TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 7, 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).

At present, the U.S. Supreme Court is in summer recess, with the October 2010 Term scheduled to start on Monday, October 4, 2010. Once again, the addition of a new Associate Justice to the Court is highly anticipated. Last week, the Senate Judiciary Committee conducted four days of hearings for the confirmation of Solicitor General Elena Kagan to replace Justice John Paul Stevens. The Senate Judiciary Committee is scheduled to mark-up the nomination of Elena Kagan next week, with a final Committee vote the following week. The full Senate will likely hold its final roll call vote on her confirmation before the August recess which begins August 6, 2010. NARF has prepared a memo which provides more background information and a summary of Kagan's Indian law experience, a copy of which can be obtained by contacting Richard Guest at richardg@narf.org.

The end of the October 2009 Term provides an opportunity to review the work of the Tribal Supreme Court Project. In stark contrast to the previous term during which the Court issued three Indian law decisions–ruling against tribal interests in all three cases–during the October 2009 Term, the Court did not issue any Indian law decisions this past term. However, the Court has granted review in *United States v. Tohono O'odham Nation* (see summary below) which will be argued and decided this next term. In all, twenty-six petitions for writ of certiorari were filed in Indian law cases this past term. On average, twenty-five petitions have been filed in Indian law cases each year since 2001. Of the twenty-six petitions filed, one was granted, twenty-four were denied, and one was dismissed by agreement of the parties.

As always, the Tribal Supreme Court Project monitored each petition at the time it was filed, and provided resources in the preparation of the briefs where appropriate. For example, the Project assisted in the development of the amicus strategy and briefs in support of the petitions 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'"). Unfortunately, the Court denied review in both cases. The Project also worked closely with attorneys representing tribal interests which prevailed in the lower courts to prepare response briefs to successfully oppose review. These cases included: *Elliot v. White Mountain Apache Tribe* (non-

Indian defendant must exhaust her tribal court remedies before the federal court will entertain her challenge to tribal court jurisdiction); and *Rosenberg v. Hualapai* (sovereign immunity bars lawsuit in state court against a tribally-owned whitewater rafting business).

Unlike the previous term when eight petitions involved questions relating to provisions of the Indian Gaming Regulatory Act (IGRA) and/or questions arising under state-tribal gaming compacts, only one petition this past term, *North County Community Alliance v. Salazar*, involved a question arising under IGRA. No one subject matter area dominated the field of twenty-six petitions filed this past term: five involved questions of state or federal criminal jurisdiction over Indians; four involved issues related to the federal trust relationship; and three involved questions of state or federal taxes on Indians. The remainder of the petitions was a mix of questions regarding tribal civil jurisdiction over non-Indians (2), the status of Indian lands (2), various tribal membership disputes (3), Indians and trademark issues (2); tribal sovereign immunity (1), water rights (1), civil rights (1) and class actions (1).

In addition to its work before the U.S. Supreme Court, the Project continues to monitor Indian law cases pending before the lower federal courts and in the state courts. In certain cases, the Project may become involved in the lower court litigation—coordinating resources, developing litigation strategy and/or filing briefs in support of tribal interests. This past term, the Project assisted in the preparation of amicus briefs in a number of cases, including: *Patchak v. Salazar* (pending before the D.C. Circuit challenging trust land acquisition based on *Carcieri* and the status of the Tribe in 1934); *Water Wheel Camp v. LaRance* (pending before the Ninth Circuit on questions involving the scope of tribal court jurisdiction over non-Indian lessees); *Osage Nation v. Irby* (request for en banc review by Tenth Circuit on question of disestablishment of Osage Reservation denied); and *Colorado v. Cash Advance* (pending before the Colorado Supreme Court on the question of the sovereign immunity of tribal enterprises doing business outside the reservation). The Project has renewed its efforts to monitor a substantial number of Indian law cases pending in the lower courts, updating the cases by subject matter area, including: Post-*Carcieri* Litigation; Criminal Jurisdiction (Federal and State); Civil Jurisdiction (Tribal and State); Diminishment/ Disestablishment; Indian/Tribal Status; Sovereign Immunity; Taxation; Treaty Rights; Religious Freedoms; and Trust Relationship. Hopefully, these efforts will help us identify trends or currents within distinct areas of Indian law that can be effectively addressed prior to reaching the Supreme Court.

PETITIONS FOR WRIT OF CERTIORARI GRANTED

Currently, a writ of certiorari has been granted in one Indian law case:

UNITED STATES V. TOHONO O'ODHAM NATION (NO. 09-846) – On April 19, 2010, the Supreme Court granted 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). Specifically, the question presented is:

> Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

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 United States filed its opening brief on the merits on July 1, 2010. The Tribe's response brief on the merits is due on August 6, 2010 and the United States' reply brief is due on August 19, 2010.

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:

HOFFMAN V. SANDIA RESORT AND CASINO (NO. 10-4) – On June 21, 2010, Gary Hoffman, a non-Indian patron of the Sandia Resort and Casino, filed a petition seeking review of a decision by the Court of Appeals of New Mexico which held that the doctrine of tribal sovereign immunity barred his claims related to a $1.5 million jackpot payout from a slot machine that "malfunctioned." The Court of Appeals held that the limited waiver of immunity within the tribal-state gaming compact for physical injury to persons or property did not apply to his claims. The Tribe's brief in opposition is due on July 29, 2010.

UNITED STATES V. EASTERN SHAWNEE TRIBE OF OKLAHOMA (NO. 09-1521) – On June 15, 2010, the United States filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which held that, based its recent decision in *Tohono O'odham,* 28 U.S.C. § 1500 is not a bar to the Tribe in seeking relief in the Court of Federal Claims where it seeks different relief and the relief sought could not be awarded in the Federal District Court. The Tribe's brief in opposition is due on July 15, 2010.

METLAKATLA INDIAN COMMUNITY V. SEBELIUS (NO. 09-1466) – On June 1, 2010, the Metlakatla Indian Community filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which held that the filing of a class action against the government does not toll the statute of limitations for asserted class members to exhaust their administrative remedies. The underlying class action lawsuit was filed in 2001 against the Indian Health Service for failure to pay contract support costs to tribal contractors. The U.S. brief in opposition is due on July 6, 2010.

MAYBEE V. STATE OF IDAHO (NO. 09-1471) – On June 1, 2010, Scott Maybee, an enrolled tribal member of the Seneca Nation who resides on the Seneca Reservation in New York and who is sole proprietor of the websites smartsmoker.com, ordersmokesdirect.com, and buycheapcigarettes.com, filed a petition seeking review of a decision by the Idaho Supreme Court. The court held that his sale of unstamped cigarettes shipped from the Seneca Reservation to consumers in Idaho was in violation of state law as adopted pursuant to the Master Settlement Agreement with the four largest tobacco manufacturers in the United States. Idaho's brief in opposition was filed on June 25, 2010. The petition will be scheduled for the Court's opening conference in September 2010.

SCHAGHTICOKE TRIBAL NATION V. KEMPTHORNE (NO. 09-1433) – On May 24, 2010, the Schaghticoke Tribal Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which rejected the Tribe's argument that Reconsidered Final Determination denying federal acknowledgement resulted from undue (and improper) political influence and was issued by an unauthorized decision-maker in violation of the Vacancies Reform Act. On June 21, 2010, the U.S. filed a waiver of its right to respond. The petition will be scheduled for the Court's opening conference in September 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 filed its brief in opposition on March 25, 2010. After consideration in conference, on April 26, 2010, the Court invited the Solicitor General to file a brief expressing the views of the United States.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court denied review in or dismissed the following cases:

ARCTIC SLOPE NATIVE ASSOCIATION V. SEBELIUS (NO. 09-1172) – On June 28, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Federal Circuit which held, in conflict with three other Circuits, that the filing of a class action against the government does not toll the statute of limitations for asserted class members to exhaust their administrative remedies. The underlying class action lawsuit had been filed in 2001 against the Indian Health Service for failure to pay contract support costs to tribal contractors.

OGLALA SIOUX TRIBE V. U.S. ARMY CORP OF ENGINEERS (NO. 09-1051) – On June 28, 2010, the Court denied 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 of the Oglala Sioux Tribe barred under the Indian Claims Commission Act. The Eighth Circuit also found 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.

COBELL V. SALAZAR (NO. 09-758) – On June 24, 2010, the Court granted the Rule 46 motion of lead plaintiff Elouise Cobell to dismiss the 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." The parties have entered into a settlement agreement which requires action by Congress and final approval by the district court.

JEFFREDO V. MACARRO (NO. 09-1137) – On May 24, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which upheld the district court's dismissal of a petition by disenrolled members of the Pechanga Band of Luiseno Mission Indians requesting habeas corpus relief 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*.

SHARP V. UNITED STATES (NO. 09-820) – On May 17, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that non-Indian 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 made 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 the California Building Industry Association had all filed amicus briefs in support of the non-Indian homeowners.

UTE DISTRIBUTION CORPORATION V. SALAZAR (NO. 09-1103) – On May 17, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that Ute Distribution Corporation's 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.

ATTEA V. DEPARTMENT OF TAXATION AND FINANCE OF NEW YORK (NO. 09-910) – On May 3, 2010, the Court denied review of a decision by the New York State Court of Appeals which rejected a federally licensed Indian trader's (JR Attea Wholesale—wholesale distribution of tobacco products) argument that all state transactional record-keeping requirements are inapplicable to Indian traders based on the doctrine of federal preemption. The court held that failure to substantiate the allocation of sales to Native Americans on Indian reservations justified the Department of Taxation allocating 100% of income to New York.

DICKSON V. SAN JUAN COUNTY (NO. 09-997) – On April 26, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the dismissal of a complaint filed by former employees of a county health clinic located within the Navajo Reservation 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.*

WOLFCHILD V. UNITED STATES (NO. 09-579); ZEPHIER V. U.S. (NO. 09-580) – On April 19, 2010, the Court denied 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 in relation to individual Indians who claim to be descendants of the "loyal" Mdewakanton Sioux. 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.

NORTH COUNTY COMMUNITY ALLIANCE V. SALAZAR (NO. 09-800) – On April 19, 2010, the Court denied 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.

DAVIS V. MINNESOTA (NO. 09-1002) – On April 19, 2010, the Court denied review of a decision by the Minnesota Supreme Court which upheld the authority of the state to prosecute a non-member Indian for traffic offenses committed on the Mille Lacs Reservation. The Minnesota Supreme Court had rejected the 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*.

ROSENBERG V. HUALAPAI INDIAN NATION (NO. 09-742) – On April 5, 2010, the Court denied review of a petition seeking review of a decision by the Arizona Court of Appeals affirming the trial court's dismissal of a 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.

STYMIEST V. UNITED STATES (NO. 09-9420) – On April 5, 2010, the Court denied review of a decision of the U.S. Court of Appeals for the Eighth Circuit which upheld a conviction for assault resulting in serious bodily injury of a defendant who challenged the jury's finding that he was an "Indian" for purposes of Major Crime's Act. 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."

BRIONES V. UNITED STATES (NO. 09-1044) – On March 29, 2010, the Court denied review of a decision of the U.S. Court of Appeals for the Ninth Circuit which affirmed the convictions of defendants who are Indian and who were convicted under the Major Crimes Act for crimes committed on the Salt River Pima-Maricopa Indian Reservation. Among the questions presented that defendants asked 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?"

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 protection claims arising from widespread, violent unrest on the Mohawk Indian Reservation in the 1980s and 1990s. 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 a question arising purely 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 an 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

PATCHAK V. SALAZAR (D.C. CIR. NO. 09-5324) – On May 10, 2010, the United States and the Match-E-Be-Nash-She-Wish Tribe filed their answering briefs in response to an appeal from the decision of the U.S. District Court for the District of Colombia which dismissed a challenge to the Secretary's decision to take land in trust for the Tribe. Mr. Patchak filed his lawsuit three years after the Secretary's decision to take the land in trust was published in the Federal Register, and after the Supreme Court granted review in *Carcieri v. Salazar.* The suit claimed that the Secretary lacks authority to take the land in trust under the provisions of the Indian Reorganization Act (IRA) since the Tribe was not a "federally recognized tribe" in 1934. The district court never addressed the merits of the lawsuit, holding that Mr. Patchak's alleged injury does not fall within the "zone of interests" protected by the IRA and, therefore, he lacks standing to challenge the Secretary's decision. The district court also observed that its subject matter jurisdiction was "seriously in doubt" after the land was taken in trust and the waiver of immunity by the United States under the Quiet Title Act does not apply to Indian trust or restricted lands. The Project prepared and filed an amicus brief in support of the United States and the Tribe on behalf of the National Congress of American Indians. Final briefs are due on June 15, 2010.

OSAGE NATION V. IRBY (OKLAHOMA TAX COMMISSION) (10TH CIR. NO. 09-5050) – On May 25, 2010, the U.S Court of Appeals for the Tenth Circuit denied the Osage Nation's combined petition for rehearing and rehearing en banc of the three-judge panel decision which 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. Although the three-judge panel of the Tenth Circuit found that the Osage Allotment Act did not have any specific language indicating Congress's intent to disestablish the reservation, the panel held that such intent is manifested by subsequent events (*e.g.* opening of reservation to non-Indians) and modern demographics (*e.g.* high percentage of non-Indians living within reservation). The Osage Nation is considering its options, including a possible petition for writ of certiorari to the Supreme Court.

WATER WHEEL CAMP RECREATIONAL AREA, INC. V. LARANCE (9TH 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 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 Tribal Court filed its opening brief on May 14, 2010. The Project helped develop and coordinate the filing of several amicus briefs in support of the Tribal Court which were filed on May 21, 2010, including a brief on behalf of the Colorado River Indian Tribe; a brief on behalf of the National Congress of American Indian and individual Indian tribes; and a brief on behalf of the National American Indian Court Judges Association.

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 (5TH 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 (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).