TRIBAL SUPREME COURT PROJECT MEMORANDUM

MARCH 21, 2008

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.

In another major setback for Indian country, on February 25, 2008, the U.S. Supreme Court granted review in *Carcieri v. Kempthorne,* a decision by the en banc panel of U.S. Court of Appeals for the First Circuit which upheld the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act (IRA) over the objections of the State of Rhode Island. The Supreme Court granted review on the first two questions presented within the State's petition for writ of certiorari: (1) "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934" (*i.e.* whether the IRA and its benefits apply only to tribes that were "now under federal recognition" in 1934); and (2) "Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there" (*i.e.* whether the Rhode Island Settlement Act creates an implicit limitation on the Secretary's land to trust authority). The Court did not grant review of the third question presented: (3) "Whether providing land "for Indians" in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust" (*i.e.* whether Section 5 of the IRA is an unconstitutional delegation of legislative authority).

Rhode Island's arguments threaten the land and sovereignty of all Indian tribes. A group of sixteen (16) state Attorney Generals filed an amicus brief prepared by the State of Connecticut in support of the State of Rhode Island as part of their on-going coordinated strategy to mount additional legal challenges to the acquisition of trust land for the benefit of Indians and Indian tribes. These states are: Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah. The Tribal Supreme Court Project coordinated amicus briefs at each stage in the First Circuit and will continue to coordinate resources and develop legal strategy at the Supreme Court level.

This development follows in the wake of the Supreme Court's grant of review in *Plains Commerce Bank v. Long Family Land and Cattle Company,* a decision by the U.S. Court of Appeals for the Eighth Circuit which upheld the authority of Cheyenne River Sioux Tribal Court over claims by tribal members against a non-Indian bank doing business on the reservation. The question presented by the petitioner, Plains Commerce Bank, is: "Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an 'other means' of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member owned corporation." Throughout the proceeding in the federal courts, the Bank has only challenged the tribal court's

jurisdiction over the discrimination (tort) claim, leaving the breach of contract and bad faith claims unchallenged.

NARF is representing the Long family as pro-bono co-counsel before the Supreme Court and the Project is working with co-counsel in the preparation of the merits brief. NCAI is taking the lead for the Project and is working with the U.S. Solicitor's General Office, the Cheyenne River Sioux Tribe, and others to develop a tribal amicus brief strategy in support of affirming tribal court jurisdiction. The Bank's opening brief was filed on February 14, 2008, and several amicus briefs in support of the Bank's position have been filed: the State of Idaho (joined by eight other states: Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington and Wisconsin); the American Bankers Association; the Association of American Railroads; and the Mountain States Legal Foundation. The Long family's response brief was filed on March 12, 2008, and the amicus briefs in support of the Long family were filed on March 19, 2008. Oral arguments will be heard on April 14, 2008.

You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org/sct/index.html).

PETITIONS FOR WRIT OF CERTIORARI GRANTED

The Court has granted review in two Indian law cases and two cases with implications for American Indians and Alaska Natives:

CARCIERI V. KEMPTHORNE (NO. 03-2647) – On February 25, 2008, the U.S. Supreme Court granted review in *Carcieri v. Kempthorne,* a decision by the en banc panel of U.S. Court of Appeals for the First Circuit which upheld the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act (IRA) over the objections of the State of Rhode Island. The Supreme Court granted review on the first two questions presented within the State's petition for writ of certiorari: (1) "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934" (*i.e.* whether the IRA and its benefits apply only to tribes that were "now under federal recognition" in 1934); and (2) "Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there" (*i.e.* whether the Rhode Island Settlement Act creates an implicit limitation on the Secretary's land to trust authority). The Court did not grant review of the third question presented: (3) "Whether providing land "for Indians" in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust" (*i.e.* whether Section 5 of the IRA is an unconstitutional delegation of legislative authority).

Rhode Island's arguments threaten the land and sovereignty of all Indian tribes. A group of sixteen (16) state Attorney Generals filed an amicus brief prepared by the State of Connecticut in support of the State of Rhode Island on its petition for cert as part of their on-going coordinated strategy to mount additional legal challenges to the acquisition of trust land for the benefit of Indians and Indian tribes. These states are: Alabama, Alaska, Arkansas, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Massachusetts, Missouri, North Dakota, Oklahoma, Pennsylvania, South Dakota, and Utah. The Tribal Supreme Court Project coordinated amicus briefs at each stage in the First Circuit and will continue to coordinate resources and develop legal strategy at the Supreme Court level. We have enjoyed excellent cooperation with the United States on this case and fully expect the amicus effort to play an essential role since tribal interests are at stake, yet no Indian tribe is a party to the litigation. Rhode Island's opening brief is due on

April 10, 2008. The U.S. response brief is due on May 12, 2008 and the tribal amicus briefs are due on May 19, 2008. Oral argument will likely be scheduled in October 2008.

PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE COMPANY (NO. 06-3093) – On January 4, 2008, the Supreme Court granted review of a decision by the U.S. Court of Appeals for the Eighth Circuit which affirmed the district court's holding that the Cheyenne River Sioux Tribal Court has jurisdiction over 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. The question presented by the petitioner, Plains Commerce Bank, is: "Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an "other means" of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member owned corporation." In the tribal court proceedings, a unanimous jury had found in favor of the Long family on their breach of contract, bad faith and discrimination claims, and the general verdict was upheld by the Cheyenne River Sioux Tribal Court of Appeals.

The federal district court and the U.S. Court of Appeals for 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 the U.S. Supreme Court in *Montana v. U.S.,* the pathmarking case on tribal civil jurisdiction over non-Indians. The Bank's opening brief was filed on February 14, 2008, and several amicus briefs in support of the Bank's position have been filed: the State of Idaho (joined by eight other states: Alaska, Florida, Oklahoma, North Dakota, South Dakota, Utah, Washington and Wisconsin); the American Bankers Association; the Association of American Railroads; and the Mountain States Legal Foundation. The Project worked with the attorneys representing the Long family in the preparation of the merits brief which was filed on March 12, 2008. In addition an amicus brief prepared by the U.S. Solicitor General's Office, the Project coordinated the preparation of four other amicus briefs in support of the Long family: (1) the Cheyenne River Sioux Tribe Amicus Brief describing the tribal governmental interest; (2) the NCAI-National Tribal Amicus Brief providing an overview of the foundational principles of Indian law; (3) the NAICJA/Navajo Nation/NICS Amicus Brief discussing the status of tribal courts and tribal laws; and (4) the Sacred Circle Amicus Brief providing information regarding tribal authority over non-members in the area of domestic violence. The amicus briefs were filed on March 19, 2008. Oral arguments will be heard on April 14, 2008.

EXXON SHIPPING COMPANY V. BAKER (NO. 07-219) – On October 29, 2007, the Court granted review of a decision by the U.S. Court of Appeals for the Ninth Circuit upholding an award of $2.5 billion in punitive damages in a class action lawsuit against Exxon as a result of the 1989 Exxon Valdez oil spill in Prince William Sound. A number of Alaska Native villages that depend on subsistence fishing, hunting and gathering were among the most affected by the disaster, and their members are included within a larger group of class action plaintiffs. Among other issues, the Supreme Court will be reviewing whether the punitive damages award is "excessive" under federal maritime law. The Tribal Supreme Court Project, in coordination with NCAI, NARF and AFN, is helping to prepare an amicus brief on behalf of Alaska Native groups to describe the unique non-economic damages suffered by Alaska Natives as a result of their loss of subsistence and disruption of community life. This case is also important for the precedent it may establish in relation to the ability of Alaska Natives to recover damages, including punitive damages when necessary, for loss of the subsistence way of life due to environmental degradation caused by development. The respondents-class plaintiffs' brief was filed on January 22, 2008, and the tribal amicus brief was filed on January 29, 2008. Oral argument is scheduled for February 27, 2008.

CRAWFORD V. MARION COUNTY ELECTION BOARD (NO. 07-21); INDIANA DEMOCRATIC PARTY V. ROKITA (NO. 07-25) – On September 25, 2007, the Court granted review of a decision by the U.S. Court of Appeals for the Seventh Circuit which upheld a law enacted by the State of Indiana that requires voters to present state or federal photo identification in order to vote. In essence, this case is a test case which will impact a number of states who have adopted similar photo identification requirements. If the decision of the Seventh Circuit is affirmed and the law is upheld, other states with substantial Indian populations may be encouraged to adopt restrictive voter identification statutes. In turn, this would impose significant financial and administrative burdens on the ability of Indians to exercise their right to vote in state and federal elections, and would undermine the sovereign status of Indian tribal governments in issuing tribal identification cards. The Tribal Supreme Court Project, with the *pro bono* assistance of the law firm of Dorsey & Whitney, has prepared and filed a tribal amicus brief on behalf of NCAI and the Navajo Nation to explain the impacts of voter identification laws on American Indians and Alaska Natives to the Supreme Court. The case has been fully briefed and oral arguments were heard on January 9, 2008.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

KICKAPOO TRADITIONAL TRIBE OF TEXAS V. STATE OF TEXAS (NO. 07-1109) – On February 25, 2008, the Kickapoo Traditional Tribe of Texas filed a petition seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the Secretarial Procedures Regulation (25 C.F.R. Part 291), promulgated pursuant to the Indian Gaming Regulatory Act, is invalid. The Secretarial Procedures Regulation was adopted following the Supreme Court's decision in *Seminole Tribe of Florida v. Florida* which held that Congress has no authority to abrogate a state's Eleventh Amendment immunity from suit under the Indian Commerce Clause of Article I of the U.S. Constitution. Based on *Seminole Tribe,* absent a waiver of immunity, a state cannot be sued in federal court for refusing to negotiate a Class III gaming compact in good faith with an Indian Tribe. In such a case, the Secretarial Procedures Regulation provided an alternative process for approval of a Class III gaming compact. The state's brief in opposition is due on March 28, 2008.

CARLS V. BLUE LAKE HOUSING AUTHORITY (NO. 07-1037) – On February 7, 2008, the Pacific Legal Foundation filed a petition for cert seeking review of an unpublished decision of the California Court of Appeal, Third District, which upheld the defense of tribal sovereign immunity. The question presented is framed as follows: "Petitioner purchased a new home from a commercial construction company. The home was not located on tribal land or within a tribal *reservation*, and neither the petitioners nor the company had any connection whatever to any Indian tribe. Respondent, a tribal business entity, then voluntarily acquired the construction company, assuming its liabilities. Petitioners' home suffered from water intrusion, resulting in high level of toxic mold that left petitioners ill and the house uninhabitable. Question: When a tribe voluntarily acquires a non-tribal business, with existing contract obligations, does sovereign immunity allow the tribe to repudiate those obligations." The Project is in contact with the attorneys regarding their brief in opposition which is due April 14, 2008.

PETITIONS FOR WRIT OF CERTIORARI DENIED

MACARTHUR V. SAN JUAN COUNTY (NOS. 05-4295, 05-4310) – On February 19, 2008, the Court denied review of a decision by the U.S. Court of Appeals for the Tenth Circuit 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 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 or 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.

MANN V. NORTH DAKOTA TAX COMMISSIONER (NO. 07-671) – On January 7, 2007, the Court denied review of a decision by the North Dakota Supreme Court which upheld a motor fuel tax refund procedure for Indians residing on their Reservations as reasonable and not unduly burdensome. Plaintiff Indians had claimed that the refund procedure established by the state legislature violates due process for its failure to provide for a hearing to challenge a denial and violates equal protection by denying a refund unless the claimant provides original receipts.

JONES V. MINNESOTA (NO. 07-412) – On January 7, 2008, the Court denied review of a decision by the Minnesota Supreme Court which held that a tribal member who failed to register as a sex offender was a violation of the state's predatory-offender registration statute, and thus under P.L. 280, the state has subject matter jurisdiction to prosecute tribal member who lives on the reservation for failure to register. The court found that, under the analytical framework established under *California v. Cabazon Band of Mission Indians,* failure to register as a sex offender is *criminal/prohibitory* conduct, not *civil/regulatory* conduct and is subject to prosecution by the state.

AROOSTOOK BAND OF MICMACS V. RYAN (NO. 07-357) AND HOULTON BAND OF MALISEET INDIANS V. RYAN (NO. 07-354) – On November 26, 2007, the Supreme Court denied review of a decisions by the U.S. Court of Appeals for the First Circuit in two related cases in which the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians 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 denial leaves in place the decision 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

REBER V. UTAH (NO. 07-103) – On October 29, 2007, the Supreme Court denied 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 contended 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.

CATAWBA INDIAN TRIBE V. SOUTH CAROLINA (NO. 07-69) – On October 1, 2007, the Supreme Court denied review of the 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.

GROS VENTRE TRIBES V. U.S. (NO. 06-1672) – On October 1, 2007, the Supreme Court denied review of the decision by the U.S. Court of Appeals for the Ninth Circuit in a case that involved 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.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION V. CONFEDERATED TRIBES OF THE COLVILLE RESERVATION (NO. 06-1588) – On October 1, 2007, the Supreme Court denied review the 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.

PENDING CASES BEFORE THE U.S. COURTS OF APPEAL AND OTHER COURTS

NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (No. 06-15455) – On December 13, 2007, the Ninth Circuit, sitting en banc, reheard a case involving a recent three-judge panel decision ruling that the Forest Service failed to comply with the Religious Freedom Restoration Act in permitting the use of recycled sewage water to manufacture snow for a ski resort on the San Francisco Peaks. The San Francisco Peaks are a sacred mountain very important to the Indian people of the Southwest. The Forest Service argues that its proposal to expand a marginal ski resort using recycled sewage to manufacture snow is a compelling government interest that justifies overriding tribal religious traditions. The Supreme Court decision in *Gonzales v. O Centro Espirita Beneficente Unia Do Vegetal,* 546 U.S. 418 (2006) defined a test under RFRA where the burden on religious practice is weighed together with the nature of the governmental interest. In this case the Forest Service chose to dismiss legitimate religious concerns, hold other prerogatives as paramount, and refuse to make any accommodation of religious beliefs. The Religious Freedom Restoration Act is an important federal law, and Indian tribes worked very hard on its passage.

ONEIDA INDIAN NATION V. ONEIDA COUNTY (NOS. 07-2730-CV(L); 07-2548-CV(XAP); 07-2550-CV(XAP) – On May 21 2007, the United States District Court for the Northern District of New York issued a decision granting in part and denying in part the State and County defendants' motion to dismiss the land claim complaints filed by the plaintiff Oneida tribes and the United States as intervenor on the basis of the Second Circuit's opinion in *Cayuga Indian Nation v. Pataki.* The district court agreed with defendants that *Cayuga* required dismissal of the claims for trespass damages premised on a continuing right of possession unaffected by land purchases that were not approved by the United States in accord

with the Nonintercourse Act. However, the district court also ruled that the Oneida tribes had sufficiently pleaded and could pursue claims for fair compensation based on the State's payment to the Oneidas of far less than the true value of the land. The district court certified the order for interlocutory appeal and the Second Circuit granted the State's petition to appeal and the conditional cross-petitions filed by the Oneidas and the United States. The State's opening brief was filed on October 9, 2007, and the Oneidas' initial brief was filed on December 10, 2007. The Tribal Supreme Court Project, with the *pro bono* assistance of NARF as lead counsel, prepared the NCAI-Tribal amicus brief in support of the Oneida tribes' position in this case.

ONEIDA TRIBE OF WISCONSIN V. VILLAGE OF HOBART (NO. 06-C-1302) - In this case pending in the U.S. Federal District Court for the Eastern District of Wisconsin, the Oneida Tribe is seeking declaratory and injunctive relief against the Village of Hobart in its efforts to condemn and take tribally owned fee land within the reservation boundaries. An amicus brief submitted by a group of non-Indian landowners is supporting the Village of Hobart with an argument based on the 2005 Supreme Court decision in *City of Sherrill* – that the only way for Indian tribes to exercise sovereignty over reacquired lands on their reservations is by have the land taken into trust by the United States pursuant to section 5 of the Indian Reorganization Act. The Tribal Supreme Court Project, working closely with the Great Lakes Intertribal Council and with the *pro bono* assistance of NARF as lead counsel, prepared and filed a countering tribal amicus brief regarding the purposes of the Indian Reorganization Act in restoring the tribal land base.

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).