TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 30, 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.

On Thursday, June 28, 2007, Chief Justice Roberts announced that "the Court has acted on all cases submitted for decision this Term [and the] Court will be in recess from today until the first Monday in October, 2007, at which time the October 2006 Term will be adjourned and the October 2007 Term of the Court will begin as provided by law." During the 2006 Term, the Court did not accept any Indian law cases for review. However, two Indian law-related cases were reviewed and decided by the Court (see *Zuni Public School District v. Department of Education* and *BP America v. Burton* below). In all, 29 petitions for cert were filed in Indian law cases this term: 25 petitions were denied review; two petitions were dismissed under settlement agreements pursuant to Rule 46; and two petitions are being carried over to the October 2007 Term. Most of the petitions for cert in Indian law cases filed this term can be grouped into one of five subject matter areas: tribal sovereign immunity (7 petitions); issues related to criminal jurisdiction (5 petitions); rights related to Indian lands (4 petitions); the trust responsibility of the United States (3 petitions); and issues related to taxing authority on-reservation (2 petitions).

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 July 20, 2007, in an important victory for Indian tribes, the en banc panel of the U.S. Court of Appeals for the First Circuit issued its opinion 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. In a well-written, well-reasoned opinion, the First Circuit upheld the Secretary's authority to take land into trust on behalf of the Narragansett Indian Tribe and rejected all of the State's constitutional and statutory arguments. The Tribal Supreme Court Project worked closely with the attorneys for the Tribe and the United States throughout the appeals process. The Project prepared and filed two amicus briefs and a supplemental brief in this case on behalf of NCAI and over 40 individual Indian tribes. Highlighting the significance of this case, a group of Attorney Generals representing ten states had submitted an amicus brief in support of the State of Rhode Island making arguments that would negatively impact many tribes. The states' amicus brief is clearly part of a larger 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.

In another development, on July 14, 2007, the Agua Caliente Band of Cahuilla Indians announced that it had reached a settlement agreement with the California Fair Political Practices Commission (FPPC) wherein the Tribe agreed not to seek review of the California Supreme Court's 4-to-3 decision in which the 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. The Tribal Supreme Court Project worked closely with the Tribe and its attorneys on these issues, hosting a conference call earlier this year to discuss the potential implications of a petition for cert in this case.

Finally, in an extremely disappointing development, on June 8, 2007, the U.S. Court of Appeals for the DC Circuit issued orders denying the San Manuel Tribe's petitions for rehearing and rehearing en banc in *San Manuel Indian Bingo and Casino v. National Labor Relations Board* , leaving in place the 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 DC Circuit 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.

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 did not issue any Indian law opinions during the October 2006 Term. However, the Court did issue 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

The Court did not grant review for any Indian law case during the October 2006 Term.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

CATAWBA INDIAN TRIBE V. SOUTH CAROLINA (NO. 07-69) – On July 16, 2007, the Catawba Indian Tribe filed a petition for cert seeking review of a decision by the South Carolina Supreme Court which reversed the lower circuit court's grant of summary judgment in favor of the Tribe on the issue of whether the Tribe has a present and continuing right to operate video poker and other electronic devices on its Reservation under the terms of the Settlement Act and the state law. The South Carolina Supreme Court held that the language of the Settlement Act authorizing the Tribe to permit or operate video poker only "to the same extent the devices are authorized by state law" will bind the Tribe to any future state legislation such as the statewide ban on the devices. The brief in opposition is due August 17, 2007.

GROS VENTRE TRIBES V. U.S. (NO. 06-1672) – On June 14, 2007, the Gros Ventre and Assiniboine Tribes of the Fort Belknap Reservation filed a petition for cert seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit in a case that involves a breach of trust claim 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. The Ninth Circuit held that even if the federal government has 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 United States' brief in opposition is due on August 20, 2007.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION V. CONFEDERATED TRIBES OF THE COLVILLE RESERVATION (NO. 06-1588) – On May 29, 2007, the Yakama Nation filed a petition for cert seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which reversed the district court and held that the Colville Tribes are not foreclosed by res judicata from asserting a claim on behalf of the Wenatchi Tribe to fishing rights at the Wenatshapam Fishery on Icicle Creek, a tributary to the Colombia River. The federal district court had issued an injunction preventing members of the Wenatchi Tribe from fishing at that location based on the Colville Tribes' earlier failed efforts to intervene in earlier litigation involving off-reservation fishing rights in the area. The Colville Tribes filed their brief in opposition on June 27, 2007, and the Court has scheduled the case for conference on September 24, 2007.

PETITIONS FOR WRIT OF CERTIORARI DENIED

LEBEAU V. UNITED STATES (NO. 06-1427) – On June 25, 2007, the Court denied review of a decision by the U.S. Court of Appeals for the Federal Circuit which denied the claims for damages brought by the lineal descendants of the Sisseton- Wahpeton Tribe of Mississippi 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.

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

CARCIERI V. KEMPTHORNE (NO. 03-2647) – On July 20, 2007, the en banc panel of the U.S. Court of Appeals for the First Circuit issued a 4-2 opinion 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. In its 80-page opinion, the First Circuit upheld the Secretary's authority to take land into trust on behalf of the Narragansett Tribe and rejected all of the state's arguments, including: (1) Section 5 of the Indian Reorganization Act (IRA) is an unconstitutional delegation of legislative authority, violates the 10th Amendment and violates the Enclave Clause of the U.S. Constitution; (2) Section 5 of the IRA 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; and (3) 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.

The Tribal Supreme Court Project worked closely 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.

AGUA CALIENTE V. SUPERIOR COURT (NO. S123832) – On July 14, 2007, the Agua Caliente Band of Cahuilla Indians announced that it had reached a settlement agreement with the California Fair Political Practices Commission (FPPC) wherein the Tribe agreed not to seek review by the U.S. Supreme Court of the California Supreme Court's 4-to-3 decision in which the 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 California Supreme Court had 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.

PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE COMPANY (NO. 06-3093) – On June 26, 2007, the U.S. Court of Appeals for the Eighth Circuit issued an opinion upholding tribal court jurisdiction in a discrimination action by tribal members against a non-Indian bank who had entered into a number of loan transactions with the Long family farming and ranching business. In the tribal court proceedings, a unanimous jury had found in favor of the Long family, and the verdict was upheld by the tribal court of appeals based on traditional common law of the Tribe. The Eighth Circuit found that the bank had formed concrete commercial relationships with the business and its Indian owners, had taken advantage of the BIA loan guarantees and, therefore, had engaged in the kind of consensual relationship contemplated by *Montana*.

SAN MANUEL INDIAN BINGO AND CASINO V. NATIONAL LABOR RELATIONS BOARD (NO. 05-1392) – On June 8, 2007, the U.S. Court of Appeals for the DC Circuit issued orders denying the Tribe's petitions for rehearing and rehearing en banc, leaving in place the 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 DC Circuit 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.

ALEMAN V. CHUGACH SUPPORT SERVICES (NO. 06-1461) – On May 3, 2007, the U.S. Court of Appeals issued a decision in a case involving unlawful discrimination claims brought by individual plaintiffs under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 against Chugach Support Services, a wholly owned subsidiary of Chugach Alaska Corporation, an Alaska Native Corporation which allegedly occurred on construction projects in Bethesda, Maryland. The Fourth Circuit reversed the district court and remanded the case, holding that the exclusion of Alaska Native Corporations and Indian tribes from the definition of the term "employer" under Title VII is limited to claims brought pursuant to Title VII and does not extend to a separate and distinct claim brought under § 1981 alleging discrimination in the making and enforcement of contracts. The Fourth Circuit expressly rejected the reasoning of the Tenth Circuit in *Wardle v. Ute Indian Tribe* which held that the "specific" provisions of Title VII must be

understood to place limits on the "broad, general provision" of § 1981, therefore excluding Indian tribes from suit under § 1981.

AROOSTOOK BAND OF MICMACS V. RYAN (NOS. 06-1127, 06-1358) AND HOULTON BAND OF MALISEET INDIANS V. RYAN (NO. 06-1774) – On April 17, 2007, the U.S. Court of Appeals for the First Circuit issued its decisions in two cases in which the Tribes sought to enjoin proceedings before the Maine Human Rights Commission, the state agency which has jurisdiction over complaints of employment discrimination brought under state law, involving claims of discrimination by former tribal employees. The 3-judge panel held that the Maine Claims Settlement Act of 1980, a federal statute, allows Maine to enforce its employment discrimination laws against Maine Tribes, including the Aroostook Band and Houlton Band (and other than the Penobscot Nation and the Passamaquoddy Tribe.

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).