

# TRIBAL SUPREME COURT PROJECT

## MEMORANDUM

MARCH 25, 2010

### 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](http://www.narf.org/sct/index.html)).

Although no Indian law cases have been granted review by the Court, several new petitions have been filed in the past several weeks. At present, there are 16 petitions pending, with a total of ten petitions having been denied this term. We are monitoring several petitions closely, including: (1) *Wolfchild v. United States*, a case that could become a vehicle for the Court to further erode the nature of the United States' trust responsibility, and to limit the scope of the fiduciary duties the United States owes to the Indian people; (2) *Rosenberg v. Hualapai Indian Nation*, a case involving the doctrine of tribal sovereign immunity as it applies to tribal enterprises; and (3) *United States v. Tohono O'odham Nation*, another case involving claims for breach of fiduciary duties which could impact a number of other cases filed by Indian tribes against the United States in both the Court of Federal Claims and the Federal District Court seeking separate relief.

However, most of the resources of the Tribal Supreme Court Project have been focused on litigation pending in the lower courts. Project attorneys are tracking lower court litigation based on subject matter area to allow the Project an opportunity to assist in earlier stages of litigation. For example, the Project has been monitoring five cases involving challenges to Reservation status of certain lands (diminishment) or challenges to the continuing existence of an entire Reservation (disestablishment). Currently, in *Osage Nation v. Irby (Oklahoma Tax Commission)*, the Project is working diligently with the attorneys representing the Osage Nation in developing an amicus strategy and preparing amicus briefs in support of their petition for rehearing of a Tenth Circuit decision which held that the legislative history and subsequent events to the Osage Allotment Act evidence Congress' intent to disestablish the Osage Reservation.

In similar fashion, the Project has been monitoring 11 cases involving challenges to the authority of the Secretary to take land in trust for tribes based on the Supreme Court's decision last year in *Carcieri v. Salazar*. Currently, the Project is preparing materials and developing strategy in anticipation of amicus support for the tribes and the United States as the *Carcieri*-related litigation works its way through the courts. The Project is also tracking litigation involving challenges to the doctrine of tribal sovereign immunity; challenges to the authority of Tribes to regulate the activities of non-Indians on-reservation or adjudicate disputes involving non-Indians; attempts to undermine tribal cultural values and laws

protecting Native religious freedom; and attacks against the authority of tribal courts to impose consecutive sentences of more than one-year for violent crimes committed by Indians on the reservation.

### **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:

**JEFFREDO V. MACARRO (NO. 09-1137)** – On March 18, 2010, disenrolled members of the Pechanga Band of Luiseno Mission Indians filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which upheld the district court’s dismissal of their petition for habeas corpus under the Indian Civil Rights Act. The Ninth Circuit rejected the petitioners’ novel approach that their disenrollment from the Tribe was tantamount to unlawful detention, thus providing the federal courts with subject matter jurisdiction under *Santa Clara Pueblo*. The Tribe’s brief in opposition is due on April 21, 2010.

**UTE DISTRIBUTION CORPORATION V. SALAZAR (NO. 09-1103)** – On March 12, 2010, the Ute Distribution Corporation (UDC) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that their claim for a declaration that the Secretary’s implementation of the 1954 Ute Partition and Termination Act (UPA) did not provide for an equitable and practicable division and distribution of water rights between “mixed blood” and “full blood” members of the Ute Indian Tribe was time-barred. The Tenth Circuit rejected the UDC’s argument that the United States has a continuing duty to properly manage the undistributed assets (including water rights) and held that the Secretary’s approval of the Plan of Division in 1961 was the “single discrete event associated with the UPA” that triggered the six-year limitations period. The United States brief in opposition is due on April 15, 2010.

**STYMIEST V. UNITED STATES (NO. 09-9420)** – On March 2, 2010, Stymiest filed a petition seeking review of a decision of the U.S. Court of Appeals for the Eighth Circuit which upheld his conviction for assault resulting in serious bodily injury. The Eighth Circuit held that the jury’s finding that he was an “Indian” for purposes of Major Crime’s Act was not improper. Stymiest had objected that the jury instruction regarding the second element of the *Rogers* test for determining Indian status was an inaccurate and inadequate statement—failing to instruct the jury to consider the factors in declining order of importance (e.g., giving most weight to tribal enrollment) and adding two irrelevant factors: tribal recognition by tribal court jurisdiction and “defendant holding himself out as an Indian.” The United States has waived its right of response and the petition has been scheduled for **conference on April 2, 2010**.

**OGLALA SIOUX TRIBE V. U.S. ARMY CORP OF ENGINEERS (NO. 09-1051)** – On March 1, 2010, the Oglala Sioux Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that the federal district courts lack subject matter jurisdiction over claims barred under the Indian Claims Commission Act and that the National Historic Preservation Act does not

establish a clear duty upon federal agencies to evaluate Native American cultural items or historic sites for nomination in a certain time frame or in a specific manner. The Oglala Sioux Tribe sued the United States seeking a declaration that the 1889 Act of Congress dissolving the Great Sioux Reservation never took effect. The United States brief in opposition is due on April 2, 2010.

**DICKSON V. SAN JUAN COUNTY (NO. 09-997)** – On February 16, 2010, former employees of a county health clinic located within the Navajo Reservation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the dismissal of their complaint based on the law-of-the-case doctrine. This longstanding litigation is based on the former employees’ efforts to enforce an injunction and other orders of the Navajo Tribal Court against the clinic officials. The Tenth Circuit held that its prior decision in *McArthur III* which found that the Navajo Tribal Court does not have civil jurisdiction over the non-Indian clinic officials under *Montana v. U.S.*, as confirmed in *Plains Commerce Bank v. Long Family*. San Juan County’s brief in opposition is due on March 26, 2010.

**DAVIS V. MINNESOTA (NO. 09-1002)** – On February 16, 2010, Mr. Davis, a member of the Leech Lake Band of Chippewa, filed a petition seeking review of a decision by the Minnesota Supreme Court which upheld the authority of the state to prosecute him for traffic offenses committed on the Mille Lacs Reservation. The court rejected Mr. Davis’ argument that state courts do not have jurisdiction over offenses committed by Indians, whether members or nonmembers, on Indian reservations based on the U.S. Supreme Court’s decision in *U.S. v. Lara*. On March 17, 2010, the State of Minnesota filed its waiver of response and the petition has been scheduled for **conference on April 16, 2010**.

**HOGAN V. KALTAG TRIBAL COUNCIL (NO. 09-960)** – On February 11, 2010, the State of Alaska filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which upheld the authority of the Kaltag Tribal Court over a tribal member-child placement proceeding. The Ninth Circuit held that under ICWA, the State is required to extend full faith and credit to the Tribal Court’s adoption judgment. The Tribe’s brief in opposition is due on April 21, 2010.

**ATTEA V. DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK (NO. 09-910)** – On January 25, 2010, Elias A. Attea, Jr., a federally licensed Indian trader (dba JR Attea Wholesale—wholesale distribution of tobacco products), filed a petition seeking review of a decision by the New York State Court of Appeals which held that Attea’s failure to substantiate the allocation of sales to Native Americans on Indian reservations on his nonresident income tax returns. This failure justified the Department of Taxation allocating 100% of his income to New York with credit for sales that might be tax-exempt based on his Indian trader licenses. Mr. Attea argues that all state transactional record-keeping requirements are inapplicable to Indian traders based on the doctrine of federal preemption. New York’s brief in opposition is due on March 31, 2010.

**SHARP V. UNITED STATES (NO. 09-820)** – On January 7, 2010, Mary D. Sharp, a water-front homeowner on the Lummi Reservation, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the water-front homeowners are liable for trespass and are in violation of the River & Harbors Act (“RHA”) for failing to remove various “shore defense structures” (e.g., bulkheads and rip-rap) from tidelands owned by the United States in trust for the Lummi Nation. In their petition, the homeowners make three assertions: (1) the homeowners cannot be liable in trespass because their shore defense structures were originally built on the uplands, not the tidelands; (2) the homeowners cannot be in violation of the RHA for failing to obtain a federal permit since, at the time of construction, the structures were not within the navigable waters of the United States; and (3) homeowners are not liable for trespass because, under the equal footing doctrine, the State of Washington owns the tidelands.

The Pacific Legal Foundation, the Washington State Farm Bureau, the Bay Planning Coalition and California Building Industry Association have filed amicus briefs in support of the petitioner. On February 10, 2010, the Lummi Nation filed its brief in opposition. The United States was granted a second extension, and its brief in opposition is due on April 12, 2010.

**UNITED STATES V. TOHONO O’ODHAM NATION (NO. 09-846)** – On January 15, 2010, the United States filed 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 Tohono O’odham Tribe filed its brief in opposition on March 18, 2010.

**NORTH COUNTY COMMUNITY ALLIANCE V. SALAZAR (NO. 09-800)** – On January 4, 2010, the North County Community Alliance (a nonprofit environmental organization) filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the National Indian Gaming Commission (NIGC) does not have a duty under the Indian Gaming Regulatory Act (IGRA) to make an “Indian lands” determination prior to a tribe’s licensing and construction of a casino under an existing Tribal Gaming Ordinance approved by the NIGC. The United States filed its brief in opposition on March 8, 2010, and the petition has been scheduled for conference on April 16, 2010.

**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 was filed on February 24, 2010 and the petition is scheduled for conference on March 26, 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. At present, the United States brief in opposition is due on March 29, 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 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, and the petitions were scheduled for conference on January 15, 2010. However, on January 13, 2010, the Court issued a request for the United States file a response which it filed on March 15, 2010.

**BRIONES V. UNITED STATES (NO. 09-1044)** – On October 16, 2009, defendants, who are Indian and were convicted under the Major Crimes Act for crimes committed on the Salt River Pima-Maricopa Indian Reservation, filed a petition seeking review of a decision of the U.S. Court of Appeals for the Ninth Circuit which affirmed their convictions. Among the questions presented defendants ask the Court to review: “Whether the District Court had the jurisdiction under the General Crimes Act 18 U.S.C. § 1152 and the Major Crimes Act 18 U.S.C. § 1153, to apply federal statutes of crimes on Indian land not expressly authorized by Federal statute?” The United States filed its waiver of response on March 5, 2010, and the petition has been scheduled for **conference on March 26, 2010**.

### **PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED**

The Court denied review in or dismissed the following cases:

**SHINNECOCK SMOKESHOP V. KAPPOS (09-635)** – On January 19, 2010, the Court denied 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 individual 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.

**HARVEST INSTITUTE FREEDMAN FEDERATION V. U.S. (NO. 09-585)** – On January 19, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Federal Circuit affirming the district court’s dismissal of a complaint by individuals claiming to be Freedman members of the Five Civilized Tribes. The petitioners had sought 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.

**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 1980s and 90s. 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 than 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 caused 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**

**OSAGE NATION V. IRBY (OKLAHOMA TAX COMMISSION) (10<sup>TH</sup> CIR. NO. 09-5050)** – On March 5, 2010, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court’s grant of summary judgment in favor of the State of Oklahoma, concluding that the Osage Reservation has been disestablished by Congress. The Osage Nation sued the state seeking declaratory and injunctive relief: a declaration that Osage County, Oklahoma, formed the boundaries of the Osage Reservation and that the Osage Reservation was “Indian country” within the meaning of 18 U.S.C.S. § 1151; and an order enjoining state agents from imposing or collecting taxes on members of the tribe who lived in Osage County. The district court held that the Osage reservation had been disestablished and that tribal members who work and live on non-trust/non-restricted land in Osage County are not exempt from state income tax. In large measure, the holding was based on the district court’s findings that the Osage Nation only recently sought to reestablish their claimed reservation and Oklahoma’s longstanding reliance on tax revenue counsels against now establishing Osage County as a reservation. On March 9, 2010, the Tenth Circuit granted Osage Nation’s request to extend time to file petition for rehearing until April 2, 2010.

**WATER WHEEL CAMP RECREATIONAL AREA, INC. V. LARANCE (9<sup>TH</sup> CIR. NOS. 09-17349; 09-17357)** – On September 23, 2009, the United States District Court for the District of Arizona issued a decision in a case involving non-Indian holdover tenants of tribal lands on the California portion of the Colorado River Indian Reservation who sought a declaration that the Tribal Court had no jurisdiction over an eviction suit filed by the Tribe. The district court judge denied relief to Water Wheel holding that there was a consensual relationship between the Tribe and its corporate tenant sufficient to meet the first exception to the rule in *Montana v. United States*. But the district court held that Tribe did not have jurisdiction over Robert Johnson, the President of Water Wheel under the *Montana* test, and he enjoined Judge LaRance from exercising jurisdiction over Mr. Johnson. The Tribal Court had sanctioned Mr. Johnson, holding him individually liable to any judgment against Water Wheel, for his refusal to comply with discovery requests and tribal court orders compelling compliance with discovery requests. Parts of the judgment were, in effect, sanctions against the defendants for violation of court orders. The Tribal Court of Appeals affirmed the judgment evicting Water Wheel and Johnson, and awarded over \$3 million for unpaid rent, trespass damages, and attorney fees. The Tribal Court appealed the district court’s decision with respect to jurisdiction over Mr. Johnson and Water Wheel has cross-appealed the denial of relief as to it. The U.S. Court of Appeals has set out a briefing schedule with opening briefs due on April 30, 2010. The Project is working closely with the attorneys representing the Tribe and the Tribal Court to prepare amicus briefs in support of tribal court jurisdiction.

**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 continues to work

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. The Project participated in moot court oral argument at the University of Colorado School of Law in preparation for oral argument before the Colorado Supreme Court on January 21, 2010.

**A.A. v. NEEDVILLE INDEPENDENT SCHOOL DISTRICT (5<sup>TH</sup> CIR. NO. 09-20091)** – On December 4, 2009, oral argument was heard before the U.S. Court of Appeals for the Fifth Circuit in review of a decision by the United States District Court for the Southern District of Texas which issued a preliminary injunction enjoining the Needville Independent School District from enforcing its grooming policy against A.A., a Native American boy in kindergarten, which would require him 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.

**ONEIDA INDIAN NATION V. ONEIDA COUNTY (2<sup>ND</sup> 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](mailto:jdossett@ncai.org)) or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 ([richardg@narf.org](mailto:richardg@narf.org)).**