TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 21, 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. You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org/sct/index.html).

At present, the U.S. Supreme Court is in summer recess, with the October 2009 Term scheduled to start on Monday, October 5, 2009. The big news continues to be the prospect of a new Associate Justice to the Court. Last week, the Senate Judiciary Committee conducted four days of hearings for the confirmation of Judge Sonia Sotomayor to replace Justice Souter who has retired from the Court. The Senate Judiciary Committee is scheduled to mark-up the nomination of Judge Sotomayor this week, with a final Committee vote next week. The full Senate will likely hold its final roll call vote on her confirmation before the August recess (by August 7, 2009).

As reported in the last update, Judge Sotomayor is considered a centrist and pragmatist, in the mold of a Justice Souter. NARF conducted an extensive review of her record which reveals that she has had very little exposure to, or experience in federal Indian law. Our research of her years as an Assistant District Attorney, as an attorney in private practice, or as a federal district court judge has not uncovered any cases dealing with issues pertaining to Indians or Indian tribes. During her tenure on the Second Circuit, Judge Sotomayor participated in only a handful of cases involving Indians, Indian tribes, or issues involving some aspect of federal Indian law. NARF has prepared a memo which provides more background information and a summary of her Indian law cases, a copy of which can be obtained by contacting Richard Guest at richardg@narf.org.

The approach of the October 2009 Term also provides an opportunity to review the work of the Tribal Supreme Court Project during this past term, and since the beginning of the Roberts' Court era in 2005. During the October 2008 Term, the Court issued three Indian law decisions – ruling against tribal interests in all three cases. The Tribal Supreme Court Project coordinated resources and developed strategy in each case at the merits stage, with NCAI appearing as an amicus party in all three cases and NARF preparing amicus briefs in two of the three cases. It is significant that in all three cases – *United States v. Navajo Nation, State of Hawaii v. Office of Hawaiian Affairs* and *Carcieri v. Salazar* – the tribal interests had been upheld by the lower courts of appeal with no conflict between the lower courts on the legal issues presented in each case. This development is a continuation of a disturbing trend in Indian law cases granted review since Chief Justice Roberts joined the Court (tribal interests have lost in two other cases – *Plains Commerce Bank v. Long Family Land & Cattle Co.* and *Wagnon v. Prairie Band*

Potawatomi Nation – under similar circumstances). At present, tribal interests are 0 for 5 in the Roberts' Court!

At present, the Tribal Supreme Court Project continues to dedicate substantial resources in the wake of the Court's disastrous decision in *Carcieri v. Salazar.* In *Carcieri,* the Court held that the authority of the Secretary of the Interior to take land in trust for Indian tribes under the provisions of the Indian Reorganization Act ("IRA") is limited to tribes that were "under Federal jurisdiction" in June 1934, the date the IRA was enacted. NCAI and NARF are coordinating tribal efforts to pursue a legislative "fix" to reverse the Court's damage to Congress' overall policy of Indian self-determination and economic self-sufficiency. This legislative fix will clarify that the benefits of the Indian Reorganization Act are available to all Indian tribes, regardless of how or when they achieved federal recognition, and retroactively ratify all past decisions made by the Secretary on behalf of tribes pursuant to the IRA. As we pursue this legislative fix, the Project remains vigilant in persuading the Department of the Interior to adopt a broad, inclusive definition of "under Federal jurisdiction" in relation to pending applications to acquire lands in trust.

During this past term, thirty petitions for writ of certiorari were filed in Indian law cases, a sharp increase over the October 2007 Term which witnessed a low of only eleven petitions filed, and well above the average of twenty-five petitions filed each year since 2001. Of the thirty petitions filed, three were granted, twenty-six were denied, and one was dismissed by agreement of the parties. The Tribal Supreme Court Project monitored each petition at the time it was filed, and provided resources in the preparation of the briefs in opposition where appropriate. Three of the thirty petitions involved issues surrounding the protection of native religious practices and questions under the Religious Freedom Restoration Act – *Navajo Nation v. United States Forest Service, Friday v. United States* and *Rodriquez-Martinez v. United States.* The Project consulted with the attorneys representing the tribes and individual Indians in each of the cases, and committed substantial resources towards the preparation of the petition and the development of amicus brief support in the *Navajo Nation v. United States Forest Service* case.

Surprisingly, eight of the thirty petitions involved questions relating to provisions of the Indian Gaming Regulatory Act and/or questions arising under state-tribal gaming compacts, a sharp increase in the number of Indian gaming cases to reach the Supreme Court over the past several years. Although this number is skewed slightly by the three separate-but-related petitions filed by the State of California in relation disputes regarding number of gaming licenses allocated under 1999 state-tribal compacts, this development will be closely monitored in the lower courts. Six of the thirty petitions filed this past term involved questions regarding the status of tribal lands, including native lands in Alaska and Hawaii. Two of the three petitions granted this past term – *Carcieri v. Salazar* and *State of Hawaii v. Office of Hawaiian Affairs* – fall into this category. Finally, four of the thirty petitions involved questions of tribal sovereign immunity, with the lower courts siding with tribal interests in three out of four times and the Court denying review in all four cases. This is an area we closely monitor every term in the lower courts.

CASES RECENTLY DECIDED BY THE U.S. SUPREME COURT

UNITED STATES V. NAVAJO NATION (NO. 07-1410) – On April 6, 2009, the Court issued its opinion reversing and remanding the case to the U.S. Court of Appeals for the Federal Circuit with instructions to affirm the Court of Federal Claims' dismissal of the Tribe's complaint. This case was 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 in *Navajo I.* The *Navajo I* Court held that the Indian Mineral Leasing

Act of 1938 (IMLA) and its regulations did not constitute the substantive source of law necessary to establish specific trust duties which mandate compensation for breach of those duties by the Government, and remanded the case for further proceedings consistent with its opinion. On remand the Federal Circuit held that provisions of the Navajo-Hopi Rehabilitation Act of 1950 and the Surface Mining Control and Reclamation Act of 1977 (SMCRA) create specific trust duties which the Government had violated, as well as their violation of the "common law trust duties of care, candor, and loyalty" that arise from the comprehensive control exercised by the Government over tribal coal. Justice Scalia, writing for a unanimous Court, found that the IMLA governed the coal lease at issue here and, as the Court held in *Navajo I,* the IMLA does not constitute the requisite substantive source of law. The Court found that the provisions of the Navajo-Hopi Rehabilitation Act and SMCRA relied upon by the Tribe and the Federal Circuit on remand simply do not apply to the coal lease. Justice Souter, joined by Justice Stevens, concurred in the judgment, but expressed their regret their dissent (along with Justice O'Connor) in *Navajo I* "did not carry the day" back in 2003.

STATE OF HAWAII V. OFFICE OF HAWAIIAN AFFAIRS (NO. 07-1372) – On March 31, 2009, the Court issued a unanimous opinion reversing the decision by the Supreme Court of Hawaii which had 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 based on the Apology Resolution adopted by Congress in 1993. Justice Alito, writing for the unanimous Court, found that the "State Supreme Court incorrectly held that Congress, by adopting the Apology Resolution, took away from the citizens of the Hawaii the authority to resolve an issue that is of great importance to the people of the state." However, the unanimous Court remanded the case and recognized that the Office of Hawaiian Affairs, on behalf of native Hawaiians, may have property rights in the land in question and "broader moral and political claims for compensation for the wrongs of the past" as a matter of Hawaiian law entitled to further proceedings.

CARCIERI V. SALAZAR (NO. 03-2647) – On February 24, 2009, the Court issued an extraordinarily troubling decision, limiting the authority of the Secretary of the Interior under the provisions of the Indian Reorganization Act ("IRA"). This case involved a challenge by the State of Rhode Island to the authority of the Secretary to take land in to trust for the Narragansett Tribe under the IRA. The Court held that the term "now" in the phrase "now under Federal jurisdiction" in the definition of "Indian" is unambiguous and limits the authority of the Secretary to only take land in trust for Indian tribes that were under federal jurisdiction in June 1934, the date the IRA was enacted.

Writing for the majority, Justice Thomas, joined by Chief Justice Roberts, Justices Scalia, Kennedy, Breyer and Alito, reversed the decision of the U.S. Court of Appeals for the First Circuit and held that "the record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted." In concurrence, Justice Breyer wrote separately to make the point that Indian tribes federally recognized after 1934 may still have been "under federal jurisdiction" in 1934, particularly where the Interior Department made a mistake about their status or if there was a federal treaty in place. Justice Souter, joined by Justice Ginsberg, concurred in part (holding that the term "now" is unambiguous), but dissented to the Court's straight reversal, finding instead that the case should be remanded to the lower courts to provide an opportunity for the United States and the Narragansett Tribe to pursue a claim that the Tribe was under federal jurisdiction in 1934. Justice Stevens dissented from the majority's opinion finding "no temporal limitation on the definition of 'Indian tribe'" within the IRA.

The Supreme Court has invoked a strained and circular reading of a few sentences in the Indian Reorganization Act to create different "classes" of tribes. Given the fundamental purpose of the IRA was

to organize tribal governments and restore land bases for tribes that had been torn apart by prior federal policies, the Court's ruling is an affront to the most basic policies underlying the IRA.

The Court's decision threatens to be destabilizing for a significant number of Indian tribes. For over 70 years the Department of the Interior has applied a contrary interpretation – that "now" means at the time of application – and has formed entire Indian reservations and authorized numerous tribal constitutions and business organizations under the IRA. There are serious questions about the effect on long settled actions as well as on future decisions. If the decision stands, the Interior Department will have to determine the meaning of "under federal jurisdiction" in 1934, an uncertain legal question and one that makes little sense from a policy perspective. By calling into question which federally recognized tribes are or are not eligible for the IRA's provisions, the Court's ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.

The Supreme Court's new interpretation of the Indian Reorganization Act is squarely at odds with Congress' relatively recent direction to the federal agencies that all tribes must be treated equally regardless of how or when they received federal recognition. In 19994, Congress enacted the Federally Recognized Indian Tribe List Act ("List Act") in part to prohibit the Department of the Interior's attempts to impermissibly "differentiate between federally recognized tribes as being 'created' or 'historic.'" *See* H.Rep. 103-781, at 3-4. That same year, Congress enacted an amendment to the IRA, codified at 25 U.S.C. § 476(f), which prohibits the federal agencies from classifying, diminishing or enhancing the privileges and immunities available to a recognized tribe relative to those privileges and immunities available to other Indian tribes. Congress has also enacted 25 U.S.C. § 2202 which authorizes the Secretary to acquire land in trust for "all tribes." The Court entirely ignored subsequent Congressional action which made clear Congress' intent that all tribes should be treated equally under the law regardless of the manner in which the tribe was recognized or the date on which the tribe was recognized.

To reverse the Court's damage to Congress' overall policy and intent, an amendment to the IRA is necessary to make clear that the benefits of the Indian Reorganization Act are available to all Indian tribes, regardless of how or when they achieved federal recognition.

PETITIONS FOR WRIT OF CERTIORARI GRANTED

Currently, no petitions for writ of certiorari have been granted in any additional Indian law or Indian law-related cases.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Currently, no petitions for a writ of certiorari have been filed and are currently pending before the Court in one Indian law case:

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court denied review in or dismissed the following cases:

STRATMAN V. SALAZAR (NO. 08-863) – On June 29, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that under the provisions of ANILCA, Congress had determined that Leisnoi, Inc., met the eligibility requirements to be a native village corporation.

NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (NO. 08-846) – On June 8, 2009, the Court denied review of a 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").

MARCEAU V. BLACKFEET HOUSING AUTHORITY (NO 08-881) – On May 18, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that: (1) tribal members must exhaust their tribal court remedies before bringing their claim against the Housing Authority; (2) the federal government did not undertake a trust responsibility toward tribal members to construct houses or maintain or repair houses; and (3) tribal members do allege sufficient facts to state claims against HUD under the Administrative Procedure Act.

COOK V. AVI CASINO ENTERPRISES (NO. 08-930) – On May 4, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the Avi Casino, a tribal casino incorporated under tribal law, is entitled to sovereign immunity from suit arising from an automobile-motorcycle accident involving a tribal employee who had been drinking at the tribal casino prior to the accident.

SCHWARZENEGGER V. RINCON BAND OF LUISENO MISSION INDIANS (NO. 08-1030) – On April 20, 2009, the Court denied review of an unpublished decision of the U.S. Court of Appeals for the Ninth Circuit which held that the Tribe may bring a declaratory judgment claim against the state regarding the maximum number of slot machine licenses available to Indian tribes in California.

CALIFORNIA V. CACHIL DEHE BAND OF WINTUN INDIANS (NO. 08-931) – On April 20, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which reversed the lower court and held that in this gaming compact interpretation dispute, other Indian tribes are not necessary parties under Rule 19 of the Federal Rules of Civil Procedure, and that the Tribe's action for declaratory and injunctive relief may proceed.

LOSH V. MINNESOTA (NO. 08-8522) – On April 6, 2009, the Court denied review of a decision by the Minnesota Supreme Court which held that the state has jurisdiction under Public Law 280 to prosecute a tribal member for the offense of driving after revocation of a driver's license on tribal land because the offense is criminal/prohibitory when the underlying basis for revocation is driving while impaired.

COUSHATTA INDIAN TRIBE OF LOUISIANA V. MEYER & ASSOCIATES (NO. 08-985) – On April, 6, the Court denied review of a decision by the Louisiana Supreme Court which held that the Tribe had waived its sovereign immunity under various forum selection clauses in contracts signed by the Tribal Chairman.

SEMINOLE TRIBE OF FLORIDA V. FLORIDA HOUSE OF REPRESENTATIVES (NO. 08-746) – On March 2, 2009, the Court denied 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 contended 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.

FRIDAY V. UNITED STATES (NO. 08-6651) – On February 23, 2009, the Court denied review of Winslow of a decision of the U.S. Court of Appeals for the Tenth Circuit which held that a tribal member's 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.

HARRAH'S OPERATING COMPANY V. NGV GAMING (NO. 08-655) – On January 26, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which involved 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.

MICHIGAN GAMBLING OPPOSITION V. KEMPTHORNE (NO. 08-554) – On January 21, 2009, the Court denied 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. MichGO sought 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."

RODRIGUEZ-MARTINEZ V. UNITED STATES (NO. 08-6467) – On January 26, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which rejected an 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.

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

A.A. V. NEEDVILLE INDEPENDENT SCHOOL DISTRICT (5TH CIR. NO. 09-20091) – On January 20, 2009, the United States District Court for the Southern District of Texas issued a preliminary injunction enjoining the Needville Independent School District from enforcing its grooming policy which would require A.A., a Native American boy in kindergarten, to either cut his braided long hair, wear it in a "bun," or wear a single braid tucked inside his shirt. Based on its finding of A.A.'s sincerely held Native American religious beliefs, the district court held that the school district's policy, as applied to A.A., violates the Texas Religious Freedom Restoration Act, and violates the rights of A.A. to free exercise and free expression of his religious beliefs under the First Amendment to the U.S. Constitution. The school district has filed an appeal of the lower court's decision to the U.S. Court of Appeals for the Fifth Circuit, and is supported by amicus Texas Association of School Boards. The Tribal Supreme Court Project is in contact with the attorneys from the American Civil Liberties Union who represent A.A. and assisted in coordinating the preparation of an amicus brief summarizing the long history of the use of mainstream education policies to undermine tribal culture and religion.

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.

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, 1516 P Street, NW, Washington, DC 20005.

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).