TRIBAL SUPREME COURT PROJECT MEMORANDUM

JULY 13, 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).

On June 21, 2012, the U.S. Supreme Court held its final conference of October Term 2011, and rose for its summer recess after a tumultuous last week in session. In its final order list, the Court denied review in *Sebelius v. Southern Ute* and granted, vacated and remanded (GVR) *Arctic Slope Native Association v. Sebelius* for further consideration in light of its decision earlier in the week in *Salazar v. Ramah Navajo Chapter*. As reported during the NCAI Mid-Year Conference, in *Ramah Navajo* Indian country scored its first and only victory before the Roberts Court. The Court held (5-4) that the United States must pay each Tribe's contract support costs—administrative costs incurred by Tribes who enter into contracts with the United States under the Indian Self-Determination Act and Education Assistance Act—in full (see summary below). However, this win was over-shadowed by another extremely disappointing loss for Indian country in *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak* in which the Court held (8-1) that the United States has waived its sovereign immunity under the Administrative Procedures Act in relation to a *Carcieri* challenge to trust land acquisition (see summary below).

At the present time, there are no Indian law cases pending before the Court on the merits for the October Term 2012, and only two petitions for review have been filed which will likely be considered during the Court's opening conference in late September 2012 (see summaries below). The end of the October 2011 Term 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 Roberts' Court stands at 1 win and 8 losses. (For a full summary of the work of the Tribal Supreme Court Project from the October Term 2001 – October Term 2010, download the Ten Year Report available at http://sct.narf.org/updatememos/tsct-10-year-report.pdf.)

In all, twenty-seven petitions for writ of certiorari were filed in Indian law cases this past term (down from thirty-one petitions last term). On average, twenty-six petitions have been filed in Indian law cases each year since 2001. Of the twenty-seven petitions filed, three were granted and heard on the merits, with one GVR, and twenty-three petitions 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, Project attorneys worked directly on the development of strategy and

the preparation of an amicus brief in support of the petitions filed in *Oneida Indian Nation v. County of Oneida* and *United States v. New York* (Indian land claims subject to equitable defenses).

Unlike past years, only limited opportunities existed for the Project to work closely with attorneys representing tribal interests which prevailed in the lower courts to prepare response briefs to successfully oppose review. On the whole, tribes and tribal interests were more likely to be petitioners, not respondents before the Court. In a new development this term, Indians as criminal defendants were before the Court in six petitions, raising unsuccessful challenges such as: the use of tribal court convictions for determining status as a habitual offender under federal law (*see Shavanaux* and *Cavanaugh*); state jurisdiction under PL 280 for civil commitment of a tribal member as a dangerous sexual offender (*see Beaulieu*); and status as "Indian" is an element of the crime under the Major Crimes Act which must be proven beyond a reasonable doubt (*see LaBuff*).

The Project continues to closely monitor cases challenging tribal sovereign immunity with five of the twenty-seven petitions raising that question. In four of the five petitions, tribes and tribal interests were the respondents in which the lower courts upheld tribal sovereign immunity. Only one lower court—the Nebraska Supreme Court in *Omaha Tribe v. Storevisions*—held that the tribe had waived its sovereign immunity (*i.e.* 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 remainder of the petitions were a mix of questions, including various challenges to state and federal jurisdiction over civil matters arising within Indian country.

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 prepare 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.

CASES RECENTLY DECIDED BY THE SUPREME COURT

Three Indian law cases were granted by the Court during the October Term 2011:

ARCTIC SLOPE NATIVE ASSOCIATION V. SEBELIUS (NO. 11-83) – On June 25, 2012, the Court granted, vacated, and remanded for further consideration in light of *Salazar v. Ramah Navajo Chapter* (see below), a decision of the U.S. Court of Federal Claims which had 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.

SALAZAR V. RAMAH NAVAJO CHAPTER (NO. 11-551) – On June 18, 2012, the Court announced its decision affirming 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 Court held (5-4) that the United States must pay each Tribe's contract support costs—administrative costs incurred by Tribes who enter

into contracts with the United States under the Indian Self-Determination Act and Education Assistance Act—in full. Justice Sotomayor, joined by Justices Scalia, Kennedy, Thomas, and Kagan, found the Court's 2005 decision in *Cherokee Nation v. Leavitt* controlling: When "Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on the grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump sum appropriation is insufficient to pay *all* the contracts the agency has made."

Chief Justice Roberts, joined by Justices Ginsberg, Breyer and Alito in dissent, found that this case was not a typical government contracts case. In short, although many government contracts contain a "subject to the availability of appropriations clause," and many statutes contain "not to exceed" language, the operative language within the Indian Self-Determination Act and contained in each contract provides that "the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under the [Act]." According to the dissent, this "reduction" clause relieves the Secretary of any obligation to make the required funds available.

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 June 18, 2012, the Court announced its decision, affirming the decision by the U.S. Court of Appeals for the District of Columbia and held: (1) 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; and (2) 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. The Court held (8-1) that the United States has waived its sovereign immunity and that Patchak has standing to bring his *Carcieri* challenge. In an opinion authored by Justice Kagan, the Court found that the Administrative Procedures Act (APA) generally waives the immunity of the United States from any suit "seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under the color of legal authority." 5 U.S.C. § 702. According to the Court, Patchak's *Carcieri* claim fits within this waiver of immunity.

The Court rejected the arguments of the United States and the Tribe that Patchak seeks to divest the United States of title to land held in trust for the Tribe and should barred under the Indian lands exception to the waiver of immunity within the Quiet Title Act (QTA). The Court relied heavily on a letter written by former Assistant Attorney General (now Justice) Scalia to Congress about the APA's waiver of immunity for the principle that "when a statute 'is not addressed to the type of grievance which the plaintiff seeks to assert,' then the statute cannot prevent an APA suit." According to the Court, the QTA only applies to actions seeking quiet title by a party with a competing ownership interest in the land and therefore "addresses a kind of grievance different from the one Patchak advances." Although the Court concedes that Patchak is contesting the United States' title to the land, since he is not claiming any competing ownership interest in the land, the QTA and the Indian lands exception to the QTA are not applicable to this litigation.

The Court also rejected the arguments of the United States and the Tribe that Patchak cannot bring a *Carcieri* challenge because he lacks prudential standing (*e.g.* within the "zone of interests") under the Indian Reorganization Act (IRA). The Court found that although Section 5 of the IRA only specifically addresses land acquisition, decisions made by the Secretary under Section 5 "are closely enough and often enough entwined with considerations of land use" to allow neighboring landowners to bring "economic, environmental or aesthetic" challenges to the those decisions.

In her dissent, Justice Sotomayor states: "After today, any person may sue under the APA to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land." Justice Sotomayor points out that the Court's decision works against the one of the primary goals of the IRA—new economic development and financial investment in Indian country. Now, trust land acquisitions for the benefit of Indian tribes will be subject to judicial challenge under the APA's six-year statute of limitations—not the 30-day period provided for under the regulations—substantially constraining the ability of all Indian tribes to acquire and develop lands.

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 acquisitions.

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:

YOUNG V. FITZPATRICK (NO. 11-1485) – On June 4, 2012, Mr. Young, as representative of the estate of his brother, filed a petition seeking review of an unpublished decision by the Washington State Court of Appeals which held that, based on the doctrine of tribal sovereign immunity, state courts do not have subject matter jurisdiction over claims against tribal police officers acting in their official capacity on tribal lands. The tribal police officers' brief in opposition is due July 9, 2012.

UNITED STATES V. SAMISH INDIAN NATION (NO. 11-1448) – On June 1, 2012, the United States filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which reversed the Court of Federal Claims and held that the Samish Tribe may pursue its claims for money damages under the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act). The Federal Circuit held that the Revenue Sharing Act is a "money mandating statute" and is not limited by operation of the Anti-Deficiency Act, 31 U.S.C.§ 1341. However, the Federal Circuit affirmed the lower court's holding that the Tribal Priority Allocation (TPA) system is not money-mandating. This case arises from a series of suits brought by the Samish Tribe to obtain treaty rights and statutory benefits from the United States as a result of its efforts to be a "federally recognized" Indian tribe which began in 1972. The Tribe's brief in opposition is due August 10, 2012.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

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

SEBELIUS V. SOUTHERN UTE TRIBE (NO. 11-762) – On June 25, 2012, the Court, following its decision in *Salazar v. Ramah Navajo Chapter*, denied 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.

CORBOY V. LOUIE (NO. 11-336) – On June 25, 2012 the Court denied review of a decision by the Supreme Court of Hawaii which held that the non-Native petitioners do not have standing to challenge the state and county tax law exemption granted to Hawaiian homestead lessees under the Hawaiian Homes Commission Act. At the request of the Court, the United States filed an amicus brief recommending the Court deny review.

NIELSON V. KETCHUM (NO. 11-680) – On May 21, 2012, the Court denied 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.

COMENOUT V. WASHINGTON (NO. 11-1171) – On May 14, 2012, the Court denied 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.

MCCRARY V. IVANHOFF BAY VILLAGE (NO. 11-1092) – On April 23, 2012, the Court denied 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 a breach of contract suit.

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).