TRIBAL SUPREME COURT PROJECT MEMORANDUM

OCTOBER 4, 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).

The U.S. Supreme Court held its opening conference on Monday, September 27, 2010, in which it considered eight petitions for writ of certiorari in Indian law and Indian-law related cases. In its order of October 4, 2010, the Court requested the views of the U.S. Solicitor General in one Indian law case, *Thunderhorse v. Pierce,* which seeks review of a decision by the U.S. Court of Appeals for the Fifth Circuit which held that the prison's enforcement of its grooming rules, including the prohibition of long hair on men with no exception for Native American religious practitioners, does not violate the Religious Land Use and Institutionalized Person's Act.

Without comment, the Court denied review of the other seven Indian law petitions (see Petitions for Writ of Certiorari Denied/Dismissed below). The denial of review preserves important victories in the lower courts in *Hoffman v. Sandia Resort & Casino* and *Hogan v. Kaltag Tribal Council.* In *Hoffman v. Sandia Resort & Casino*, the Court denied 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 a non-Indian's claims related to a $1.5 million jackpot payout from a slot machine that "malfunctioned." The Court of Appeals also 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 petitioner had asked the U.S. Supreme Court to carve out "a narrower and more equitable application of tribal immunity in the context of tribal gaming under the provisions of the Indian Gaming Regulatory Act."

In *Hogan v. Kaltag Tribal Council,* the Court denied the State of Alaska's petition seeking review of a Ninth Circuit decision which upheld the authority of the Kaltag Tribal Court over a tribal member-child placement proceeding. In the view of the State, since there are no reservations (with one exception) in Alaska, Native villages have no authority under the Indian Child Welfare Act over child placement proceedings, except the authority to request transfer of tribal member-child placement proceedings from state courts. In its petition, the State sought to characterize the dispute as a challenge to "the tribe's effort to enforce a decree entered in a child custody proceeding involuntarily initiated in tribal court involving non-members domiciled outside of Indian country." The Court had invited the U.S. Solicitor General to file a brief expressing the views of the United States in which the Solicitor General recommended that the Court deny review.

The Court's next scheduled conference is October 8, 2010, during which it will consider *Madison County v. Oneida Indian Nation of New York.* In *Madison County,* the Second Circuit held that the Tribe is immune from suit in foreclosure proceedings for non-payment of county taxes involving fee property owned by the Tribe. This petition is the latest chapter of a lengthy dispute over payment of taxes addressed by the Supreme Court in 2005 in *City of Sherrill v. Oneida Indian Nation of New York.* Five amicus briefs, including an amicus brief on behalf of the State of New York joined by seven other states, have been filed in support of the petition. This is definitely a petition to watch!

You can find copies of briefs and opinions on the major cases we track on the Project's website (www.narf.org/sct/index.html).

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 November 1, 2010, the U.S. Supreme Court will hear oral argument in *United States v. Tohono O'odham Nation,* a case in which the U.S. Court of Appeals for 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). The question presented for the Court's review 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 and the Tribe's response brief on the merits was filed on August 27, 2010. Four amicus briefs in support of the Tohono O'odham Nation were filed by the U.S. Chamber of Commerce, the National Association of Home Builders, the Colorado River Indian Tribes and National Congress of American Indians, and the Osage Nation. Justice Kagan is recused in this case.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

GLACIER ELECTRIC COOP V. ESTATE OF SHERBURNE (NO. 10-408) – On September 22, 2010, Glacier Electric Cooperative, Inc., ("GEC") filed a petition seeking review of an unpublished one-page memorandum decision of the U.S. Court of Appeals for the Ninth Circuit which held that under the doctrine of issue preclusion GEC can not challenge the subject matter jurisdiction of the Blackfeet Tribal Court. In an earlier stage of this seventeen-year litigation, the Respondents sought enforcement as a matter of comity in the federal courts of a $2 million money judgment against GEC entered by the tribal court after a jury trial. (Comity requires a finding of jurisdiction and due process.) The federal district court ruled that the tribal court had subject matter jurisdiction, that GEC was accorded due process, and

that "the underlying tribal court judgment is entitled to recognition and enforcement in the federal courts." GEC appealed the district court's ruling regarding due process to the Ninth Circuit, but did not appeal its ruling regarding tribal court jurisdiction. The Ninth Circuit reversed the district court, finding that GEC had been denied due process based on inflammatory statements made during closing arguments, thus not entitling respondents to enforce the tribal court judgment through the federal courts. Respondents returned to tribal court to seek enforcement of the money judgment against the assets of GEC located within the Reservation, and GEC has unsuccessfully challenged the tribal court's jurisdiction to enforce the judgment. The Respondents' brief in opposition is due on October 25, 2010.

UNITED STATES V. JICARILLA APACHE NATION (NO. 10-382) – On September 20, 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 the federal government "cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern the management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications." The Federal Circuit adopted the fiduciary exception to the attorney-client privilege in tribal trust cases which permits a beneficiary to discover information relating to fiduciary matters (including trust management). The Tribe's brief in opposition is due on October 21, 2010.

TRUCKEE-CARSON IRRIGATION DISTRICT V. UNITED STATES AND PYRAMID LAKE PAIUTE TRIBE (NO. 10-396) – On September 20, 2010, the Truckee-Carson Irrigation District filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that, under the provisions of the Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, the United States can pursue all claims against the Irrigation District for past excess diversions of water in favor of farmers. The United States and Tribe's brief in opposition is due on October 22, 2010.

MORRIS V. U.S. NUCLEAR REGULATORY COMMISSION (NO. 10-368) – On September 15, 2010, the New Mexico Environmental Center filed a petition on behalf of Eastern Diné Against Uranium Mining seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which upheld the license issued by the U.S. Nuclear Regulatory Commission (NRC) to Hydro Resources, Inc. (HRI). The license will allow HRI to conduct *in situ* leech mining for uranium on four sites in northwestern New Mexico impacting a number of Navajo families. The petitioners contend that, in issuing a license to HRI, the NRC violated the Atomic Energy Act and the National Environmental Protection Act by failing to properly consider airborne radiation already being emitted in one area and by failing to ensure that HRI will fully restore groundwater quality in another area. The United States' brief in opposition is due on October 18, 2010.

SCHWARZENEGGER V. RINCON BAND OF LUISENO INDIANS (NO. 10-330) – On September 3, 2010, the State of California filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court's holding that the State of California negotiated in bad faith based on its finding that the State's repeated demands that the Tribe pay a portion of its net revenues to the State's general fund was an attempt to impose a tax on the Tribe in violation of the Indian Gaming Regulatory Act. The Tribe's brief in opposition is due on November 12, 2010.

COTTIER V. CITY OF MARTIN (NO. 10-335) – On September 1, 2010, the American Civil Liberties Union filed a petition on behalf of Native voters seeking review of an en banc decision of the U.S. Court of Appeals for the Eighth Circuit which upheld Ordinance 122, which established boundaries for three voting wards within the City. The petitioners allege that Ordinance 122 was enacted with a racially

discriminatory purpose and dilutes the votes of Indians in each ward in violation of Section 2 of the Voting Rights Act, and in violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution. The City of Martin's brief in opposition is due on October 12, 2010.

MICCOUSUKEE TRIBE V. SOUTH FLORIDA WATER MANAGEMENT DISTRICT (NO. 10-252) – On August 19, 2010, the Miccosukee Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which upheld the Environmental Protection Agency's regulation adopting the "unitary waters" theory. The Tribe argues that the "unitary waters" regulation is contrary to the unambiguous language of the Clean Water Act which prohibits the transfer or discharge of a pollutant from one meaningfully distinct body of water to another without a NPDES permit. The United States' and the Water District's briefs in opposition is due on October 22, 2010.

EAGLE V. PERINGTON PAIUTE TRIBE (NO. 10-5764) – On August 2, 2010, Leslie Dawn Eagle filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that her Indian status, although a requirement of tribal jurisdiction, is not an element of the crime which must be proven beyond a reasonable doubt. Ms. Eagle had argued that the she was denied due process when the Tribe failed to allege or prove that she was "Indian." The Tribe's brief in opposition is due on October 7, 2010.

MADISON COUNTY V. ONEIDA NATION OF NEW YORK (NO. 10-72) – On July 9, 2010, Madison County filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that the Tribe is immune from suit under the doctrine of tribal sovereign immunity, thus preventing the County from foreclosing on property owned by the Tribe for non-payment of county taxes. This petition is the latest chapter of a lengthy dispute over payment of taxes addressed by the Supreme Court in 2005 in *City of Sherrill v. Oneida Indian Nation of New York*. The Tribe's brief in opposition was filed on September 10, 2010, and the petition is scheduled for conference on October 8, 2010.

SUQUAMISH INDIAN TRIBE V. UPPER SKAGIT INDIAN TRIBE, ET AL. (NO. 10-33) – On July 1, 2010, the Suquamish Indian Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the Suquamish's usual and accustomed fishing grounds ("U&A") do not include Saratoga Passage and Skagit Bay on the eastern side of Whidbey Island. This case is a sub-proceeding of *U.S. v. Washington,* a case decided in 1974 where Judge Boldt determined the U&A grounds for the Puget Sound Indian tribes. The petition is scheduled for the conference on October 15, 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. Although the Tribe filed a waiver of its response, the Court has requested and the Tribe filed its response on September 15, 2010. The petition is scheduled for the conference on October 15, 2010.

THUNDERHORSE V. PIERCE (NO. 09-1353) – On October 4, 2010, the Court called for the views of the U.S. Solicitor General in a case in which Iron Thunderhorse, a Native American incarcerated in the Texas Department of Criminal Justice, is seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit. The petition contends that the Fifth Circuit's holding—that the prison's enforcement of its grooming rules, including the prohibition of long hair on men with no exception for Native American

religious practitioners, does not violate the Religious Land Use and Institutionalized Person's Act—is in conflict with the other Circuits.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court has denied or dismissed the following petitions for writ of certiorari:

GOULD V. CAYUGA INDIAN NATION (NO. 10-206) – On October 4, 2010, the Court denied review of a decision by the Court of Appeals of New York which held that the Tribe's convenience stores are located on a "qualified reservation" (as defined under state tax law) and are thus exempt from the collection of state cigarette sales taxes.

FORT PECK HOUSING AUTHORITY V. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (NO. 10-195) – On October 4, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the regulation adopted by HUD implementing the block grant funding formula does not violate the provisions of the Native American Housing Assistance and Self-Determination Act of 1996

HOFFMAN V. SANDIA RESORT AND CASINO (NO. 10-4) – On October 4, 2010, the Court denied review of a decision by the Court of Appeals of New Mexico which held that the doctrine of tribal sovereign immunity barred a non-Indian's 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.

METLAKATLA INDIAN COMMUNITY V. SEBELIUS (NO. 09-1466) – On October 4, 2010, the Court denied 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.

MAYBEE V. STATE OF IDAHO (NO. 09-1471) – On October 4, 2010, the Court denied review of a decision by the Idaho Supreme Court which held that an enrolled tribal member's on-line sale of unstamped cigarettes, shipped from his business located on 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

SCHAGHTICOKE TRIBAL NATION V. KEMPTHORNE (NO. 09-1433) – On October 4, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Second Circuit which rejected the Tribe's argument that the 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.

HOGAN V. KALTAG TRIBAL COUNCIL (NO. 09-960) – On October 4, 2010, the Court denied 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.

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

PATCHAK V. SALAZAR (D.C. CIR. NO. 09-5324) – On September 14, 2010, the U.S. District Court for the District of Colombia heard oral arguments in an appeal from the district court's dismissal of a challenge to the Secretary's decision to take land in trust for the Match-E-Be-Nash-She-Wish 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.

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 January 21, 2010, the Colorado Supreme Court heard oral argument 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's denial of the motion, and its finding that the State's power to investigate violations of state law effectively trumps tribal sovereign immunity. 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. The Tribal Supreme Court Project worked 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 in the preparation of amicus briefs and moot court oral argument.

A.A. V. NEEDVILLE INDEPENDENT SCHOOL DISTRICT (5TH CIR. NO. 09-20091) – On July 9, 2010, the U.S. Court of Appeals for the Fifth Circuit issued its decision. In a split decision (2-1), the Fifth Circuit held that the school district's requirement that A.A., a Native American boy in kindergarten, either cut his braided long hair, wear it in a "bun," or wear a single braid tucked inside his shirt offends his sincere religious belief and is invalid under the Texas Religious Freedom Restoration Act. The Fifth Circuit upheld the district court's issuance of a permanent injunction enjoining the school district from enforcing its grooming policy against A.A. Judge Jolly, in dissent, contends that the school district's "off the collar" policy would not impose a substantial burden on A.A.'s belief that he should not cut his hair. The Fifth Circuit issued its mandate on August 2, 2010, and any petition seeking review by the U.S. Supreme Court would be due on October 7, 2010.

ONEIDA INDIAN NATION V. ONEIDA COUNTY (2ND CIR. NOS. 07-2430-CV(L); 07-2548-CV(XAP); 07-2550-CV(XAP) – On August 9, 2010, the United States Court of Appeals for the Second Circuit issued its decision. In a split decision (2-1), the Second Circuit affirmed the district court's dismissal of the possessory land claims (*e.g.* trespass damages) filed by the Oneida tribes and the United States based on the equitable considerations (*i.e.* "indisputably disruptive" nature of the claims) discussed in *Cayuga Indian Nation v. Pataki* and the Supreme Court's opinion in *City of Sherrill v. Oneida Indian Nation.* The Second Circuit reversed the district court and held that the Oneida tribes are also barred from pursuing their non-possessory claims for fair compensation based on the State's payment to the Oneidas of far less than the true value of the land. Judge Gershon, in dissent, finds that the tribes and the United States are not foreclosed from pursuing their non-possessory claims. In particular, the United States should be allowed to pursue its claim against the State for violation of the Non-intercourse Act based on the State's failure to pay a fair price for the tribes' lands. At present, the Tribes are considering their options, including whether to seek rehearing en banc before the Second Circuit, or to seek review before the Supreme Court.

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).