TRIBAL SUPREME COURT PROJECT MEMORANDUM

APRIL 16, 2012

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).

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

SALAZAR V. RAMAH NAVAJO CHAPTER (NO. 11-551) – On April 18, 2012, the Court will hear oral argument in 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. In its petition, the United States framed the following question presented:

> Whether the government is required to pay all the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq.,* where the Congress has imposed an express statutory cap on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap.

The Tenth Circuit holding is in direct conflict with the holding of the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius* (No. 11-83) in which a petition was filed by the tribal contractors and is being held by the Court with the following question presented:

> 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 overcommits itself to other projects and, as a result, does not have enough money left in its annual appropriation to pay the contractor.

The United States filed its opening brief on February 17, 2012, and the Tribe filed its response on March 19, 2012. Three amicus briefs in support of the Tribal position were filed: (1) Amicus Brief of the U.S. Chamber of Congress and the National Defense Industrial Association; (2) Amicus Brief of the National Congress of American Indians and a Coalition of Indian Tribes and Tribal Organizations; and (3) Amicus Brief of the Arctic Slope Native Association.

SALAZAR V. PATCHAK (NO. 11-247); MATCH-E-BE-NASH-SHE-WISH BAND OF POTAWATOMI INDIANS V. PATCHAK (NO. 11-246) – On April 24, 2012, the Court will hear oral argument in review of a decision by the U.S. Court of Appeals for the District of Columbia that 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. 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." 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, with the United States and the Tribe splitting their allotted 30 minutes. The opening briefs of the United States and the Tribe were filed on January 26, 2012. The Tribal Supreme Court Project assisted in the preparation of a NCAI-NAFOA amicus brief focused on the issues related to the Quiet Title Act question. Wayland Township, et al., also prepared an amicus brief at the merits stage focused on the economic benefits derived by local governments and businesses as the result of tribal trust land acquisition.

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:

COMENOUT V. WASHINGTON (NO. 11-1171) – On March 22, 2012, a member of the Quinault Indian Nation filed a petition seeking review of a decision by the Supreme Court of the State of Washington which held that the state has criminal jurisdiction to prosecute a tribal member for selling untaxed cigarettes on his trust allotment outside the boundaries of the Quinault Indian Reservation. The state's brief in opposition is due on April 25, 2012.

MCCRARY V. IVANHOFF BAY VILLAGE (NO. 11-1092) – On March 5, 2012, a non-Indian filed a petition seeking review of a decision by the Supreme Court of the State of Alaska which held that the Tribe is a federally-recognized Indian tribe entitled to sovereign immunity from his breach of contract suit. The Tribe filed a waiver of its right to respond on March 19, 2012, and the petition is scheduled for conference on April 20, 2012.

SEBELIUS V. SOUTHERN UTE TRIBE (NO. 11-762) – On December 19, 2012, 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 under the Indian Self-Determination Act, the Indian Health Service may not "decline a contract on the basis that available appropriations are insufficient to fund the contract" and that an Indian tribe is entitled to a contract specifying the full statutory amount of contract support costs. The United States requests that the Court hold the petition pending its disposition of *Salazar v. Ramah Navajo Chapter* (No. 11-551), and then dispose of it as appropriate (see above). The Tribe filed its brief in opposition is due February 16, 2012. The petition was scheduled for conference on March 16, 2012, and appears have been held over by the Court.

NIELSON V. KETCHUM (NO. 11-680) – On December 2, 2012, a member of 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 the Indian Child Welfare Act (ICWA) or satisfy the definition of "Indian child" under ICWA. The brief in opposition was filed on March 5, 2012, and the petition was scheduled for conference on April 13, 2012, and appears to have been held over by the Court.

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 a "CVSG" order requesting the views of the Solicitor General.

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 United States' brief in opposition was filed on November 2, 2011. The petition, originally scheduled for conference on November 22, 2011, was re-scheduled for conference on January 6, 2012, and is now being held by the Court pending its disposition of *Salazar v. Ramah Navajo Chapter* (see above).

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

BEAULIEU V. MINNESOTA (NO. 11-753) – On April 16, 2012, the Court denied review of a decision by the Minnesota Supreme Court which held that Public Law 280 expressly grants the state jurisdiction to determine the status of an individual tribal member as a sexually dangerous person or a sexual psychopathic personality under the state's civil commitment statute.

LABUFF V. UNITED STATES (NO. 11-6168) – On April 2, 2012, the Court denied 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.

SHAVANAUX V. UNITED STATES (NO. 11-7731) – On March 19, 2012, the Court denied review of a petition filed by Adam Shavanaux, an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservations, 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*, acknowledged a conflict with the decision of the Ninth Circuit in *United States v. Ant.*

UTE MOUNTAIN UTE TRIBE V. PADILLA (NO. 11-729) – On February 21, 2012, the Court denied review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that federal law does not preempt state taxation of non-Indian lessees extracting oil and gas from the Ute Mountain Ute Reservation in New Mexico. The Tenth Circuit found 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.

CAVANAUGH V. UNITED STATES (NO. 11-7379) – On February 21, 2012, the Court denied review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that an enrolled tribal member's 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.

GUSTAFSON V. POITRA (NO. 11-701) – On February 21, 2011, the Court denied 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 between a non-Indian business owner and tribal members involving member-owned fee land within the Turtle Mountain Indian Reservation.

K2 AMERICA CORPORATION V. ROLAND OIL & GAS (NO. 11-573) – On January 17, 2012, the Court denied 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.

MALATERRE V. AMERIND RISK MANAGEMENT (NO. 11-441) – On January 17, 2012, the Court denied review of a decision by the U.S. Court of Appeals for the Eighth Circuit which held that, based on the doctrine of tribal sovereign immunity, the Turtle Mountain Tribal Court does not have jurisdiction over a direct suit against by tribal members 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.

YSLETA DEL SUR PUEBLO V. STATE OF TEXAS (NO 11-553) – On January 9, 2012, the Court denied 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 Ysleta del Sur Pueblo 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.

OMAHA TRIBE OF NEBRASKA V. STOREVISIONS, INC. (NO. 11-508) – On January 9, 2012, the Court denied review of a decision by the Nebraska Supreme Court which held that the Omaha 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.

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. COUNTY OF ONEIDA (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.

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).**