

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

SEPTEMBER 11, 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 September 29, 2008, the U.S. Supreme Court will conduct its opening conference for the upcoming October 2008 Term. At present, there are ten (10) petitions for writ of certiorari involving questions of Indian law pending, eight (8) of which will be considered by the Court during this conference. Unfortunately, at least two of the petitions—both of which involve favorable decisions in the lower courts—have a reasonable chance of being granted review. First, in *United States v. Navajo Nation*, the United States has requested that the Court review a favorable decision by the U.S. Court of Appeals for the Federal Circuit upholding the federal trust responsibility to the Navajo Nation under a network of federal statutes and regulations which establish specific trust duties that mandate compensation for breach of those 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.

Second, in *State of Hawaii v. Office of Hawaiian Affairs*, the State of Hawaii is 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.” In 2000, while in private practice, Chief Justice Roberts represented the State of Hawaii in *Rice v. Cayetano*, a case involving the status of native Hawaiians in which the Court held against Native interests. No doubt, the questions presented in this case are of keen interest to the Chief Justice.

In addition, two other petitions which are being closely monitored by the Project may have some interest to the Court. In *Kemp (Oklahoma Tax Commission) v. Osage Nation*, another favorable decision for Indian country, the U.S. Court of Appeals for the Tenth Circuit held that, under the *Ex parte Young* doctrine, individual state officials are not entitled to Eleventh Amendment immunity from suit by the Osage Nation which is seeking declaratory and injunctive relief, 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. In their petition, the Oklahoma Tax Commission has framed the question presented in a manner which characterizes the relief sought by the Tribe as a “roll back” of a century of state jurisdiction across an entire county with “far-reaching implications on Oklahoma’s sovereignty.” In *Kickapoo Traditional Tribe of Texas v. State of Texas*, the Kickapoo Traditional Tribe of Texas is seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the Secretarial Procedure Regulations—the regulations 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—are invalid. 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.

The Tribal Supreme Court Project will provide an update shortly after the Court releases its order list following the September 29 opening conference. 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

Thus far, the Court has granted review in one Indian law case to be decided in the October 2008 Term:

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 U.S. filed its response brief on August 18, 2008. The Tribal Supreme Court Project coordinated the preparation of four tribal amicus briefs which were filed on August 25, 2008: (1) the Narragansett Tribe amicus brief addressing issues arising under the Rhode Island Settlement Act; (2) the NCAI-Tribal amicus brief

addressing issues arising under the Indian Reorganization Act; (3) the Indian Law Professors' amicus brief providing information to the Court regarding the concept of "federal recognition" and development of the federal acknowledgment process; and (4) the Historians' amicus brief providing information to the Court regarding the history and development of federal policies leading up to the Indian Reorganization Act. Oral argument has been 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 and Indian law-related cases:

LAWRENCE V. DEPARTMENT OF THE INTERIOR (NO. 08-173) – On August 11, 2008, Phillip Lawrence, a member of the Standing Rock Sioux Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which upheld the denial by the Bureau of Indian Affairs of his enhanced retirement benefits payable to BIA employees whose duties include firefighting. The court held that the BIA's failure to provide timely, actual notice of the 1987 regulations limiting his claim does not violate the federal trust responsibility or the Indian Preference Act. On September 2, 2008, the United States filed a waiver of response and the petition has been scheduled for conference on September 29, 2008.

CITY OF POCATELLO V. IDAHO (NO. 08-135) – On August 1, 2008, the City of Pocatello, Idaho, in a sub-proceeding to the Snake River General Stream Adjudication, filed a petition seeking review of a decision by the Idaho Supreme Court which found that the 1888 Cession Agreement approved by Congress creating the City of Pocatello did not grant a federal water right to the City. The court held that the legislation only granted the City access to surface water sources on the Reservation along with an opportunity to establish a water right under state law. The Shoshone-Bannock Tribes have filed a waiver of response and other brief(s) in opposition are due on October 2, 2008.

SOUTH FORK BAND V. UNITED STATES (NOS. 08-100 AND 08-231) – On July 21, 2008, several tribes, bands and groups which are part of the Western Shoshone Nation filed a petition seeking review of an unpublished decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court's dismissal of the quiet title claims for sixty (60) million acres of lands in Nevada and California against the United States under the Treaty of Ruby Valley. The district court held that the claims were barred by the 12-year statute of limitations in the Quiet Title Act. On August 19, 2008, the United States filed a waiver of response and the petition has been scheduled for conference on September 29, 2008. However, on August 20, 2008, another group of Western Shoshone tribes, groups and members, who had brought separate claims in the lower courts and were named as respondents in the first petition, filed a cross-petition seeking separate review by the Court.

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 Washington Court of Appeals 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, and the petition is scheduled for conference on September 29, 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 en 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, and the petition is scheduled for conference on September 29, 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 was filed on August 4, 2008, and the petition is scheduled for conference on September 29, 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 29, 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. This case is scheduled for conference on September 29, 2008.

PETITIONS FOR WRIT OF CERTIORARI DENIED

The Court will be holding its opening conference for the October 2008 Term on September 29, 2008.

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

NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (9th Cir. No. 06-15455) – On August 8, 2008, an en banc panel of the U.S. Court of Appeals for the Ninth Circuit issued a decision reversing a three-judge panel decision and holding that the U.S. Forest Service’s approval of a permit allowing the use of recycled sewage waste-water to manufacture snow for a ski resort on the San Francisco Peaks – a sacred-site for many American Indian Tribes – does not violate the Religious Freedom Restoration Act

(“RFRA”). Judge Bea, writing for the majority, established a very restrictive standard for determining whether an action of the federal government creates a “substantial burden” on an individual’s religious belief and thus violates RFRA. The majority stated: “a ‘substantial burden’ is imposed only when individuals are forced to choose between following the tenants of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions.” According to the majority, the only effect of the use of waste-water to manufacture snow at this sacred site is on the Indians’ “subjective, emotional religious experience,” which merely offends their “religious sensibilities” and diminishes their “spiritual fulfillment,” but does not substantially burden their free exercise of religion. The Tribal Supreme Court Project is working with the attorneys representing the plaintiff Tribes in the preparation of the petition for writ of certiorari to the U.S. Supreme Court and the development of an amicus strategy in support of the petition.

U.S. v. FRIDAY (10TH CIR. NO. 06-8093) – On July 7, 2008, the U.S. Court of Appeals for the Tenth Circuit denied the petition for rehearing en banc filed by Winslow Friday, a member of the Northern Arapaho Tribe of Wyoming, which sought review by the full panel of the May 8, 2008, three-judge panel decision which held that his shooting of a bald eagle without a permit, for use in the tribe’s traditional Sun Dance ceremony, violated the Bald and Golden Eagle Protection Act. The Tenth Circuit rejected Mr. Friday’s argument that the Religious Freedom Restoration Act—which prohibits the federal government from substantially burdening a person’s exercise of religion—precludes the government from prosecuting him. The Tribal Supreme Court Project is working with the attorneys representing Mr. Friday and the Northern Arapaho Tribe in the preparation of the petition for writ of certiorari to the U.S. Supreme Court and the development of an amicus strategy in support of the petition.

ONEIDA INDIAN NATION V. ONEIDA COUNTY (2ND CIR. 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 (E.D.WI 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).