TRIBAL SUPREME COURT PROJECT MEMORANDUM

FEBRUARY 22, 2011

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 Supreme Court remains extremely (and unusually) active in relation to its Indian law case docket. In its order of February 22, 2011, the Court invited the Solicitor General to file a brief expressing the views of the United States in *Osage Nation v. Irby.* This practice by the Court is known as a "CVSG" (Call for the Views of the Solicitor General) and generally occurs when the views of the federal government are relevant to a case in which the United States is not a party. It is not unusual for the Court to CVSG in an Indian law case on occasion—once every two or three years—particularly when the petitioner is a state or local government challenging an Indian tribe. Thus, it was not unusual for the Court to CVSG in the *Hogan v. Kaltag Tribal Council* case late last term when the State of Alaska challenged the authority of the Tribal Court over a tribal member-child placement proceeding (cert denied October 4, 2011).

However, the Court has now Called for the Views of the Solicitor General in a total of four Indian law cases this term: *Osage Nation v. Irby* (reservation disestablishment); *Brown (formerly Schwarzenegger) v. Rincon Band* (IGRA "revenue" sharing); *Miccosukee Tribe v. Kraus-Anderson* (enforcement of tribal court judgments); and *Thunderhorse v. Pierce* (Native American religious practices). In three of the four cases, Indian tribes and Indian interests have been on the top-side—the petitioners seeking review by the Court. The court denied review in *Thunderhorse,* but there is a good chance it may grant review in *Osage Nation* or *Miccosukee Tribe,* largely dependent on the views of the Solicitor General. In another remarkable development, the Court has requested a response from the State of Oklahoma in the *Native Wholesale Supply* case (state regulation of intertribal commerce)—the first time in the history of the Project that the Court has required a state government to respond to a petition filed by Indians. Although it would be premature to draw any conclusions regarding these "requests" by the Court, these developments may be the result of the addition of Justice Sotomayor and Justice Kagan on the Court. Perhaps one or both Justices are seeking a better understanding of the issues being raised and the law being applied by the lower federal and state courts in our Indian law cases.

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CASES RECENTLY DECIDED BY THE SUPREME COURT

MADISON COUNTY V. ONEIDA NATION OF NEW YORK (NO. 10-72) – On January 10, 2011, the Court issued an order vacating and remanding the case to the U.S. Court of Appeals for the Second Circuit. In a per curiam opinion, the Court stated:

> We granted certiorari on the questions "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes" and "whether the ancient Oneida reservation in New York was disestablished or diminished." Counsel for respondent Oneida Indian Nation advised the Court through a letter on November 30, 2010, that the Nation had, on November 29, 2010, passed a tribal declaration and ordinance waiving "its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States." Petitioners Madison and Oneida Counties responded in a December 1, 2010 letter, questioning the validity, scope, and permanence of that waiver; the Nation addressed those concerns in a December 2, 2010 letter.
>
> We vacate the judgment and remand the case to the United States Court of Appeals for the Second Circuit. That court should address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and—if necessary—proceed to address other questions in the case consistent with its sovereign immunity ruling. [Citations omitted].

This ruling is a victory for the Oneida Indian Nation and for all of Indian country. In *Madison County,* the Second Circuit had held that the Oneida Indian Nation is immune from suit, but in a terse concurring opinion written by Judge Cabranes, two of the three judges on the panel made clear that although they were bound by Supreme Court precedent upholding tribal sovereign immunity, the decision "defies common sense" and "is so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi.*" For the present, the Court will not be revisiting its well-settled precedent.

PETITIONS FOR WRIT OF CERTIORARI GRANTED

Currently, a writ of certiorari has been granted in two Indian law cases:

UNITED STATES V. JICARILLA APACHE NATION (NO. 10-382) – On January 7, 2011, the Court granted 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 United States opening brief is due on February 22, 2011. The Tribe's brief in response is due on March 24, 2011. Oral argument has been scheduled for April 20, 2011.

UNITED STATES V. TOHONO O'ODHAM NATION (NO. 09-846) – On November 1, 2010, the U.S. Supreme Court heard 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.

During oral argument, the Justices appeared to struggle with the positions of both parties and the practical implications resulting from a ruling for either side. In particular, the Court appeared hesitant to adopt the broad rule sought by the United States—a rule precluding jurisdiction in the Court of Federal Claims in which a "related" case is pending in another court even if it seeks different relief. 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. Unlike prior Indian law cases, the Justices did not appear as hostile to the tribal position. 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:

NAVAJO NATION V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (NOS. 10-981 AND 10-986) – On January 28, 2011, the Navajo Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which involves "complex compulsory party joinder issues" in longstanding litigation brought by the EEOC over the application of Title VII of the Civil Rights Act to Navajo preference for employment provisions in leases between Peabody Coal and the Navajo Nation as approved by the Secretary of the Interior. (Peabody Coal has filed a separate petition seeking review in No. 10-986.) The United States brief in opposition is due on March 3, 2011.

SOUTH DAKOTA V. YANKTON SIOUX TRIBE (NOS. 10-929, 10-931 AND 10-932) – On January 18, 2011, the State of South Dakota, Charles Mix County and the Southern Missouri Recycling and Waste Management District each filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that the Yankton Sioux Reservation was not disestablished by the Act of 1894. The state parties argue that the Eighth Circuit decision in direct conflict with the decision of the South Dakota Supreme Court decision in *Bruguier v. Class* which held that the reservation had been disestablished by Congress. The United States and the Tribe's briefs in opposition are due on March 24, 2011.

HENZLER V. SALAZAR (NO. 10-942) – On January 14, 2011, Grace Henzler and other heirs of Dick George 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 grant of summary judgment to the Department of the Interior in relation to due process challenge to a 1930 denial of an allotment application filed pursuant to the Alaska Native Allotment Act of 1906. The United States brief in opposition is due on February 23, 2011.

NATIVE WHOLESALE SUPPLY V. OKLAHOMA (NO. 10-754) – On December 3, 2010, Native Wholesale Supply, a cigarette importer and distributor chartered under the laws of the Sac & Fox Tribe of Oklahoma, filed a petition seeking review of a decision by the Supreme Court of the State of Oklahoma which held that the state courts have personal jurisdiction over a nonresident corporation for an alleged violation of state law, and that tribal sovereign immunity does not bar state enforcement of the Tobacco Master Settlement Agreement Complementary Act against an individually-owned Indian business. On December 8, 2010, the state filed a waiver of its right to respond. The petition was scheduled for conference on January 21, 2011. However, the Court has requested a response from the state which is due on March 21, 2011.

MICCOSUKEE TRIBE V. KRAUS-ANDERSON CONSTRUCTION COMPANY (NO. 10-717) – On November 29, 2010, the Miccosukee Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that federal courts do not have subject matter jurisdiction over an action filed by the Tribe seeking enforcement of a tribal court judgment against a non-Indian. The Eleventh Circuit found that "a suit to domesticate a tribal judgment does not state a claim under federal law, whether statutory, or common law." Kraus-Anderson filed its response brief on December 21, 2010, in support of granting the petition. The petition was scheduled for conference on January 21, 2011, however, the Court has called for the Solicitor General to submit a brief to provide the views of the United States on whether to grant review.

OSAGE NATION V. IRBY (OKLAHOMA TAX COMMISSION) (NO. 10-537) – On October 22, 2010, the Osage Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the Osage Reservation has been disestablished by Congress. The Osage Nation sued the State of Oklahoma seeking declaratory and injunctive relief: a declaration that the Osage Reservation was "Indian country" within the meaning of 18 U.S.C. § 1151; and an order enjoining state agents from imposing or collecting taxes on members of the tribe who lived within the reservation. Although 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). On November 22, 2010, NCAI filed an amicus brief in support of the petition for writ of certiorari and on January 11, 2011, the State of Oklahoma filed its brief in opposition. The petition was scheduled for conference on February 18, 2011, however, the Court has called for the Solicitor General to submit a brief to provide the views of the United States on whether to grant review.

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 filed its brief in opposition on November 11, 2010, and on December 13, 2010, the Court invited the Acting Solicitor General to file a brief expressing the views of the United States.

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 was scheduled for the conference on October 15, 2010, and is likely being held pending the Court's decision in *United States v. Tohono O'odham Nation*.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

YELLOWBEAR V. WYOMING (NO. 10-7881) – On February 22, 2011, the Court denied review of a petition filed by Andrew John Yellowbear, Jr., a member of the Northern Arapaho Tribe, seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which affirmed the district court's denial of his writ for habeas corpus in relation to his state court conviction for murder. The Tenth Circuit rejected Mr. Yellowbear's attempt to have the federal courts review *de novo* whether the scene of his crime was within an Indian reservation. The Wyoming Supreme Court had held that a 1905 Act of Congress diminished the Wind River Reservation and the scene of the crime was outside the current boundaries of the Reservation.

DAY V. APOLIANA (OFFICE OF HAWAIIAN AFFAIRS) (NO. 10-811) – On February 22, 2011, the Court denied review of a petition filed by four "native Hawaiians" seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which rejected petitioners contention that they have a federal right, enforceable under 42 U.S.C. § 1983, to require that trust funds managed by the Office of Hawaiian Affairs (OHA) trustees only be spent "for the betterment of the conditions of native Hawaiians." Petitioners challenge four projects on which the OHA trustees spent parts of the trust proceeds, including support for the Akaka bill.

EAGLE V. PERINGTON PAIUTE TRIBE (NO. 10-5764) – On January 24, 2011, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that defendant's 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."

ATTORNEY'S PROCESS AND INVESTIGATION SERVICES, INC. V. SAC & FOX TRIBE OF MISSISSIPPI IN IOWA (NO. 10-613) – On January 18, 2011, the Court denied review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that the Sac & Fox Tribal Court had jurisdiction over a non-Indian corporation which provides security and consulting services to casino operators. Attorney's Process and Investigation Services, Inc. (API) had filed a petition seeking review of the lower court's holding that the tribal court had jurisdiction over API and the tort claims brought against API under the second exception to the *Montana* test (the conduct of the non-Indian threatens the political integrity, economic security, health and welfare of the tribe).

THUNDERHORSE V. PIERCE (NO. 09-1353) – On January 10, 2011, the Court denied 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. The U.S. Solicitor General had recommended that the petition be denied, or in the alternative, "be granted and the decision below summarily reversed and remanded for application of the correct legal standard."

GLACIER ELECTRIC COOP V. ESTATE OF SHERBURNE (NO. 10-408) – On November 19, 2010, the Court denied 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 Glacier Electric Cooperative, Inc., ("GEC") could 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 unsuccessfully challenged the tribal court's jurisdiction to enforce the judgment.

MICCOUSUKEE TRIBE V. SOUTH FLORIDA WATER MANAGEMENT DISTRICT (NO. 10-252) – On November 29, 2010, the Court denied 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 Miccosukee Tribe had argued 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.

TRUCKEE-CARSON IRRIGATION DISTRICT V. UNITED STATES AND PYRAMID LAKE PAIUTE TRIBE (NO. 10-396) – On November 29, 2010, the Court denied 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.

COTTIER V. CITY OF MARTIN (NO. 10-335) – On November 15, 2010, the Court denied 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 American Civil Liberties Union filed a petition on behalf of Native voters who alleged 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.

MORRIS V. U.S. NUCLEAR REGULATORY COMMISSION (NO. 10-368) – On November 15, 2010, the Court denied 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 New Mexico Environmental Center had filed a petition on behalf of Eastern Diné Against Uranium Mining seeking review of a license which will allow HRI to conduct *in situ* leech mining for uranium on four sites in northwestern New Mexico impacting a number of Navajo families.

<u>SUQUAMISH INDIAN TRIBE V. UPPER SKAGIT INDIAN TRIBE, ET AL. (NO. 10-33)</u> – On October 18, 2010, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the Suquamish Indian Tribe'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.

<u>GOULD V. CAYUGA INDIAN NATION (NO. 10-206)</u> – 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.

<u>FORT PECK HOUSING AUTHORITY V. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (NO. 10-195)</u> – 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.

<u>HOFFMAN V. SANDIA RESORT AND CASINO (NO. 10-4)</u> – 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.

<u>METLAKATLA INDIAN COMMUNITY V. SEBELIUS (NO. 09-1466)</u> – 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.

<u>MAYBEE V. STATE OF IDAHO (NO. 09-1471)</u> – 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.

<u>SCHAGHTICOKE TRIBAL NATION V. KEMPTHORNE (NO. 09-1433)</u> – 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.

<u>HOGAN V. KALTAG TRIBAL COUNCIL (NO. 09-960)</u> – 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.

<u>PENDING CASES BEFORE THE U.S. COURTS OF APPEAL AND OTHER COURTS</u>

<u>PATCHAK V. SALAZAR (D.C. CIR. NO. 09-5324)</u> – On January 21, 2011, the U.S. Court of Appeals for the D.C. Circuit issued its decision, reversing the U.S. District Court and rejecting the jurisdictional arguments of the United States and the Match-E-Be-Nash-She-Wish Tribe (Gun Lake Tribe). The D.C. Circuit held that: (1) Mr. Patchak, an individual non-Indian landowner, is within the "zone of interests" protected by the Indian Reorganization Act and thus has standing to bring a *Carcieri* challenge to a land-in-trust acquisition; and (2) Mr. Patchak's *Carcieri* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all "suits 'seeking to divest the United States of its title to land held for the benefit of an Indian tribe,' whether or not the plaintiff asserts any claim to title in the land." At present, any petition for rehearing/rehearing en banc is due on March 7, 2011.

<u>WATER WHEEL CAMP RECREATIONAL AREA, INC. V. LARANCE (9TH CIR. NOS. 09-17349; 09-17357)</u> – On February 17, 2011, the U.S. Court of Appeals for the Ninth Circuit heard oral argument on review of a decision by the U.S. District Court for the District of Arizona 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 has now appealed the federal 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.

<u>CASH ADVANCE V. STATE OF COLORADO (COLORADO SUPREME COURT NO. 2008SC639)</u> – On November 30, 2010, the Colorado Supreme Court issued its opinion holding that tribal sovereign immunity applies to judicial enforcement of state investigatory actions, including a state investigative subpoena enforcement action. In this case, the Santee Sioux Nation and the Miami Nation of Oklahoma 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 state court of appeals had held that the State's power to investigate violations of state law trumps 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.

<u>ONEIDA INDIAN NATION V. ONEIDA COUNTY (2ND CIR. NOS. 07-2430-CV(L); 07-2548-CV(XAP); 07-2550-CV(XAP)</u> – On December 16, 2010, the United States Court of Appeals for the Second Circuit denied the petition for rehearing/rehearing en banc filed by the United States and the tribes. The Second Circuit, in a split decision (2-1), had 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, any petition for writ of certiorari will be due on March 16, 2011.

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).