TRIBAL SUPREME COURT PROJECT MEMORANDUM

MAY 23, 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).

The Supreme Court's Indian law docket became and has remained very dynamic over the course of this term. On April 26, 2011, the Supreme Court issued its decision in *United States v. Tohono O'odham Nation*, ruling (7-1) in favor of the United States. The Court reversed the judgment of the U.S. Court of Appeals for the Federal Circuit and, in an opinion written by Justice Kennedy, found that 28 U.S.C. § 1500 deprives the Court of Federal Claims ("CFC") of jurisdiction over a claim when a suit is pending in another court that is based on substantially the same operative facts, regardless of relief sought in each suit. The Tohono O'odham Nation, like many other Indian tribes, had brought a tribal trust funds mismanagement suit in Federal District Court seeking an equitable remedy—an accounting to determine precisely what the United States has on the books as its tribal trust assets, the condition of those assets, the identification of any missing assets, and a restatement of the tribal trust account. The Tribe then brought suit in the CFC seeking money damages, alleging that the federal government had breached its fiduciary duty to invest and manage its tribal trust assets prudently. The Tribe argued that in order for it to be made whole, the Court should interpret § 1500 in a manner that would allow both suits to proceed.

On April 20, 2011, the Court heard oral argument in *United States v. Jicarilla Apache Tribe* on the question of whether the federal government can "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." Justice Sotomayor took the lead in questioning the attorney for the United States as to the nature and scope of its fiduciary duties to Indian tribes, at one point commenting:

> Is there any greater value to a fiduciary duty than to manage the account for the benefit of the beneficiary? That's the very essence of what a trust means, and so I'm having a hard time understanding not a competing interest situation where you're addressing a different statutory requirement, but merely—and that's what this case was presented as, merely the management of the trust. So what you're, it seems to me, you're arguing is there is no duty. You're saying it's all defined by statute only, but you're rendering—there's no need to use the word "trust" because it wouldn't be a trust.

In addition, three Indian law cases remain pending on petitions for writ of certiorari in which the Court has invited the U.S. Solicitor General to file briefs expressing the views of the United States: *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). 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. However, in 2 of the 3 cases, Indian tribes and Indian interests have been on the top-side—the petitioners seeking review by the Court. More than likely, the Solicitor General will be filing briefs in the next couple of weeks, with the petitions being scheduled for conference before the Court begins its summer recess on June 30, 2011. The Court will generally follow the recommendation of the Solicitor General on whether to grant or deny review.

Finally, the Court will likely consider the petitions, cross-petition and hold petition filed in *Osage Nation v. Irby, South Dakota v. Yankton Sioux Tribe* and the *Yankton Sioux Tribe v. Army Corps of Engineers* respectively in conference together before it begins the summer recess. Based on discussions with leading Supreme Court practitioners, there is a high likelihood that the Court will grant review in one or both of these reservation disestablishment cases for next term. And now with the recent filing of petitions by the United States (*United States v. New York*) and the Oneida tribes (*Oneida Indian Nation of New York v. County of Oneida*) in their long-standing Nonintercourse Act land claims litigation, it does not appear as though the Court's Indian law docket will slow down any time soon.

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).

CASES RECENTLY DECIDED BY THE SUPREME COURT

UNITED STATES V. EASTERN SHAWNEE TRIBE OF OKLAHOMA (NO. 09-1521) – On May 2, 2011, the U.S Supreme Court granted the petition, vacated the judgment, and remanded the case to the U.S. Court of Appeals for the Federal Circuit for further consideration in light of the Court's recent decision in *United States v Tohono O'odham Nation* (see below). In both *Eastern Shawnee* and *Tohono O'odham*, the Federal Circuit had held that 28 U.S.C. § 1500 does not preclude jurisdiction in the Court of Federal Claims when an Indian tribe also files an action in Federal District Court based on substantially the same operative facts, but seeking different relief (*e.g.* money damages versus historical accounting)

UNITED STATES V. TOHONO O'ODHAM NATION (NO. 09-846) – On April 26, 2011, the U.S. Supreme Court issued its decision (7-1), reversing the judgment of the U.S. Court of Appeals for the Federal Circuit, and holding in favor of the federal government. In its opinion written by Justice Kennedy, the Court found that 28 U.S.C. § 1500 deprives the Court of Federal Claims ("CFC") of jurisdiction over a claim when a suit is pending in another court that is based on substantially the same operative facts, regardless of relief sought in each suit. 28 U.S.C. § 1500 provides that the CFC "shall not have jurisdiction over any claim for or in respect to which the plaintiff … has pending in any other court any suit or process against the United States."

The Tohono O'odham Nation, like many other Indian tribes, had brought a tribal trust funds mismanagement suit in Federal District Court seeking an equitable remedy—an accounting to determine

precisely what the United States has on the books as its tribal trust assets, the condition of those assets, the identification of any missing assets, and a restatement of the tribal trust account. The Tohono O'odham Nation then brought suit in the CFC seeking money damages, alleging that the federal government had breached its fiduciary duty to invest and manage its tribal trust assets prudently. The Nation argued that in order for it to be made whole, the Court should interpret § 1500 in a manner that would allow both suits to proceed. Unfortunately, the Court rejected any interpretation of § 1500 which would allow both claims to proceed on the basis that each claim seeks different remedial relief. The Court stated that the Nation could proceed in its suit in Federal District Court "without losing the chance to later file in the CFC, for Congress has provided in every appropriations Act for the Department of the Interior since 1990 that the statute of limitations on Indian trust mismanagement claims shall not run until the affected tribe has been given an appropriate accounting."

Justice Sotomayor filed an opinion joined by Justice Breyer concurring in the judgment. Both justices agree that § 1500 bars the Tohono O'odham Nation's suit in the CFC since it seeks overlapping relief. In their view, the historical accounting and money damages are both a "money remedy." However, they disagree with the majority that § 1500 bars suit in the CFC when a party is seeking entirely "different forms of relief to make the plaintiff whole." Justice Ginsberg wrote a dissenting opinion, and would have affirmed the decision of the Federal Circuit. Justice Kagan took no part in the consideration or decision of this case.

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.
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> 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, but not yet decided, in one Indian law case:

UNITED STATES V. JICARILLA APACHE NATION (NO. 10-382) – On April 20, 2011, the Court heard oral argument a case decided by the U.S. Court of Appeals for the Federal Circuit which 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 Federal Circuit had 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." Justice Sotomayor took the lead in questioning the attorney for the United States as to the nature and scope of its fiduciary duties to Indian tribes, at one point commenting:

> Is there any greater value to a fiduciary duty than to manage the account for the benefit of the beneficiary? That's the very essence of what a trust means, and so I'm having a hard time understanding not a competing interest situation where you're addressing a different statutory requirement, but merely—and that's what this case was presented as, merely the management of the trust. So what you're, it seems to me, you're arguing is there is no duty. You're saying it's all defined by statute only, but you're rendering—there's no need to use the word "trust" because it wouldn't be a trust.

A decision should be issued before the Court begins its summer recess on June 30, 2011.

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:

ONEIDA INDIAN NATION OF NEW YORK V. ONEIDA COUNTY (NO. 10-1420) – On May 16, 2011, the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin and the Oneida of the Thames (the "Oneida tribes") filed their petitions seeking review of the decision by the U.S. Court of Appeals for the Second Circuit which held that the Oneida tribes are barred from pursuing their claim for trespass damages and their claim for fair compensation based on the State's payment to the Oneidas of far less than the true value of the land. The Oneida tribes framed two questions presented:

> 1. Whether the court of appeals contravened this Court's decisions in *Oneida Indian Nation of New York v. County of Oneida,* 470 U.S., 226 (1985), and *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), by ruling that "equitable considerations" rendered petitioners' claims for money damages for the dispossession of their tribal lands in violation of federal law void *ab initio.*
> 2. Whether the court of appeals impermissibly encroached on the legislative power of Congress by relying on equitable considerations" to bar petitioners' claims as untimely,

> even though they were brought within the statute of limitations fixed by Congress for the precise tribal land claims at issue.

The briefs in opposition are due on June 20, 2011.

UNITED STATES V. STATE OF NEW YORK, ET AL. (NO. 10-1404) – On May 16, 2011, the United States filed its petition seeking review of the decision by the U.S. Court of Appeals for the Second Circuit which held that, based on the Supreme Court's 2005 decision in *City of Sherrill* and the Second Circuit's 2005 decision in *Cayuga*, the claims of the United States are barred by the doctrine of laches. The United States framed the question presented as follows:

> The Trade and Intercourse Act of 1793 (also known as the Nonintercourse Act) stated in relevant part that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution." Ch. 19, § 8, 1 Stat. 330. The question presented is as follows:
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> Whether the United States may be barred from enforcing the Nonintercourse Act against a State that repeatedly purchased and resold (at a substantial profit) India lands in violation of the Act between 1795 and 1846, based on the passage of time and the transfer of the unlawfully obtained Indian lands into the hands of third parties, when the United States seeks monetary relief only against the State.

The United States contends that the "court of appeals' treatment of the United States' claim to enforce the Nonintercourse Act conflicts with settled and fundamental principles that extend beyond the context of Indian land claims—specifically, that laches does not apply to suits brought by the United States, especially not when the statue of limitations specified by Congress that preserves the claim has not run." The briefs in opposition are due on June 15, 2011.

REED V. GUTIERREZ (NO. 10-1390) – On May 10, 2011 a non-Indian couple filed a petition seeking review of a decision by the Supreme Court of New Mexico which held that the Pueblo of Santa Clara and its employees are entitled to sovereign immunity from suit for injuries sustained in a car accident outside the reservation. The Tribe's brief in opposition is due on June 13, 2011.

YANKTON SIOUX TRIBE V. ARMY CORPS OF ENGINEERS (NO. 10-1059) – On February 22, 2011, the Yankton Sioux Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eight Circuit which held that certain land transfers by the United States to the State of South Dakota were lawful since the lands were not within the "external boundaries" of the Yankton Sioux Reservation. The Tribe filed this "hold" petition in light of the petitions filed by the State of South Dakota, Charles Mix County and the Southern Missouri Recycling and Waste Management District in *South Dakota v. Yankton Sioux Tribe* (see below). The United States filed its brief in opposition on May 9, 2011.

NAVAJO NATION V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (NOS. 10-981, 10-986 AND 10-1080) – 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.) On March 3, 2011, the United States filed a conditional cross-petition (No. 10-1080) on the

question of whether the Secretary of the Interior is a "required party" under Rule 19(a)(1). The United States brief in opposition is due on June 3, 2011.

SOUTH DAKOTA V. YANKTON SIOUX TRIBE (NOS. 10-929, 10-931, 10-932 AND 10-1058) – 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 is 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. On February 22, 2011, the Yankton Sioux Tribe filed a conditional cross-petition seeking review on the separate question of incremental diminishment of the reservation. The United States and the Tribe filed their briefs in opposition on May 9, 2010.

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. On January 24, 2011, the Court invited 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. On February 22, 2011, the Court invited the Solicitor General to submit a brief to provide the views of the United States on whether to grant review.

BROWN (FORMERLY 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.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

ROSALES V. UNITED STATES (NO. 10-1103) – On May 2, 2011, the Court denied review of a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which affirmed the decision of the U.S. Court of Federal Claims granting the United States' motion to dismiss claims which stem from a 15-year-old tribal election and membership dispute. The claims involved ownership of two parcels of land held in trust by the United States for the benefit of the Jamul Indian Village. The petitioners claimed that the beneficial owners of the trust lands are the individual Indian families, not the Tribe.

NATIVE WHOLESALE SUPPLY V. OKLAHOMA (NO. 10-754) – On April 25, 2011, the Court denied review of a decision by the Supreme Court of the State of Oklahoma which held that the state courts have personal jurisdiction over Native Wholesale Supply, a cigarette importer and distributor chartered under the laws of the Sac & Fox Tribe of Oklahoma, 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.

WINNEMUCCA COLONY COUNCIL V. WASSON (NO. 10-1011) – On April 15, 2011, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the parties to this intra-tribal factional dispute over tribal funds have been afforded due process, have exhausted their tribal court remedies, and then affirmed the Nevada Inter-tribal Court of Appeals' dismissal of the case for lack of jurisdiction.

HENZLER V. SALAZAR (NO. 10-942) – On March 21, 2011, the Court denied 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 a due process challenge to a 1930 denial of an allotment application filed pursuant to the Alaska Native Allotment Act of 1906.

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.

SUQUAMISH INDIAN TRIBE V. UPPER SKAGIT INDIAN TRIBE, ET AL. (NO. 10-33) – 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.

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 March 28, 2011, the U.S. Court of Appeals for the D.C. Circuit denied the United States' and the Match-E-Be-Nash-She-Wish Tribe's (Gun Lake Tribe) petitions for rehearing and rehearing en banc. The U.S. and the Tribe had asked the court to review its decision 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." Any petition for writ of certiorari in the U.S. Supreme Court will be due June 27, 2011.

WATER WHEEL CAMP RECREATIONAL AREA, INC. V. LARANCE (9TH CIR. NOS. 09-17349; 09-17357) – 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.

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).