TRIBAL SUPREME COURT PROJECT MEMORANDUM

MAY 16, 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.

The good news is that on May 12, 2008, the Court denied review in *Carls v. Blue Lake Housing Authority,* a case we have been monitoring closely which challenged the applicability of the defense of tribal sovereign immunity in relation to claims by a non-Indian who purchased a new home built by a non-Indian construction company which was subsequently purchased by the Tribe. The Project assisted in the preparation of the brief in opposition and we were fortunate that this case did not provide a good vehicle for the Court to reach the issue of sovereign immunity directly (based on the failure of petitioner to seek arbitration in the first instance, or seek discovery on the issue of waiver before the state courts). However, tribal leaders and tribal attorneys must continue to carefully consider how (and when) to use the defense of sovereign immunity in future cases dealing with off-reservation commercial transactions, in particular, cases involving companies or corporations purchased an Indian tribe.

The Court has not yet issued a decision in *Plains Commerce Bank v. Long Family Land and Cattle Company.* The Court heard oral argument on April 14, 2008, on the question of whether the Cheyenne River Sioux Tribal Court has jurisdiction over claims by tribal members against a non-Indian bank doing business on the reservation. The Project remains "cautiously optimistic." At least some members of the Court seem willing to say that based on the facts of this case, the tribal court has jurisdiction. The Court's decision will be issued no later than June 30, 2008.

Meanwhile, the Project remains extremely busy in other cases, including developing strategy and coordinating resources for tribal amicus briefs in *Carcieri v. Kempthorne,* a case in which the Court is reviewing the authority of the Secretary of the Interior to take land in to trust for the benefit of Indian tribes under section 5 of the Indian Reorganization Act. As noted below, the states' arguments in this case 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 lands in to trust and the exercise of tribal governmental authority over such lands.

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

CRAWFORD V. MARION COUNTY ELECTION BOARD (NO. 07-21); INDIANA DEMOCRATIC PARTY V. ROKITA (NO. 07-25) – On April 28, 2008, in a 6-3 ruling, the Court upheld one of the strictest voter-identification laws in the nation which requires voters to present state or federal photo identification in order to vote. Justice Stevens announced the opinion of the Court which rejected arguments that the Indiana voter-identification law imposes a substantial burden on poor people, minority groups, the elderly and others who do not have drivers' licenses or other acceptable forms of identification. The Court found the identification requirements reasonable in light of the states' interest in protecting the integrity and reliability of the electoral process. In essence, this case was a test case, the result of which may encourage other states with substantial Indian populations to adopt restrictive voter-identification statutes. Such a result, may impose significant financial and administrative burdens on the ability of Indians to exercise their right to vote in state and federal elections, and could undermine the sovereign status of Indian tribal governments in issuing tribal identification cards. The Tribal Supreme Court Project participated on the merits in this case 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.

PETITIONS FOR WRIT OF CERTIORARI GRANTED

The Court has granted review in two Indian law cases and one other case 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 June 6, 2008, and the U.S. response brief is due on August 11, 2008. Oral argument will likely be scheduled in November-December 2008.

PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE COMPANY (NO. 06-3093) – On April 14, 2008, the Supreme Court heard oral arguments on 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 was joined by several amicus parties in support of the Bank's position, including: 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 who were joined by several amicus parties, including: the United States; the Cheyenne River Sioux Tribe; the National Congress of American Indians; and the National American Indian Court Judges Association.

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 case has been fully briefed and oral arguments were heard on February 27, 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:

UNITED STATES V. NAVAJO NATION (NO. 07-1410) – On May 13, 2008 the United States filed a petition for seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which concluded that under the network of federal statutes and regulations relied upon by the Navajo Nation, there are substantive sources of law that establish specific trust duties that mandate compensation for breach of those duties. The Federal Circuit held that the "Navajo Nation has a cognizable money claim against the United States for the alleged breaches of trust and that the government breached its trust duties." This case is part of the on-going litigation between the Navajo Nation and the United States which reached the Supreme Court in 2003 on the question of whether the Indian Mineral Leasing Act of 1938 (IMLA) and its implementing regulations constituted the requisite substantive source of law. Holding that the IMLA did not constitute the requisite substantive source of law, the Court remanded the case for further proceedings on the question of whether other federal statutes and regulations provided the required source of law. The brief in opposition of the Navajo Nation is due on June 12, 2008.

STATE OF HAWAII V. OFFICE OF HAWAIIAN AFFAIRS (NO. 07-1372) – On April 29, 2008, the State of Hawaii filed a petition seeking review of a decision by the Supreme Court of Hawaii which reversed the lower state court and held that the State of Hawaii should be enjoined from selling or transferring 'ceded lands" held in trust until the claims of the native Hawaiians to the such lands have been resolved. The Supreme Court of Hawaii based its decision, in principal part, on the Apology Resolution adopted by Congress in 1993 which gives "rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands, until such time as the unrelinquished claims of the native Hawaiians has been resolved." The briefs in opposition of the Office of Hawaiian Affairs and the individual native Hawaii plaintiffs are due on July 2, 2008.

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 Procedure Regulations (25 C.F.R. Part 291), promulgated pursuant to the Indian Gaming Regulatory Act, are invalid. The Secretarial Procedure Regulations were 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 Procedure Regulations provided an alternative process for approval of a Class III gaming compact. On April 8, 2008, the State of Texas filed a waiver of its right to respond, however, on April 28, 2008 the United States filed a brief in opposition indicating that, although the Fifth Circuit erred in invalidating the Secretarial Procedure Regulations, since no other court of appeals has yet addressed the issue, there is no conflict among the circuits or with decision of the Court requiring further review. The case has been scheduled for the conference of May 29, 2008.

PETITIONS FOR WRIT OF CERTIORARI DENIED

CARLS V. BLUE LAKE HOUSING AUTHORITY (NO. 07-1037) – On May 12, 2008, the Court denied review of an unpublished decision of the California Court of Appeal, Third District, which upheld the defense of tribal sovereign immunity. The Pacific Legal Foundation who represented the petitioner framed the framed the question presented 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 worked with the attorneys representing the Tribe and the Housing Authority to prepare their brief in opposition.

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, 2008, 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. 07-2430-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. Oral argument has been scheduled for June 3, 2008.

ONEIDA TRIBE OF WISCONSIN V. VILLAGE OF HOBART (NO. 06-C-1302) – On March 28, 2008, Judge Griesbach of the U.S. Federal District Court for the Eastern District of Wisconsin issued his decision holding that the Village of Hobart "is not barred from instituting condemnation proceedings and levying special assessments on the Oneida Tribe's reacquired lands under state law." The Tribe had filed suit in federal court seeking to enjoin the Village of Hobart in its efforts to condemn and take tribally owned fee land within the reservation boundaries. The Village and its supporting *amici* relied heavily on the 2005 Supreme Court decision in *City of Sherrill* to argue 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 will continue to work with the Oneida Tribe of Wisconsin and the Great Lakes Intertribal Council to develop the litigation strategy on 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).