TRIBAL SUPREME COURT PROJECT MEMORANDUM

AUGUST 4, 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.

On June 25, 2008, in a disappointing 5-4 decision authored by Chief Justice Roberts, the Supreme Court ruled that tribal courts do not have jurisdiction over a discrimination action by tribal members against a non-Indian bank arising out of the sale of non-Indian fee land on the reservation to non-Indians. *Plains Commerce Bank v. Long Family Land & Cattle Co.* was the first Indian law case since the addition of Chief Justice Roberts and Justice Alito to the Court. Although it is only one case, the opinion is disturbing since a majority of the Court is willing to ignore the Bank's extensive dealings on the Reservation, including its successful use of the Tribal Court in numerous other cases against tribe members and to rely on a hyper-technical distinction to further chip away at tribal sovereignty. It is unclear what the long-term effects of the decision will be, but it is not a promising beginning to the Robert's era.

In another disappointing outcome, the Supreme Court also issued its opinion in *Exxon Shipping Company v. Baker,* vacating the opinion of and remanding the case back to the U.S. Court of Appeals for the Ninth Circuit which had upheld 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. This decision impacts 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. The Court was equally divided (Justice Alito did not participate) on the question of whether maritime law allows corporate liability for punitive damages based on the acts of its agents, leaving the Ninth Circuit opinion which had held that it does allow punitive damages undisturbed. However, a majority held that the award of $ 2.5 billion was clearly excessive under maritime common law, and that in the circumstances of this case should be limited to the award of compensatory damages, or $507.5 million. Each class plaintiff will now receive about $15,500 in compensatory damages and an equal amount in punitive damages, for a total award of roughly $31,000 per class member.

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

PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE COMPANY (NO. 06-3093) – In a disappointing outcome, on Wednesday, June 25, 2008, a sharply divided (5-4) Supreme Court took another significant step in diminishing the authority of Indian tribes over nonmembers. In *Plains Commerce Bank v. Long Family Land & Cattle Co.,* the Court held that the Cheyenne River Sioux Tribal Court does not have jurisdiction over a claim by tribal members Ronnie and Lila Long against Plains Commerce Bank involving the bank's sale of fee lands on the reservation to non-Indians on terms more favorable than those offered to the tribal members. As a matter of record, the less than favorable terms offered by the bank to the Longs was based solely on their status as Indians. The Native American Rights Fund were co-counsel representing the Longs before the Supreme Court

In a hyper-technical distinction, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas and Alito, distinguished *sales* of fee land by non-Indians on the Reservation, over which the majority opined that Tribes have no legislative authority, and *activities* by non-Indians on fee lands which may implicate a Tribe's sovereign interests and, thus, be subject to tribal regulation. According to the majority, since the discrimination claim "is tied specifically to the sale of the fee land" – land alienated from tribal trust land and removed from tribal control – the Tribe has no authority to regulate the terms upon which the land can be sold, even if those terms are discriminatory and favor non-Indians over Indians. Lacking authority to regulate fee land sales, the Tribe has no authority over claims based on such sales since a Tribe's adjudicatory authority cannot exceed its legislative authority. Interestingly, however, because the majority expressly made clear that it was not addressing whether the Tribal Court had jurisdiction over the Longs' breach of contract and bad faith claims (the Bank had not appealed those claims), that leaves the Tribal Court jury award of $750,000 to the Longs undisturbed and subject to further proceedings.

Justice Ginsberg, joined by Justices Stevens, Souter and Breyer, dissented, finding the majority's position "perplexing." First, the dissent took issue with the majority's reliance "on a ground neither argued nor addressed below" for resolving the case. Second, if the tribal court has jurisdiction over the Longs' breach of contract and bad faith claims –"that the Bank has broken its promise or acted deceptively in the land-financing transactions at issue" – the dissent was hard pressed to understand why the Tribe could not likewise enforce its laws prohibiting discrimination arising out of those same transactions. In the view of the dissent, "the Longs case, at heart, is not about 'the sale of fee land to non-Indian individuals,' '[r]ather, this case is about the power of the Tribe to hold nonmembers like the bank to a minimum standard of fairness when they voluntarily deal with tribal members.'"

Although a disappointing outcome, the Project worked extremely hard to limit the damage that the Court could do to tribal sovereignty if it issued a broad holding. When the Court granted review of the Eighth Circuit's favorable ruling in January 2008, many Indian law practitioners anticipated three possible worst-case scenarios: (1) The Court reversing *National Farmers* and *Montana,* establishing an *Oliphant* style rule prohibiting tribal civil jurisdiction over non-Indians; (2) The Court adopting a "clear and explicit consent" requirement by non-Indians to tribal court jurisdiction following Justice Souter's concurring opinion in *Hicks*; or (3) The Court holding that tribal courts have no jurisdiction over tort claims against non-Indian defendants following the lead of Justice Scalia's majority opinion in *Hicks*. 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 June 25, 2008, the Court also issued its decision vacating the opinion of and remanding the case back to the U.S. Court of Appeals for the Ninth Circuit which had upheld 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. This decision impacts 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. The Court was equally divided (Justice Alito did not participate) on the question of whether maritime law allows corporate liability for punitive damages based on the acts of its agents, leaving the Ninth Circuit opinion which had held that it does allow punitive damages undisturbed. However, a majority held that the award of $ 2.5 billion was clearly excessive under maritime common law, and that in the circumstances of this case should be limited to the award of compensatory damages, or $507.5 million. Each class plaintiff will now receive about $15,500 in compensatory damages and an equal amount in punitive damages, for a total award of roughly $31,000 per class member.

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. Rhode Island's opening brief was filed on June 6, 2008, and a group of twenty-one (21) state Attorney Generals filed an amicus brief prepared by the State of Connecticut in support of the State of Rhode Island. In addition, an amicus brief on behalf of the Council of State Governments, the National Conference of State Legislatures, the National League of Cities and others was also filed as part of a coordinated strategy to mount additional legal challenges to the acquisition of trust land for the benefit of Indians and Indian tribes. 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. The U.S. response brief is due on August 18, 2008, and the tribal amicus briefs in support of the U.S. are due on August 25, 2008. Oral argument is scheduled for November 3, 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 several Indian law cases:

MATHESON V. GREGOIRE (NO. 08-23) – On July 1, 2008, Paul Matheson, an enrolled member of the Puyallup Tribe and an individual Indian cigarette retailer, filed a petition seeking review of a decision by the Court of Appeals Washington dismissing his challenges to a tribal-state cigarette tax agreement between the Puyallup Tribe and the Washington Department of Revenue based on Tribe's sovereign immunity from suit and the finding that the Tribe is an indispensable party to the suit. The Puyallup Tribe filed its brief in opposition on July 25, 2008.

KLAMATH TRIBES OF OREGON V. PACIFICORP (NO. 07-1492) – On May, 28, 2008, the Klamath Tribes of Oregon filed a petition seeking review of an unpublished decision of the U.S. Court of the Appeals for the Ninth Circuit which held that the Tribes' cause of action for money damages against Pacificorp for constructing a dam which destroyed a salmon fishery run in violation of the 1864 Treaty with the Klamath is foreclosed by *Skokomish Indian Tribe v. United States*. In *Skokomish*, an banc panel of the Ninth Circuit held that it could find no basis for implying a right of action for money damages asserted by the Tribe under its Treaty, emphasizing that (in that case) the City of Tacoma and Tacoma Public Utilities were not contracting parties to the Treaty, and that there was not "anything in the language of the Treaty that would support a claim for damages against a non-contracting party." The brief in opposition was filed by Pacificorp on June 30, 2008, and the petition is scheduled for conference on September 29, 2008.

KEMP (OKLAHOMA TAX COMMISSION) V. OSAGE NATION (NO. 07-1484) – On May 27, 2008, Thomas Kemp, the Chairman on the Oklahoma Tax Commission filed a petition seeking review of an unpublished decision by the U.S. Court of Appeals for the Tenth Circuit which held that, under the *Ex parte Young* doctrine, individual state officials are not entitled to Eleventh Amendment immunity from suit by the Osage Nation. The Osage Nation is seeking declaratory and injunctive relief against the individual members of the Oklahoma Tax Commission, asking the federal court (1) to declare that all lands within the original Osage Reservation are Indian country; (2) to declare that all tribal members employed by the Nation who reside on the Reservation are not subject to state income taxes; and (3) to enjoin the state

from collecting state income taxes from those tribal members. The brief in opposition was filed by the Osage Nation on July 30, 2008.

UNITED STATES V. NAVAJO NATION (NO. 07-1410) – On May 13, 2008 the United States filed a petition 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 August 4, 2008.

HO-CHUNK NATION V. WISCONSIN (07-1402) –On May 8, 2008, the Ho-Chunk Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Seventh Circuit which held that §2710(d)(7)(A)(ii) of the Indian Gaming Regulatory Act (IGRA) confers jurisdiction on the federal courts over "any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact *entered into under paragraph (3)*." The Ho-Chunk Nation and the State of Wisconsin have been in a dispute over the Tribe's alleged failure to make payments under their revenue sharing agreement and the Tribe's alleged refusal to submit the matter to binding arbitration as required by the Dispute Resolution provision within their compact. The Seventh Circuit rejected both the state's broad interpretation that IGRA authorizes the state to enjoin class III gaming for *any* violation of a Tribal-State compact, as well as the Tribe's narrow reading that federal court jurisdiction only exists for states to enjoin a tribe's class III gaming when that gaming is conducted in a manner that violates compact provisions that prescribe how the games are to be played (*e.g.* unauthorized games, unauthorized locations, unauthorized hours, etc.). The Seventh Circuit interpreted IGRA to waive tribal immunity and confer jurisdiction on federal courts only in circumstances where the alleged violation relates to a compact provision agreed upon pursuant to the negotiation process "*under paragraph (3)*" which lists seven subject matter areas for negotiation in Tribal-State compacts under the IGRA, including "remedies for breach of contract." The Seventh Circuit found the alleged refusal of the Tribe to submit to binding arbitration was within the scope of issues relating to remedies of breach of contract. The brief in opposition was filed on June 11, 2008 and the case is scheduled for the Court's opening conference on September 26, 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 Office of Hawaiian Affairs filed its brief in opposition on July 14, 2008, and the petition has been scheduled for conference on September 29, 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. Although the case was scheduled for the conference of May 29, 2008, the Court has requested a response from the State of Texas which was filed on July 16, 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 arguments were heard by the court on 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).