TRIBAL SUPREME COURT PROJECT MEMORANDUM

SEPTEMBER 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).

On Monday, September 26, 2011, the Justices return and the U.S. Supreme Court will hold its first Conference for the October Term 2011, selecting cases for review off of the summer lists which include five Indian law petitions. The Tribal Supreme Court Project is anticipating an extremely busy OT 2011 with 11 petitions having been filed in Indian law cases before the start of the term, and a number of important Indian law cases moving forward in the lower federal and state courts.

The major Indian law case being considered by the Court during its first Conference involves two petitions: a petition filed by the United States in *United States v. New York* (No. 10-1404); and a petition filed by the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin and the Oneida of the Thames in *Oneida Indian Nation v. County of Oneida* (No. 10-1420). Both petitions seek review of a split panel decision (2-1) of the U.S. Court of Appeals for the Second Circuit which affirmed the district court's dismissal of the possessory land claims (*e.g.* trespass damages) based on "equitable considerations" (*i.e.* the indisputably disruptive nature of the claims) discussed in its decision in *Cayuga Indian Nation v. Pataki* and the Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation.* The Second Circuit reversed the district court to hold that the Oneida tribes are also barred by these "equitable considerations" 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. In dissent, Judge Gershon found that the Oneida tribes and the United States are not foreclosed from pursuing their non-possessory claims. In particular he opined that the United States should be allowed to pursue its claim against the State for violation of the Non-intercourse Act. The Tribal Supreme Court assisted the Oneida tribes in coordinating the amicus strategy, and NARF prepared an amicus brief on behalf of NCAI in support of the petitions. Given the long history of this case, and the fact that it has been before the Court on two prior occasions, there is a better-than-even chance the Court will grant review.

Also pending for consideration during the first Conference is *Navajo Nation v. Equal Employment Opportunity Commission* (Nos. 10-981, 10-986 and 10-1080) which involves two petitions and a conditional cross-petition. The Navajo Nation and Peabody Coal are both 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 the Navajo preference for employment provisions in leases between Peabody Coal and the Navajo Nation as approved by the Secretary of the Interior. The United States filed a conditional cross-petition on the question of whether the Secretary of the Interior is a "required party" under Rule 19(a)(1). This case is a good candidate for a GVR (grant, vacate and remand) based on the United States observation that none of the parties agree with the Ninth Circuit's resolution of the procedural questions. The remaining Indian law case is *Reed v. Gutierrez* (No. 10-1390) which seeks 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 that occurred outside the reservation. Challenges to the doctrine of tribal sovereign immunity remain one of the primary focal points for the work of the Tribal Supreme Court Project. As many as 6 and 8 petitions have been filed in a single term seeking review of lower court decisions affirming tribal sovereign immunity in congruence with the Supreme Court's 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*

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CASES RECENTLY DECIDED BY THE SUPREME COURT

Currently, no Indian law or Indian law-related cases have been heard and decided by the Court for the October Term 2011

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:

CORBOY V. LOUIE (NO. 11-336) – On September 15, 2011, non-native individual landowners and taxpayers filed a petition seeking review of a decision by the Supreme Court of Hawaii which held that they do not have standing to challenge the state and county tax law exemption granted to Hawaiian homestead lessees under the Hawaiian Homes Commission Act. The state's brief in opposition is due on October 17, 2011.

SALAZAR V. PATCHAK (NO. 11-247) – On August 25, 2011, the United States filed a petition seeking review of the decision by the U.S. Court of Appeals for the District of Columbia in *Patchak v. Salazar* which reversed the district court and 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 on the QTA issue 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." The United States framed two questions presented:

> 1. Whether 5 U.S.C. 702 [of the APA] waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian tribe.
> 2. Whether a private individual who alleges injuries resulting from the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act, ch. 576, 48 Stat. 984.

The brief in opposition is due on October 26, 2011.

MATCH-E-BE-NASH-SHE-WISH BAND OF POTAWATOMI INDIANS V. PATCHAK (NO. 11-246) – On August 25, 2011, the Gun Lake Tribe also filed a petition seeking review of the decision by the U.S. Court of Appeals for the District of Columbia in *Patchak v. Salazar* referenced above. The Tribe framed two questions presented:

> 1. Whether the Quiet Title Act and its reservation of the United States' sovereign immunity in suits involving "trust or restricted Indian lands" apply to all suits concerning land in which the United States "claims an interest," 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held.
> 2. Whether prudential standing to sue under federal law can be based on either (i) the plaintiff's ability to "police" an agency's compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

The brief in opposition is due on October 26, 2011.

EVANS V. WAPATO HERITAGE, LLC (NO. 11-215) – On August 15, 2011, an individual heir to an Indian trust allotment filed a petition seeking review of an unpublished opinion of the U.S. Court of Appeals for the Ninth Circuit which held in favor of the other heirs in a dispute regarding the enforcement of a Settlement Agreement previously reached by the heirs. The primary question raised in the petition is whether the federal courts have subject matter jurisdiction over what the dissent calls " a garden-variety state law contract claim that simply does not 'arise under' federal law for the purposes of establishing federal question jurisdiction under 28 U.S.C. § 1331." The brief in opposition is due on October 24, 2011.

SENECA TELEPHONE COMPANY V. MIAMI TRIBE OF OKLAHOMA (NO. 11-183) – On August 10, 2011, Seneca Telephone Company filed a petition seeking review of a decision of the Supreme Court of the State of Oklahoma which reversed the lower courts and held that the Tribe's sovereign immunity has not been waived by Congress, or the Tribe. In its tort action against the tribally owned construction company for damages to its underground lines during excavation work, the Seneca Telephone Company argued that the court should follow the preemption analysis of *Rice v. Rehner* and find that the state's adoption of the Underground Facilities Damage Prevention Act, in accordance with Congress' authorization, preempts tribal sovereign immunity in the area of telecommunications. The court found that *Rice v. Rehner* was not

applicable since the Tribe was not engaged in any telecommunications activity. The Tribe's brief in opposition was filed on September 12, 2011.

ARCTIC SLOPE NATIVE ASSOCIATION V. SEBELIUS (NO. 11-83) – On July 18, 2011, the Arctic Slope Native Association, a non-profit corporation which contracts with the federal government to operate an IHS hospital in Barrow, Alaska, filed a petition seeking review of the decision of the U.S. Court of Federal Claims which held that the U.S. Department of Health and Human Services is not liable for its failure to pay full contract support costs based on the "subject to availability of appropriations" provision under the Indian Self-Determination Act. The question presented is: "Whether the Federal Circuit erred in holding, in direct conflict with the Tenth Circuit, that a government contractor which has fully performed its end of the bargain has no remedy when a government agency over commits itself to other projects and, as a result, does not have enough money left in its annual appropriation to pay the contractor." The U.S. brief in opposition is due on October 19, 2011.

GILA RIVER INDIAN COMMUNITY V. LYON (NO 11-80) – On July 15, 2011, the Gila River Indian Community filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the United States is not a necessary and indispensible party to a dispute between an Indian tribe and the trustee of a bankruptcy estate over the rights of access to a parcel of non-Indian fee land completely surrounded by tribal trust and individual Indian trust lands. The questions presented are: (1) "Whether, under Federal Rule of Civil Procedure 19(b), courts may adjudicate and compromise legal rights in land to which the United States holds title without the United States' participation in the litigation; and (2) Whether, in light of this Court's recent decision in *United States v. Jicarilla Apache Nation*, No. 10-382 (June 13, 2011), the Ninth Circuit properly held, as a matter of law, that litigation compromising the United States' title in land can proceed in the United States' absence as long as an Indian tribe is a party to the litigation." The U.S. brief in opposition is due on September 19, 2011.

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 were filed on July 20, 2011, and the petition has been scheduled for conference on September 26, 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) Indian 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 were filed on July 20, 2011, and the petition has been scheduled for conference on September 26, 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 on June 13, 2011, and the petition has been scheduled for conference on September 26, 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 petitions and cross-petition have been scheduled for conference on September 26, 2011.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

Currently, the Court has not denied or dismissed any petitions for writ of certiorari.

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

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. Any petition seeking review by the U.S. Supreme Court would have been due on September 8, 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).**