TRIBAL SUPREME COURT PROJECT MEMORANDUM

NOVEMBER 5, 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 Monday, November 3, 2008, the U.S. Supreme Court heard oral argument in *Carcieri v. Kempthorne,* an extremely important Indian law case involving a challenge by the State of Rhode Island to 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). The State of Rhode Island was represented by Ted Olson, a very experienced Supreme Court practitioner who has argued over 50 cases before the Court, was the attorney who argued *Bush v. Gore* on behalf of George W. Bush, and served as U.S. Solicitor General (2001-2004). Although the Court granted review on two questions raised by the State in its petition for writ of certiorari, the Court was clearly interested in hearing argument only on the broader question of whether Congress intended the benefits of the IRA to apply only to "recognized Indian tribes ***now*** under Federal jurisdiction" as of June 18, 1934, the date the IRA was enacted into law. The justices demonstrated no interest in hearing arguments on the narrow question of whether the 1978 Rhode Island Indian Claims Settlement Act created any limitation on the Secretary's land to trust authority in relation to the Narragansett Tribe.

Although it is very difficult, and oftentimes risky to predict an outcome based on oral argument, a number of the justices, including Chief Justice Roberts, appeared supportive of Rhode Island's position that the Secretary's authority to take land in trust for the benefit of "Indians" was limited by Congress to recognized Indian tribes ***now*** under federal jurisdiction in 1934 who were adversely impacted by the 1887 Allotment Act. Although Justices Stevens and Ginsberg sharply questioned Mr. Olson's interpretation of the IRA, a majority of the justices expressed skepticism regarding the argument by the United States that, at best, the meaning of "***now*** under federal jurisdiction" is ambiguous and the Court should defer to the Secretary's interpretation that Congress intended all Indian tribes—tribes who were federally recognized after 1934, as well as tribes under federal jurisdiction in 1934—to benefit from the provisions of the IRA. At one point during the United States' argument, this revealing exchange occurred:

> CHIEF JUSTICE ROBERTS: This is -- we are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State law and all -- wouldn't you normally regard these types of definitions in a restrictive way to limit that power instead of saying whenever he wants to recognize it, then he gets the authority to say this is no longer under Rhode Island jurisdiction; its now under my jurisdiction?

> UNITED STATES: Well there is -- there is a competing presumption there that I think is – Chief Justice Roberts, which is that Indian statutes are interpreted to the benefit of the Indian. And this was supposed to be a new deal for the Indians --
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> CHIEF JUSTICE ROBERTS: Well, how do we know which one of them benefits the Indian? I mean, have the Indians benefitted from Federal jurisdiction in the last 50 years?
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> JUSTICE KENNEDY: The Chief Justice's question, and I was going to put the same question to Mr. Olson, is whether or not there is -- some canon of construction, some principle of Federalism which makes us be very cautious before we take land out of the jurisdiction of the State. It sounds to me plausible. Is there any authority for the proposition I just stated? Have we said that in cases or --

During his rebuttal, Mr. Olson offered the *Vermont Agency* and *Seminole Tribe* cases to support a canon of construction to protect state sovereignty, stating: "if Congress is to alter the constitutional balance between States and the Federal government, it must make its intention to do so unmistakably clear." Based on this exchange, it would appear that even if the operative term "***now*** under federal jurisdiction" is ambiguous, a number of justices may be willing to discard the Indian canon of construction of an Indian statute in favor of a canon of construction which favors protecting states' rights over federal power and tribal sovereignty.

Hopefully, the justices and their clerks will thoroughly review the amicus briefs coordinated by the Tribal Supreme Court Project and reject the superficial reading of the text and purpose of the IRA offered by the State of Rhode Island. Specifically, the Court should carefully consider: (1) the NCAI-Tribal amicus brief which addresses the Secretary's long-standing practice of taking land into trust for all Indian tribes and Congress' affirmation of the Secretary's authority under the Indian Land Consolidation Act of 1983; (2) the Historians' amicus brief which details the history of federal policies leading up to the Indian Reorganization Act and debunks the State's theory that the backward looking and only purpose of the IRA was to address the disastrous federal policy of allotment; and (3) the Indian Law Professors' amicus brief which summarizes the lack of standards in 1934 for "recognizing" Indian tribes and development of the federal acknowledgment process. A decision by the Court is expected in February or March 2009.

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 three Indian law cases to be decided in the October 2008 Term:

UNITED STATES V. NAVAJO NATION (NO. 07-1410) – On October 1, 2008 the Court granted review of a decision by the U.S. Court of Appeals for the Federal Circuit which held 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 which mandate compensation for breach of those duties by the federal government. Specifically, the Federal Circuit stated: 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 Peabody Coal and the United States (as trustee) 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 questions presented are: (1) "Whether the court of appeals' holding that the United States breached fiduciary duties in connection with the Navajo coal lease amendments is foreclosed by *Navajo*"*; and (*2) "If *Navajo* did not foreclose the question, whether the court of appeals properly held that the United States is liable as a mater of law to the Navajo Nation for up to $600 million for the Secretary's actions in connection with his approval of amendments to an Indian mineral lease based on several statutes that do not address royalty rates in tribal leases and common-law principles not embodied in a governing statute or regulation." The United States opening brief is due on November 26, 2008, and the Navajo Nation's response brief is due on January 9, 2009. The Tribal Supreme Court Project is working with the attorneys representing the Navajo Nation to develop an amicus brief strategy.

STATE OF HAWAII V. OFFICE OF HAWAIIAN AFFAIRS (NO. 07-1372) – On October 1, 2008, the Court granted 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 question presented is: "In the Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Congress acknowledged and apologized for the United States' role in that overthrow. The question here is whether this symbolic resolution strips Hawaii of its sovereign authority to sell, exchange, or transfer 1.2 million acres of state land-29 percent of the total land area of the State and almost all the land owned by the State-unless and until it reaches a political settlement with native Hawaiians about the status of that land."

CARCIERI V. KEMPTHORNE (NO. 03-2647) – On November 3, 2008, the Supreme Court heard oral argument in *Carcieri v. Kempthorne,* a case involving a challenge by the State of Rhode Island to the authority of the Secretary of the Interior to take land in to trust for the benefit of the Narragansett Indian Tribe. Twenty-one states joined an amicus brief in support of Rhode Island's argument that Section 5 of the Indian Reorganization Act of 1934, which authorizes the Secretary to take land in trust for the benefit of Indians, does not apply to Indian tribes recognized after 1934, or in the alternative, that the 1978 Rhode Island Settlement Act repealed any such authority. 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 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 the preparation of four tribal amicus briefs in support of the United States: (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. A decision by the Court is expected in February or March 2009.

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:

MICHIGAN GAMBLING OPPOSITION V. KEMPTHORNE (NO. 08-554) – On October 23, 2008, Michigan Gambling Opposition ("MichGO") filed a petition seeking review of a decision by the U.S. Court of Appeals for the D.C. Circuit which held, consistent with every other federal circuit court which has considered the issue, that the authority of the Secretary of the Interior to take land in trust for the benefit of Indians pursuant to section 5 of the Indian Reorganization Act (IRA) is not an unconstitutional delegation of legislative authority. In addition, MichGO seeks to bootstrap its case to the *Carcieri* case by raising for the first time in its appeal the question of whether the IRA "empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934." The United States' brief in opposition is due on November 26, 2008.

FRIDAY V. UNITED STATES (NO. 08-6651) – On October 2, 2008, Winslow Friday, a member of the Northern Arapaho Tribe of Wyoming, filed a petition seeking review of a decision of the U.S. Court of Appeals for the Tenth Circuit 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 worked with the attorneys representing Mr. Friday and the Northern Arapaho Tribe in the preparation of the petition for writ of certiorari. The United States was granted an extension of time and its brief in opposition is now due on December 8, 2008.

BODKIN V. COOK INLET REGION, INC (NO. 08-440) – On October 2, 2008, individual shareholders of Cook Inlet Region, Inc. (CIRI), an Alaska Native Corporation, filed a petition seeking review of a decision by the Alaska Supreme Court which rejected their challenges to CIRI's authority under ANSCA to establish and make distributions from the Elders' Benefit Settlement Trust. CIRI filed its waiver of response on October 21, 2008, and the petition has been scheduled for conference on November 14, 2008.

RODRIGUEZ-MARTINEZ V. UNITED STATES (NO. 08-6467) – On September 22, 2008, Luis Manuel Rodriguez-Martinez, a descendent of the Huichol tribe of Mexico and an adherent of the Mexicayolt religion (Native American Ceremonial Group in Arizona), filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which rejected his argument that prosecution for the possession of feathers and talons without a permit under the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act violates the Religious Freedom Restoration Act by substantially burdening the free exercise of his religion. The United States was granted an extension of time and its brief in opposition is now due on November 26, 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 and the State of

Idaho have filed a waiver of response. The United States filed its brief in opposition on November 3, 2008.

SOUTH FORK BAND V. UNITED STATES (NO. 08-231) – Although the Court denied review in *South Fork v. U.S.* (No. 08-100) (see below), 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 on August 20, 2008 seeking separate review by the Court. The petitioners are 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 U.S. was granted an extension of time and its brief in opposition is now due on November 21, 2008.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court denied review in or dismissed the following cases:

KICKAPOO TRADITIONAL TRIBE OF TEXAS V. STATE OF TEXAS (NO. 07-1109) – On September 29, 2008 the Court denied 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.

KEMP (OKLAHOMA TAX COMMISSION) V. OSAGE NATION (NO. 07-1484) – On September 29, 2008 the Court denied review of an unpublished decision of 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.

KLAMATH TRIBES OF OREGON V. PACIFICORP (NO. 07-1492) – On September 29, 2008 the Court denied 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."

SOUTH FORK BAND V. UNITED STATES (NO. 08-100) – On September 29, 2008 the Court denied review of a 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.

<u>MATHESON V. GREGOIRE (NO. 08-23)</u> – On September 29, 2008 the Court denied review of a decision by the Washington Court of Appeals dismissing a tribal member-owned smokeshop's 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.

<u>LAWRENCE V. DEPARTMENT OF THE INTERIOR (NO. 08-173)</u> – On September 29, 2008 the Court denied 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.

<u>HO-CHUNK NATION V. WISCONSIN (07-1402)</u> – On September 26, 2008, the Court dismissed the petition under Rule 46 by agreement of the parties. The Ho-Chunk Nation had been 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.).

<u>PENDING CASES BEFORE THE U.S. COURTS OF APPEAL AND OTHER COURTS</u>

<u>NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (9th Cir. No. 06-15455)</u> – 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>ONEIDA INDIAN NATION V. ONEIDA COUNTY (2ND CIR. NOS. 07-2430-CV(L); 07-2548-CV(XAP); 07-2550-CV(XAP)</u> – 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.

<u>ONEIDA TRIBE OF WISCONSIN V. VILLAGE OF HOBART (E.D.WI NO. 06-C-1302)</u> – 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.

<u>CONTRIBUTIONS TO SUPREME COURT PROJECT</u>

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).