TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 30, 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 denial of review by the Supreme Court in *Harjo v. Pro-Football, Inc.* (doctrine of laches precludes 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) and *Benally v. United States* (allegations of juror racial bias based on jury foreman's statement that "'[w]hen Indians get alcohol, they get drunk,' and 'when they get drunk, they get violent'"), the docket for the Tribal Supreme Court Project has been relatively quiet.

To date, no Indian law cases have been granted review by the Court. Five petitions are currently pending, and a total of eight petitions have been denied. The Project continues to monitor a number of Indian law cases in the lower courts which will likely come before the Court. In particular, the United States has indicated its decision to file a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit in *Tohono O'odham Nation v. United States*. In *Tohono O'odham,* the Federal Circuit found that 28 U.S.C. § 1500 does not preclude jurisdiction in the Court of Federal Claims when a Indian tribe has also filed an action in Federal District Court seeking different relief (*e.g.* money damages versus historical accounting). A number of Indian tribes have filed identical claims for breach of fiduciary duties in both the Court of Federal Claims and the Federal District Court seeking separate relief. The current deadline for the cert petition is January 15, 2010.

In addition, the Project continues to monitor *Cash Advance v. State of Colorado,* a case pending before the Colorado Supreme Court involving the nature and scope of tribal sovereign immunity in relation to tribal-owned corporations 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 Project has been working with the attorneys representing the tribes and the tribal *amici.* The case has been fully briefed and is scheduled for oral argument on January 21, 2010.

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:

ROSENBERG V. HUALAPAI INDIAN NATION (NO. 09-742) – On December 21, 2009, Dr. Steven Rosenberg filed a petition seeking review of a decision by the Arizona Court of Appeals affirming the trial court's dismissal of his complaint against the Hualapai Indian Nation based on the doctrine of tribal sovereign immunity. Dr. Rosenberg filed a lawsuit in state court against the Hualapai River Runners, a tribally-owned whitewater rafting business offering tours of the Grand Canyon, for injuries suffered in a whitewater rafting accident. The Hualapai Indian Nation's brief in opposition is due on January 25, 2010.

COBELL V. SALAZAR (NO. 09-758) – On December 18, 2009, lead plaintiff Elouise Cobell filed a petition seeking review of a decision by the U.S. Court of Appeals for the D.C. Circuit which held that an historical accounting of the individual Indian trust accounts is not "impossible" and dismissed the district court's $485.6 million award to plaintiffs. The D.C. Circuit held that the federal government need only conduct "the best accounting possible, in a reasonable time, with the money Congress is willing to appropriate." Although the parties entered into a settlement agreement on December 7, 2008, settling all claims raised in the litigation, the petition was filed with a motion asking the Court to hold the petition in abeyance pending enactment by Congress of legislation specified in the agreement and final approval of the settlement by the district court.

SHINNECOCK SMOKESHOP V. KAPPOS (09-635) – On November 25, 2009, petitioner Jonathan K. Smith filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which affirmed the decision of the U.S. Patent and Trademark Office denying petitioner's application to register the trademarks "Shinnecock Brand Full Flavor" and "Shinnecock Brand Lights." The Federal Trademark Act prohibits the registration of any mark which "consists of or comprises … matter which may … falsely suggest a connection with persons, living or dead, [or] institutions …." The Federal Circuit held that the Shinnecock Tribe is an "institution" under this provision. The U.S. filed a waiver of its right to respond on December 9, 2009, and the petition has been scheduled for conference on January 15, 2010.

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. filed a waiver of its right to respond on December 16, 2009, and the petition has been scheduled for conference on January 15, 2010.

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. filed a waiver of its right to respond on December 7, 2009.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court denied review in or dismissed the following cases:

ROY V. STATE OF MINNESOTA (NO. 09-436) – On December 14, 2009, the Court denied review of a decision by the Minnesota Court of Appeals which upheld a tribal member's conviction for felon-in-possession of a firearm. Mr. Roy had challenged 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.

SMITH V. COMMISSIONER OF INTERNAL REVENUE (NO. 09-512) – On December 7, 2009, the Court denied review of a summary order by the U.S. Court of Appeals for the Second Circuit which affirmed the district court's dismissal of a tribal member's 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.

PYKE V. CUOMO (NO. 09-242) – On November 30, 2009, the Court denied 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 Native American 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.

BENALLY V. U.S. (NO. 09-5429) – On November 30, 2009, the Court denied 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."

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."

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).