TRIBAL SUPREME COURT PROJECT MEMORANDUM

SEPTEMBER 13, 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 Monday, September 24, 2007, the Court will conduct its opening conference for the October Term 2007. At present, there are four petitions for cert pending in Indian law cases (see below), all of which will be considered during the opening conference. Of important note is the fact that petitions for cert were not filed in *Aqua Caliente v. Superior Court* (California Supreme Court held that the state's exercise of state sovereignty in the form of regulating its electoral process is protected under the U.S. Constitution and trumps the doctrine of tribal sovereign immunity) and *San Manuel Indian Bingo and Casino v. NLRB* (DC Circuit held that gaming enterprise, owned and operated by the San Manuel Band, was an "employer" within the scope of the National Labor Relations Act and therefore must not interfere with a union's efforts to organize tribal casino employees). Although the lower appellate courts' holdings are detrimental to Indian tribes, the Project counseled against seeking review by the U.S. Supreme Court based on our concern that, if it granted cert, the Court would issue much broader holdings which would further undermine tribal sovereignty and apply to Indian tribes across the country. The Project, in coordination with tribal leaders and tribal attorneys, is working to limit the holdings in both *Aqua Caliente* and *San Manuel* to the specific facts and narrow circumstances in those cases.

The Project remains very busy developing strategy and coordinating resources in a number of recent Indian law cases recently decided by, or currently pending in, the various U.S. Courts of Appeal where review by the U.S. Supreme Court may be contemplated. On July 20, 2007, in an important victory for Indian tribes, the en banc panel of 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 State of Rhode Island has indicated that it will be seeking review of the en banc decision before the Supreme Court. Unless they seek an extension of time, their petition for cert is currently due on October 18, 2007. We anticipate that a number of other states will be filing an amicus brief(s) in support of Rhode Island as part 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. The Tribal Supreme Court Project will continue to work closely with the attorneys for the Tribe and the United States to oppose review by the Court.

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.

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 four Indian law cases:

REBER V. UTAH (NO. 07-103) – On July 23, 2007, Rickie Reber and other members of the Uintah Band, whose federal supervision was terminated pursuant to the Ute Partition Act, filed a petition for cert seeking review of a decision by the Utah Supreme Court which held that members of a terminated Indian tribe are "non-Indians" subject to prosecution by the state for hunting on Indian lands. In part, the petitioners contend that they were denied due process and a fair trial based on the fact that they were denied the right to present a "good faith" defense before the jury that they undertook the prohibited conduct in reliance upon a published interpretation of law by the federal courts that terminated tribes retain treaty hunting and fishing rights. The State of Utah waived the right to respond to the petition, however, the Court has requested a response which is due on September 17, 2007. The Court has scheduled the case for conference on September 24, 2007.

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. South Carolina filed its brief in opposition on August 16, 2007, and the Court has scheduled the case for conference on September 24, 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' filed its brief in

opposition on August 20, 2007, and the Court has scheduled the case for conference on September 24, 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

The Supreme Court's opening conference to consider pending petitions for cert is September 24, 2007.

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 State of Rhode has indicated its intent to seek review by the U.S. Supreme Court and, unless the state seeks an extension of time, its petition for cert is due on October 18, 2007.

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.

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*. According to the docket, the bank did not seek rehearing. Unless an extension of time is sought, the petition seeking review by the U.S. Supreme Court is due on September 24, 2007.

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. Any petition seeking review by the U.S. Supreme Court had to be filed by September 6, 2007, and no petition appears on the Court's docket.

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. The Houlton Band's petition for cert is due on September 14, 2007. The Aroostook Band's petition for cert is due on October 18, 2007.

MACARTHUR V. SAN JUAN COUNTY (NOS. 05-4295, 05-4310) – On August 14, 2007, the U.S. Court of Appeals for the Tenth Circuit denied the petition for rehearing en banc of its July 3, 2007 opinion which held that the Navajo Tribal Courts do not have subject matter jurisdiction over employment related claims against the San Juan Health Services District which operates a clinic within the exterior boundaries of the Navajo Nation. In *MacArthur,* the tribal member plaintiffs sought to enforce the tribal court's preliminary injunction orders against clinic and county officials through the federal courts. In applying the analysis of *Montana* and its progeny, the Tenth Circuit found that *Montana's* consensual relationship exception does apply to a nonmember who enters into an employment relationship with a member of the tribe on the Reservation. However, based on its understanding of *Nevada v. Hicks,* the Tenth Circuit held that *Montana's* consensual relationship exception only applies to "private" consensual relations, not to consensual relations by the state or state officials acting in their official capacity on the Reservation. Unless the plaintiffs seek an extension of time, the petition for cert is due on November 13, 2007.

MAINE V. JOHNSON (ENVIRONMENTAL PROTECTION AGENCY) (NO. 04-1363) – On August 8, 2007, a three-judge panel of the U.S. Court of Appeals for the First Circuit found that under the terms of the Maine Indian Claims Settlement Act, the Penobscot and Passamaquoddy tribes have been divested of

sovereign immunity and are subject to the general civil and criminal laws of the State of Maine (with limited exceptions), even with respect to activities on tribal lands. Thus, the First Circuit held that under the provisions of the Clean Water Act, the State of Maine may assume pollutant discharge permitting (NPDES) authority over discharge facilities owned by non-Indians but discharging within tribal territory, as well as over tribally-owned discharge facilities located within tribal territory. Any petition for rehearing/rehearing en banc is due on September 24, 2007.

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 and denied the petitions for rehearing en banc. 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. Any petition seeking review by the U.S. Supreme Court had to be filed by September 4, 2007, and no petition appears on the Court's docket.

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).