TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 14, 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 U.S. Supreme Court is in summer recess and the October 2011 Term is scheduled to start on Monday, October 3, 2011. The end of the October 2010 Term was anti-climatic, with the Court denying review in all of the remaining Indian law cases on its docket. With two prominent reservation disestablishment cases—*Osage Nation v. Irby* and *South Dakota v. Yankton Sioux Tribe*—up before the Court at the same time, many Court-watchers expected a grant of one, possibly both petitions for review. Indian law practitioners were also very concerned at the end of the Term when the Court invited the U.S. Solicitor General to file a brief expressing the views of the United States in *Brown (formerly Schwarzenegger) v. Rincon Band*, a case involving interpretation of "revenue" sharing under the Indian Gaming Regulatory Act (IGRA). Fortunately, the Solicitor General recommended denial of the petition filed by the State of California and the Court followed that recommendation. At the present time, there are no Indian law cases pending before the Court on the merits for next Term, but several petitions for review have been filed and will likely be considered during the Court's opening conference on September 26, 2011 (see summaries below).

The end of the October 2010 Term also provides us with an opportunity to review all the Indian law cases considered by the Court, as well as the work of the Tribal Supreme Court Project. At the end of the Term, the win-loss record for Indian tribes before the Robert's Court stands at 0 wins and 7 losses. The Court issued opinions in two Indian law cases, both involving the ability of Indian tribes to sue the United States for mismanagement of tribal trust assets. In *United States v. Tohono O'odham Nation,* the Court reversed (7-1) the judgment of the U.S. Court of Appeals for the Federal Circuit and held that 28 U.S.C. § 1500 deprives the Court of Federal Claims ("CFC") of jurisdiction over a claim (breach of trust claim for money damages) when a suit is pending in another court (breach of trust claim seeking trust accounting) that is based on substantially the same operative facts, regardless of relief sought in each suit. As a result and without opinion, the Court granted the government's petition in *United States v. Eastern Shawnee Tribe of Oklahoma*, vacated the judgment and remanded the case for consideration in light of its decision in *Tohono O'odham.* Then, in *United States v. Jicarilla Apache Tribe,* the Court once again reversed (7-1) the judgment of the U.S. Court of Appeals for the Federal Circuit and held that the fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and Indian tribes. Justice Kagan did not participate in either decision.

The Court did grant review in one other Indian law case, *Madison County v. Oneida Indian Nation of New York* which involved the question of whether the Tribe was entitled to the defense of sovereign immunity in foreclosure proceedings brought by the County for alleged non-payment of property taxes. However, the Oneidas recognized the severe challenges awaiting the Tribe on the merits and determined that the best strategy was to waive its sovereign immunity. As a result of the waiver, the Court vacated the judgment and remanded the case to the U.S. Court of Appeals for the Second Circuit. This remand is truly a victory for the Oneida Indian Nation and for all of Indian country. The Supreme Court had granted review based on a terse concurring opinion written by Judge Cabranes of the Second Circuit in which two of the three judges—on a three-judge 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 is decisions in *Kiowa* and *Potawatomi.*"

Thus, in stark contrast to the previous term during which the Court did not issue a single Indian law decision, the Court had a very active Indian law docket. In all, thirty-one petitions for writ of certiorari were filed in Indian law cases this past term. On average, twenty-six petitions have been filed in Indian law cases each year since 2001. Of the thirty-one petitions filed, four were granted and twenty-seven were denied. As always, the Tribal Supreme Court Project monitored each petition at the time it was filed, and provided resources in the preparation of the briefs where appropriate. For example, the Project worked directly on the development of strategy and the preparation of an amicus brief in support of the petition in *Osage Nation v. Irby (*reservation disestablishment). The Project also worked closely with attorneys representing tribal interests which prevailed in the lower courts to prepare response briefs to successfully oppose review. These cases included: *South Dakota v. Yankton Sioux Tribe* (reservation disestablishment); *Brown (formerly Schwarzenegger) v. Rincon Band* (IGRA "revenue" sharing); *Eagle v. Yerington Paiute* (tribal criminal jurisdiction over non-member Indians); *Glacier Electric Coop v. Estate of Sherburne* (tribal court civil jurisdiction over non-Indians); and *Hoffman v. Sandia Resort and Casino* (sovereign immunity).

If any one subject matter area dominated the field of thirty-one petitions filed this past term, it was the question of whether reservation boundaries had been diminished or disestablished which encompassed five of the six petitions filed related to the status of tribal lands. The next area to dominate the Court's docket was four petitions involving the trust responsibility of the United States, of which, at the request of the United States, three petitions were granted review (*Tohono O'odham, Eastern Shawnee* and *Jicarilla Apache*). There was also an up-tick with three petitions seeking review of state authority to tax or regulate on-reservation activities (*e.g.* unstamped cigarettes) with no indication from the Court that it is interested in the questions raised by those cases. The Project continues to closely monitor cases challenging tribal sovereign immunity, but only two petitions were filed on that issue (with a near-miss in relation to *Madison County*). Nonetheless, we may see a resurgence in this area given that two of the pending petitions for review next Term involve questions regarding the scope of tribal sovereign immunity. The remainder of the petitions were a mix of questions, including questions regarding tribal civil jurisdiction over non-Indians (2); water rights (2); political status, civil rights and religious freedoms (3); interpretation of various statutes or regulations (4); Indian gaming (1); and criminal jurisdiction (1).

In addition to its work before the U.S. Supreme Court, the Project continues to monitor Indian law cases pending before the lower federal courts and in the state courts. In certain cases, the Project may become involved in the lower court litigation—coordinating resources, developing litigation strategy and/or filing briefs in support of tribal interests. The Project also continues to provide updates of Indian law cases pending in the lower courts, updating the cases by subject matter area: Post-*Carcieri* Litigation; Criminal

Jurisdiction (Federal and State); Civil Jurisdiction (Tribal and State); Diminishment/ Disestablishment; Indian/Tribal Status; Sovereign Immunity; Taxation; Treaty Rights; Religious Freedoms; and Trust Relationship. Hopefully, these efforts will help us identify trends or currents within distinct areas of Indian law that can be effectively addressed prior to reaching the Supreme Court.

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. JICARILLA APACHE NATION (NO. 10-382) – On June 13, 2011, the Supreme Court issued its decision (7-1) reversing the U.S. Court of Appeals for the Federal Circuit which had 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). In its opinion written by Justice Alito, the Court found that the fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and Indian tribes. The Court stated: "The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law." In general, the Court found that the criteria justifying the fiduciary exception are not present in the tribal trust relationship: (1) the Tribe is not the "real client" of the government attorneys for whom the legal advice is intended; and (2) the documents at issue are the "property of the United States."

Justice Ginsberg filed an opinion which was joined by Justice Breyer concurring in the judgment. Both justices agree that the United States is not an "ordinary trustee," since it has its own "distinct interest" in the context of carrying out federal laws in relation to Indian tribes. Agreeing with the majority, Justice Ginsberg points out that in this context the "Government seeks legal advise in a 'personal' rather than a fiduciary capacity," and is thus protected by the attorney-client privilege. Justice Ginsberg writes separately to point out that the Court unnecessarily went beyond attorney-client communications to hold that the Government "assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." In a strong dissent, Justice Sotomayor points out that "Court's decision…rests on false factual and legal premises" and ultimately disregards settled precedent that allows the use of "common-law trust principles to define the scope of the Government's fiduciary obligations to Indian tribes."

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, no petitions for a writ of certiorari have been granted in an Indian law or Indian law-related cases for the October Term 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 July 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:

> 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 July 20, 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 filed its brief in opposition is due on June 13, 2011, and the petition has been scheduled for conference on September 26, 2011.

BREAKTHROUGH MANAGEMENT GROUP V. CHUKCHANSI GOLD CASINO (NO. 10-1389) – On May 9, 2011, a non-Indian business filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the economic development authority and casino operated by Picayune Rancheria of the Chukchansi Indians Tribe's Economic Development Authority are "subordinate economic entities" of the tribe and entitled to sovereign immunity. Breakthrough Management Group had filed suit against the tribal entities claiming copyright and trademark infringement of its on-line "elearning" applications. The Tribe's brief in opposition is due on August 12, 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 August 19, 2011.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

OSAGE NATION V. IRBY (OKLAHOMA TAX COMMISSION) (NO. 10-537) – On June 27, 2011 the Court denied 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 had 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). The Court invited the Acting Solicitor General to submit a brief to provide the views of the United States which recommended that the Court deny review.

BROWN (FORMERLY SCHWARZENEGGER) V. RINCON BAND OF LUISENO INDIANS (NO. 10-330) – On June 27, 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 holding that the State of California had 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 Court invited the Acting Solicitor General to file a brief to provide the views of the United States which recommended that the Court deny review.

SOUTH DAKOTA V. YANKTON SIOUX TRIBE (NOS. 10-929, 10-931, 10-932 AND 10-1058) – On June 20, 2011, the Court denied 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 of South Dakota, Charles Mix County and the Southern Missouri Recycling and Waste Management District each filed a petition arguing 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. The Yankton Sioux Tribe had also filed a conditional cross-petition seeking review on the separate question of incremental diminishment of the reservation which was also denied.

YANKTON SIOUX TRIBE V. ARMY CORPS OF ENGINEERS (NO. 10-1059) – On June 20, 2011, the Court denied 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 had 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*.

MICCOSUKEE TRIBE V. KRAUS-ANDERSON CONSTRUCTION COMPANY (NO. 10-717) – On June 20, 2011, the Court denied 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." The Court invited the Solicitor General to submit a brief to provide the views of the United States which recommended that the Court deny review.

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 July 26, 2011.

WATER WHEEL CAMP RECREATIONAL AREA, INC. V. LARANCE (9TH CIR. NOS. 09-17349; 09-17357) – On June 10, 2011, the U.S. Court of Appeals for the Ninth Circuit issued its opinion strongly affirming the jurisdiction of the Colorado River Indian Tribal Court over a non-Indian holdover tenant on tribal lands on the California portion of the Colorado River Indian Reservation. The lower federal district court had held that the Tribal Court had jurisdiction over the corporate tenant, Water Wheel, but did not have jurisdiction over Robert Johnson, the President of Water Wheel under the *Montana* test and its exceptions. 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 Ninth Circuit, in a per curiam opinion, held that *Montana* does not apply to this case since based on the fact that all of the activities of Mr. Johnson occurred on tribal land—not non-Indian owned fee land. However, the Court did provide its rationale of why, if *Montana* did apply to this case, the Tribe would still prevail. The Project helped develop and coordinate the filing of several amicus briefs in support of the Tribal Court, 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).**