TRIBAL SUPREME COURT PROJECT MEMORANDUM

NOVEMBER 24, 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).

With the beginning of the October 2009 Term, much of the attention and speculation has been focused on the addition of Justice Sotomayor to the Court, as well as the possible retirement of Justice Stevens at the end of the term. The implications for Indian country as a result of these changes are still unfolding, but at present, Indian country is 0 for 5 before the Roberts' Court.

To date, no Indian law cases are currently pending before the Court on the merits. In a disappointing outcome, on November 16, 2009, the Court denied review in *Harjo v. Pro-Football, Inc.* The D.C. Circuit's decision held that the doctrine of laches (*i.e.* long delay in bringing lawsuit) precluded consideration of a petition seeking cancellation of the "Redskins" trademarks owned by Pro-Football, even though the Trademark Trial and Appeals Board's found that the trademarks disparaged Native Americans. The Tribal Supreme Court Project coordinated four amicus in support of the petition: (1) the NCAI-Tribal Amicus Brief which summarizes the efforts of the Native American community over the past forty years to retire all Indian names and mascots; (2) the Social Justice/Religious Organizations Amicus Brief which focuses on the social justice and public interests present in the case; (3) the Trademark Law Professors' Brief which supports and enhances the trademark law arguments put forward by petitioners; and (4) the Psychologists' Amicus Brief which provides an overview of the empirical research of the harm caused by racial stereotyping. Attention will now focus on the *Blackhorse v. Pro-Football, Inc.* litigation which was brought in 2006 by young Native Americans in an effort to avoid the laches defense, and then stayed pending the outcome in the *Harjo* case.

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, petitions for a writ of certiorari have been filed and are currently pending before the Court in several Indian law cases:

HARVEST INSTITUTE FREEDMAN FEDERATION V. U.S. (NO. 09-585) – On November 10, 2009, individuals claiming to be Freedman members of the Five Civilized Tribes filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit affirming the district court's dismissal of the complaint based on the six-year statute of limitation. The petitioners are seeking monetary relief for breach of post-Civil War treaties between the United States and the Five Civilized Tribes which required the Tribes to abolish slavery within their territories and to allocate lands for the Freedman. The U.S. brief in opposition is due on December 16, 2009.

WOLFCHILD V. UNITED STATES (NO. 09-579); ZEPHIER V. U.S. (NO. 09-580) – On November 6, 2009, two groups of individuals who claim to be the descendants of the "loyal" Mdewakanton Sioux filed petitions seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which reversed the trial court's finding of breach of trust by the United States. Based on its determination that the finding of breach of trust is a critical prerequisite to identifying which plaintiffs are entitled to relief and calculating the measure of damages due, the trial court certified two questions for immediate appellate review. In response, the Federal Circuit held that (1) the 1888, 1889 and 1890 Appropriation Acts enacted for the benefit of the loyal Mdewakanton Sioux and their lineal descendants which included lands, improvements to lands and monies as the corpus did not create a trust; and (2) if the referenced Appropriations Acts did create a trust (which they did not), the 1980 Act terminated that trust by giving the three Mdewakanton Indian communities beneficial ownership of the lands. The U.S. brief in opposition is due on December 14, 2009.

SMITH V. COMMISSIONER OF INTERNAL REVENUE (NO. 09-512) – On October 28, 2009, Jonathan K. Smith, a member of the Shinnecock Indian Nation, filed a petition seeking review of a summary order by the U.S. Court of Appeals for the Second Circuit which affirmed the district court's dismissal of his complaint based on lack of subject matter jurisdiction over his appeal of a decision in favor of the Internal Revenue Service in a collection due process hearing. The Second Circuit found that the U.S. Tax Court has exclusive jurisdiction over his appeal of federal income taxes and penalties assessed against his on-reservation income. Among the questions presented, Mr. Smith asks the Court to overturn *Cherokee Nation v. Georgia,* "insofar as the case provides the legal underpinning of United States' jurisdiction over Indian reservations, where this Court interpreted the Commerce Clause language of 'with' to mean 'over' and found Indian tribes to be 'domestic dependent nations' rather than 'foreign nations,' an error in Constitutional interpretation and a historical wrong against Native Americans." The U.S. waived its response and the petition is scheduled for conference on December 4, 2009.

ROY V. STATE OF MINNESOTA (NO. 09-436) – On September 14, 2009, Joel Anthony Roy, an enrolled member of the Leech Lake Band of Chippewa Indians, filed a petition seeking review of a decision by the Minnesota Court of Appeals which upheld his conviction for felon-in-possession of a firearm. Mr. Roy challenges the authority of the state to prosecute a tribal member for felon-in-possession on a number of grounds, including the 1854 and 1855 Treaties with the Chippewa which specifically reserved the right of hunting to the Indians and provided annuity payments to them for firearms and ammunition. The state waived its response.

PYKE V. CUOMO (NO. 09-242) – On August 25, 2009, Joseph Pyke and other Native American plaintiffs filed a petition as representatives of a class (4000 Native American residents on the St. Regis Mohawk Indian Reservation) seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which granted summary judgment in favor of the State of New York, dismissing plaintiffs' equal protections claims arising from widespread, violent unrest on the Mohawk Indian Reservation in the 1980's and 90's. During the unrest, state law enforcement officials failed to intervene and protect the community from the escalating violence which contributed to widespread property destruction and the deaths of two young Mohawks. The Second Circuit held that the plaintiffs failed to show express racial classification or racially discriminatory intent on the part of state officials. The state filed its brief in opposition on October 28, 2009, and the petition has been scheduled for conference on November 24, 2009.

BENALLY V. U.S. (NO. 09-5429) – On July 20 2009, Kerry Dean Benally, a member of the Ute Mountain Ute Tribe, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which denied Benally's motion for a new criminal trial based on allegations of juror racial bias. Mr. Benally was convicted of assaulting a BIA officer. After his trial, a member of the jury approached the judge with concerns about racial bias in the jury room. The juror provided an affidavit that in the jury room, the foreman told the other jurors that he had lived near an Indian reservation and that "'[w]hen Indians get alcohol, they get drunk,' and 'when they get drunk, they get violent.'" A second juror stated that she lived on or near a reservation and made "clear she was agreeing with the foreman's statement about Indians." Other jurors discussed the need to "send a message back to reservation."

Based on this evidence of racist stereotyping, the district court found that two jurors had lied on voir dire when they failed to reveal their past experiences with Native Americans and their preconception that all Native Americans get drunk and then violent. The court concluded that Mr. Benally was therefore entitled to a new trial. The court of appeals reversed, holding that the Federal Rule of Evidence 606(b) prohibited the admission of jury room evidence, even to demonstrate that jurors lied on voir dire. In a dissenting opinion, Judge Briscoe noted that Rule 606(b) only precludes post-trial juror testimony "[u]pon an inquiry into the validity of a verdict," not to prove the existence of a structural defect in a trial based on the right to a fair and impartial jury.

The Tribal Supreme Court Project assisted with the development of two amicus briefs. NCAI filed an amicus brief focusing on the concerns about racial discrimination against Native Americans. The Project also assisted in the development of an amicus brief by a group of evidence law professors regarding the interpretation of Rule 606(b). The U.S. filed its brief in opposition on October 22, 2009, and the petition has been scheduled for conference on November 24, 2009.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court denied review in or dismissed the following cases:

HARJO V. PRO-FOOTBALL, INC. (NO. 09-326) – On November 16, 2009, the Court denied review of a decision by the U.S. Circuit Court of Appeals for the D.C. Circuit which held that the doctrine of laches (*i.e.* long delay in bringing lawsuit) precluded consideration of a petition seeking cancellation of the "Redskins" trademarks owned by Pro-Football, even though the Trademark Trial and Appeals Board's found that the trademarks disparaged Native Americans. The question presented for the Court's review was purely a question arising under trademark law — whether the doctrine of laches applies to a

trademark cancellation petition despite the statutory language that such a petition can be filed "at any time." The petitioners requested review based on the conflict between the decision of the D.C. Circuit and a 2001 decision of the Third Circuit written by then-Judge, now Justice Alito, which held that the statute "means what it says" – and the laches defense is not available in a case controlled by the "at any time" language.

ELLIOTT V. WHITE MOUNTAIN APACHE TRIBAL COURT (NO. 09-187) – On November 16, 2009, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that a non-Indian defendant must exhaust her tribal court remedies before the federal court will entertain her challenge to tribal court jurisdiction. In 2002, Elliot had become lost for three days on the White Mountain Apache Reservation and during her wanderings spotted a news helicopter covering a large forest fire. Elliot set a small signal fire to attract their attention, which worked and she was rescued. However, the small signal fire became a substantial forest fire, which merged with the other forest fire. The combined fire burned more that 400,000 acres of land and caused millions of dollars in damage. The White Mountain Apache Tribe brought a civil suit against Elliot in tribal court seeking civil penalties and restitution for the damages cause by the fire.

HENDRIX V. COFFEY (NO. 08-1306) – On October 5, 2009, the Court denied review of a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that there is no federal subject matter jurisdiction over claims relating to disenrollment from membership in Indian tribe. Such claims are matters of internal tribal concern.

BARRETT V. UNITED STATES (NO. 09-32) – On October 13, 2009, the Court denied review of a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the Tribal Chairman is not entitled to a refund of federal income taxes, penalties and interest assessed against his salary paid from funds received by the Tribe under the provisions of the Indian Tribal Judgment Funds Use or Distribution Act.

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

CASH ADVANCE V. STATE OF COLORADO (COLORADO SUPREME COURT NO. 2008SC639) – On April 15, 2009, the Colorado Supreme Court issued an order *sua sponte* inviting several Native organizations to file amicus briefs on the nature and scope of tribal sovereign immunity in a case involving an appeal by the Santee Sioux Nation and the Miami Nation of Oklahoma who own and operate pay-day loan companies doing business in Colorado. The State had received complaints from consumers and sought to enforce administrative subpoenas against the tribal enterprises. The Tribes' filed motions to dismiss based on the lack of subject matter jurisdiction and tribal sovereign immunity. The court of appeals affirmed the lower court denial of the motion, and its finding that the State's power to investigate violations of state law effectively trumps tribal sovereign immunity. The Tribal Supreme Court Project are working with the attorneys representing the Tribe and the attorneys representing *amici* Colorado Indian Bar Association, Ute Mountain Ute Tribe, American Indian Law Center and the University of Colorado School of Law American Indian Law Clinic.

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).