TRIBAL SUPREME COURT PROJECT MEMORANDUM

JANUARY 13, 2009

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.

At present, the Project anticipates a decision in the very near future 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 under the provisions of the 1934 Indian Reorganization Act. The Project anticipates a decision adverse to the interests of the Narragansetts (and all Indian tribes) based, in part, on the apparent support by a number of the justices, including Chief Justice Roberts, during oral argument of Rhode Island's argument 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; and based, in part, in the Court's recent action in "holding over" *MichGo v. Kempthorne,* another case involving a challenge to the Secretary's authority to take land in trust for the benefit of Indian tribes.

The Project has continued to focus its energy and resources on two other Indian law cases that the Court is scheduled to decide this term: *United States v. Navajo Nation* and *State of Hawaii v. Office of Hawaiian Affairs.* In *United States v. Navajo Nation,* the U.S. Court of Appeals for the Federal Circuit upheld the trust responsibility of the United States to the Navajo Nation under a network of federal statutes and regulations as substantive sources of law that establish specific trust duties which mandate compensation for breach of those duties by the federal government. The Project is working closely with the attorneys representing the Navajo Nation to prepare an amicus brief in support of the Navajo Nation. Oral argument has been scheduled for Monday, February 23, 2009. In *State of Hawaii v. Office of Hawaiian Affairs,* the Supreme Court of Hawaii issued an injunction, prohibiting the State of Hawaii from selling or transferring "ceded lands" held in trust until the claims of the native Hawaiians to such lands have been resolved. The court based its decision, in 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 Project is working with the attorneys representing OHA, and NARF is preparing an amicus brief on behalf of NCAI in support of Native Hawaiian interests. Oral argument has been scheduled for February 25, 2009.

In addition, the Project has committed substantial resources to the petition for writ of certiorari in *Navajo Nation v. U.S. Forest Service* filed on January 7, 2009 which seeks review of a decision by an en banc panel of the U.S. Court of Appeals for the Ninth Circuit 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"). The petition was prepared pro bono by Jeffrey Fisher of the Stanford Law School Supreme Court Clinic in collaboration with the attorneys who represented the tribes before the Ninth Circuit. The Project is assisting in the development of an amicus strategy in support of the petition which challenges the Ninth Circuit's conclusion that 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.

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 filed its opening brief on November 26, 2008, and the Peabody Coal Company and the Southern California Edison Company filed an amicus brief in support of the U.S. on December 3, 2008. The Navajo Nation filed its response brief on January 9, 2009. The Tribal Supreme Court Project have worked directly with the attorneys representing the Navajo Nation to develop an amicus brief strategy. Oral argument has been scheduled for February 23, 2009.

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." The State's opening brief was filed on December 4, 2008, and the OHA response brief is due on January 21, 2008. The Tribal Supreme Court Project is working with the attorneys representing OHA on a tribal amicus brief in support of Native Hawaiian interests. Oral argument has been scheduled for February 25, 2009.

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 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 January or February 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:

NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (NO.) – On January 6, 2009, the Navajo Nation, the Hopi Tribe, the White Mountain Apache Tribe, the Yavapai-Apache Tribe, the Havasupai Tribe, the Hualapai Tribe and others filed a petition seeking review of decision by an en banc panel of the U.S. Court of Appeals for the Ninth Circuit which held that the U.S. Forest Service's approval of a permit allowing the spraying of recycled sewage water (in the form of artificial 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"). The Tribal Supreme Court Project is working with the attorneys representing the plaintiff Tribes on the development of an amicus strategy in support of the petition. The U.S. brief in opposition is due on February 6, 2009.

SEMINOLE TRIBE OF FLORIDA V. FLORIDA HOUSE OF REPRESENTATIVES (NO. 08-746) – On December 8, 2008, the Seminole Tribe of Florida filed a petition seeking review of a decision by the Florida Supreme Court which held that the Florida Governor lacks authority (without legislative approval) to enter into a gaming compact that includes a provision allowing house-banked card games in violation of Florida state criminal law. The Tribe contends that if the Florida State Lottery is authorized to operate house-banked card games under state law, then a tribal-state gaming compact under the Indian Gaming Regulatory Act authorizing house-banked card games is valid and does not violate state criminal law. The brief in opposition is due on January 26, 2009.

HARRAH'S OPERATING COMPANY V. NGV GAMING (NO. 08-655) – On November 12, 2008, Harrah's Operating Company filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which involves a tortuous interference with contract dispute between two tribal casino developers. The majority of a three-judge panel of the Ninth Circuit held that the term "Indian lands" as used in 25 U.S.C. § 81 (which requires Secretarial approval of any "contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years") only includes land that "is" held by the United States in trust for an Indian tribe, and does not include land that may be acquired and held in trust by the United States for an Indian tribe at some point in the future. The brief in opposition by NGV Gaming was filed on December 24, 2008 and the case has been scheduled for conference on January 23, 2009.

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 filed its brief in opposition on December 5, 2008, and MichGO filed its reply brief on December 26, 2008. The petition was scheduled for conference on January 9, 2009, and has been held over for conference on January 16, 2009.

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 filed its brief in opposition on January 7, 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 filed its brief in opposition on December 29, 2008, and the case has been scheduled for conference on January 23, 2009.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court denied review in or dismissed the following cases:

ROBERTS V. HAGENER (MONTANA DEPARTMENT OF FISH, WILDLIFE AND PARKS (NO. 08-519) – On January 12, 2008, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that a state regulation which permits only "tribal members" to hunt big game on Indian reservations in Montana does not violate the equal protection clause of the U.S. Constitution. The State did not file a brief in opposition to the petition filed by the Mountain States Legal Foundation.

SOUTH FORK BAND V. UNITED STATES (NO. 08-231) – On January 12, 2009, the Court denied 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 by a group of Western Shoshone tribes and members for sixty (60) million acres of lands in Nevada and California against the United States under the Treaty of Ruby Valley.

CITY OF POCATELLO V. IDAHO (NO. 08-135) – On December 8, 2008, the Court denied 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.

BODKIN V. COOK INLET REGION, INC (NO. 08-440) – On November 17, 2008, the Court denied review of a decision by the Alaska Supreme Court which had rejected challenges by individual shareholders of Cook Inlet Region, Inc. (CIRI), an Alaska Native Corporation, to CIRI's authority under ANSCA to establish and make distributions from the Elders' Benefit Settlement Trust.

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.

MATHESON V. GREGOIRE (NO. 08-23) – 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.

LAWRENCE V. DEPARTMENT OF THE INTERIOR (NO. 08-173) – 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.

HO-CHUNK NATION V. WISCONSIN (07-1402) – 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.).

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

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).