TRIBAL SUPREME COURT PROJECT MEMORANDUM

DECEMBER 16, 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).

In an extremely positive development, on December 12, 2011, the Court granted review in *Salazar v. Patchak* and *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak,* two petitions seeking review of a decision by the U.S. Court of Appeals for the District of Colombia involving jurisdictional arguments to a *Carcieri* based challenge to trust land acquisition. In its decision, the D.C. Circuit 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 had 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." The Tribal Supreme Court Project helped to prepare an amicus brief on behalf of NCAI in support of the petitions.

The next conference is January 6, 2011, during which the Court will consider four Indian law petitions, including *Salazar v. Ramah Navajo Chapter* (11-551) and *Arctic Slope Native Association v. Sebelius* (11-83). In *Ramah Navajo,* the U.S. Court of Appeals for the Tenth Circuit held that the Bureau of Indian Affairs is liable for its failure to pay full contract support costs despite the "subject to availability of appropriations" provision under the Indian Self-Determination Act. In *Arctic Slope,* the U.S. Court of Federal Claims 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 decisions stand in direct conflict with each other and will likely result in a grant of review by the Court, setting up a second set of Indian law cases to be heard during the October 2011 Term.

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

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, two petitions for a writ of certiorari have been granted in an Indian law or Indian law-related cases for the October Term 2011:

SALAZAR V. PATCHAK (NO. 11-247); MATCH-E-BE-NASH-SHE-WISH BAND OF POTAWATOMI INDIANS V. PATCHAK (NO. 11-246) – On December 12, 2011, the Court granted the petitions filed by the United States and the Gun Lake Tribe seeking review of a decision by the U.S. Court of Appeals for the District of Columbia which had reversed the federal district court and held: (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. In its petition, 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.

In its petition, 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.

In its order, the Court consolidated the cases and allotted a total of one hour for oral argument (which has not yet been scheduled). Currently, the opening briefs of the United States and the Tribe are due on January 26, 2012. The Tribal Supreme Court Project is working with attorneys representing the Tribe and the United States to develop an effective amicus brief strategy in support of their briefs on the merits.

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:

UTE MOUNTAIN UTE TRIBE V. PADILLA (NO. 11-729) – On December 12, 2012, the Ute Mountain Ute Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that federal law does not preempt five state taxes imposed on non-Indian lessees extracting oil and gas from the Ute Mountain Ute Reservation in New Mexico. The Tenth Circuit found that that (1) although the federal regulatory scheme is extensive, it is not exclusive; and (2) the economic burden falls on the non-Indian lessees, not the Tribe. The brief in opposition is due on January 13, 2012.

SHAVANAUX V. UNITED STATES (NO. 11-7731) – On December 7, 2011, Adam Shavanaux, an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservations, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that his prior tribal court convictions for domestic violence could be used as proof of a federal charge of domestic assault by a habitual offender under 18 U.S.C. § 117. The Tenth Circuit, similar to the Eight Circuit in *Cavanaugh* (see below), acknowledged the conflict with the decision of the Ninth Circuit in *United States v. Ant.* The brief in opposition is due on January 9, 2012.

NIELSON V. KETCHUM (NO. 11-680) – On December 2, 2012, the Cherokee Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that a law passed by the Cherokee Nation extending automatic temporary Cherokee membership for any newborn who is the direct descendant of a Cherokee listed on the Dawes Rolls does not expand the reach of Indian Child Welfare Act (ICWA), or satisfy the definition of "Indian child" under ICWA. The brief in opposition is due on March 5, 2012.

GUSTAFSON V. POITRA (NO. 11-701) – On December 2, 2011, a non-Indian business owner, filed a petition seeking review of a decision by the North Dakota Supreme Court which held that the state court does not have subject matter jurisdiction over a lease and property dispute involving tribal members and member-owned fee land within the Turtle Mountain Indian Reservation. The brief in opposition is due on January 9, 2012.

CAVANAUGH V. UNITED STATES (NO. 11-7379) – On November 10, 2011, Roman Cavanaugh, an enrolled member of the Spirit Lake Sioux Tribe, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that his prior tribal court convictions for domestic violence could be used as proof of a federal charge of domestic assault by a habitual offender under 18 U.S.C. § 117. The Eighth Circuit acknowledged the inconsistency among the lower court cases dealing with "the use of arguably infirm prior judgments to establish guilt," including tribal court convictions without appointed counsel. The brief in opposition is due on January 17, 2012.

K2 AMERICA CORPORATION V. ROLAND OIL & GAS (NO. 11-573) – On November 3, 2011, K2 American Corporation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that federal courts do not have subject matter jurisdiction over a lawsuit between two non-Indian companies alleging state law claims arising from a leasing dispute over lands held in trust by the United States for individual Indian allottees. The brief in opposition is due on December 7, 2011.

SALAZAR V. RAMAH NAVAJO CHAPTER (NO. 11-551) – On October 31, 2011, the United States filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the Bureau of Indian Affairs is liable for its failure to pay full contract support costs despite the "subject to availability of appropriations" provision under the Indian Self-Determination Act. The Tenth Circuit holding is in direct conflict with the holding of the Federal Circuit in *Arctic Slope Native Assn v. Sebelius* (No. 11-83) (see below). The brief in opposition was filed on December 14, 2011 and the petition has been scheduled for conference on January 6, 2012.

YSLETA DEL SUR PUEBLO V. STATE OF TEXAS (NO 11-553) – On October 28, 2011, the Ysleta del sur Pueblo filed a petition seeking review of a decision by the U.S. Court of Appeals for the Fifth Circuit which upheld the district court's finding of contempt and issuance of sanctions against the Tribe for the unlawful operation of certain gaming machines. The sanctions include monthly access for state officials to inspect the Tribe's casino records and all tribal books and records relating to its gaming operations. The state did not file a brief in opposition, and the petition has been scheduled for conference on January 6, 2012.

OMAHA TRIBE OF NEBRASKA V. STOREVISIONS, INC. (NO. 11-508) – On October 20, 2011, the Omaha Tribe of Nebraska filed a petition seeking review of a decision by the Nebraska Supreme Court which held that the Tribe had waived its sovereign immunity through a separate waiver executed in the presence of five of the seven tribal council members which, in turn, provided apparent authority for the tribal chairman and vice-chairman to sign the contracts at issue. The brief in opposition was filed on November 23, 2011, and the petition has been scheduled for conference on January 6, 2012.

MALATERRE V. AMERIND RISK MANAGEMENT (NO. 11-441) – On October 6, 2011, enrolled members of the Turtle Mountain Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that the Turtle Mountain Tribal Court does not have jurisdiction over their direct suit against Amerind Risk Management, a federally chartered corporation established by three Charter Tribes to administer a self-insurance risk pool for Indian Housing Authorities and Indian tribes, based on the doctrine of tribal sovereign immunity. The brief in opposition was filed on December 9, 2011.

CORBOY V. LOUIE (NO. 11-336) – On September 15, 2011, non-native Hawaiian 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 Pacific Legal Foundation filed an amicus brief in support of the petition on October 17, 2011. The state's brief in opposition was filed on November 16, 2011, and on December 12, 2011, the Court issued an order requesting the views of the Solicitor General.

LABUFF V. UNITED STATES (NO. 11-6168) – On August 26, 2011, a criminal defendant filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed his conviction under the Major Crimes Act. In his appeal, the petitioner argued that the United States failed to prove his "Indian status" beyond a reasonable doubt. The United States' brief in opposition is due on January 3, 2012.

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 was filed on November 2, 2011, and the petition was scheduled for conference on November 22, 2011 and has been held over re-scheduled for conference on January 6, 2012.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

EVANS V. WAPATO HERITAGE, LLC (NO. 11-215) – On November 28, 2011, the Court denied review of an unpublished opinion of the U.S. Court of Appeals for the Ninth Circuit involving a dispute between heirs to an Indian trust allotment regarding the enforcement of a Settlement Agreement. The primary question was whether federal courts have subject matter jurisdiction over what the dissent called " 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."

LOMAS V. HEDGPETH (NO. 11-424) – On November 28, 2011, the Court denied review of a petition filed by an individual Indian criminal defendant challenging the denial of his request for a Certificate of Appealability by the U.S. Court of Appeals for the Ninth Circuit. Petitioner argued that he has a "Sixth Amendment claim that his trial counsel rendered ineffective assistance of counsel by failing to file a motion to dismiss/and or suppress pursuant to his Fourth Amendment right to be free from an unreasonable search and seizure on the Morongo Band of Indians' Reservation's protected land."

GILA RIVER INDIAN COMMUNITY V. LYON (NO 11-80) – On October 31, 2011, the Court denied 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 the Gila River Indian Community 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.

ONEIDA INDIAN NATION OF NEW YORK V. ONEIDA COUNTY (NO. 10-1420) – On October 17, 2011, Court denied review of the decision by the U.S. Court of Appeals for the Second Circuit which held that the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin and the Oneida of the Thames (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 Second Circuit had held, based on the Supreme Court's 2005 decision in *City of Sherrill,* that "equitable considerations" rendered the Oneida tribes' claims for money damages for dispossession of tribal lands by the State of New York in violation of federal law void were *ab initio.*

UNITED STATES V. STATE OF NEW YORK, ET AL. (NO. 10-1404) – On October 17, 2011, the Court denied 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. In effect, the Court let stand the Second Circuit decisions which bar the United States from enforcing the Nonintercourse Act against a State based

simply on the passage of time and the transfer of the Indian lands to innocent third parties, even where the United States is seeking only money damages.

SENECA TELEPHONE COMPANY V. MIAMI TRIBE OF OKLAHOMA (NO. 11-183) – On October 17, 2011 the Court denied 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 lower court found that *Rice v. Rehner* was not applicable since the Tribe was not engaged in any telecommunications activity.

REED V. GUTIERREZ (NO. 10-1390) – On October 3, 2011 the Court denied 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 by a non-Indian couple for injuries sustained in a car accident outside the reservation.

NAVAJO NATION V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (NOS. 10-981, 10-986 AND 10-1080) – On October 3, 2011, the Court denied review of a decision by the U.S. Court of Appeals for the Ninth Circuit which involved "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.

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).**