribal sovereignty.

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 that 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 May 10, 2007, the Tribal Supreme Court Project hosted a conference call to discuss a potential petition for cert in *Gros Ventre Tribes v. U.S.,* 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 Ninth Circuit 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. 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 petition for cert, if filed, is currently due on June 14, 2007.

AGUA CALIENTE V. SUPERIOR COURT (NO. S123832) – On May 9, 2007, Justice Kennedy granted the Tribe's motion for extension of time to file its petition for cert from May 29 to July 28, 2007. The Tribe may seek review of the December 21, 2006, California Supreme Court's 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.

FORD MOTOR CO. V. TODECHEENE (NO. 02-17048) – On June 4, 2007, the U.S. Court of Appeals for the Ninth Circuit issued an order amending the order of February 1, 2007. This case involves the scope of tribal civil jurisdiction over a products liability action arising out of a roll-over accident involving a police car that resulted in the death of a tribal police officer 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 the amended order, the Ninth Circuit recognized that the tribal court did not "plainly" lack jurisdiction and the appeal would be stayed until Ford Motor Company exhausts it appeals in the tribal courts. The three judge panel of the Ninth Circuit retained jurisdiction over the appeal.

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).