TRIBAL SUPREME COURT PROJECT MEMORANDUM

MAY 23, 2005

UPDATE ON 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 petition for certiorari, prior to the Supreme Court's acceptance of review.

Following a major victory for Tribes in *United States v. Lara* last term, the Tribal Supreme Court Project remains very busy, monitoring numerous cases at various stages of appeal within both state and federal courts, while directly participating in the preparation amicus briefs in the U.S. Supreme Court and the U.S. Circuit Courts of Appeals. You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org).

CASES PENDING BEFORE THE U.S. SUPREME COURT

RICHARDS V. PRAIRIE BAND POTAWATOMI NATION (NO. 04-631) – On February 28, 2005, the Supreme Court accepted review in *Richards v. Prairie Band Potawatomi Nation.* In *Richards,* the State of Kansas is seeking to overturn the Tenth Circuit's decision to invalidate the application of the Kansas motor fuel tax on tribal sales to non-Indian motorists. Significantly, the Tenth Circuit held that the Nation was not "marketing a tax exemption" but instead its gas station was an essential part of its on-reservation gaming enterprise – particularly where the Nation charged a tax equal to the state tax and the Nation built and maintained the transportation infrastructure on its rural reservation.

On May 12, 2005, the State of Kansas filed its Opening Brief. The importance of this case to the state's interests is underscored by the filing of amicus briefs in support of Kansas by State of South Dakota, joined by 13 other states (Alaska, California, Connecticut, Idaho, Michigan, Missouri, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Utah, and Wyoming), the Multistate Tax Commission and the National Association of Convenience Stores, the Petroleum Marketers Association of America and the Society of Independent Gasoline Marketers of America.

The Tribal Supreme Court Project is working closely with the attorneys representing Prairie Band Potawatomi Nation, and attorneys from throughout Indian country, in coordinating resources and developing a tribal amicus brief strategy. The Project is also working diligently to persuade the U.S. Solicitor General's Office to file a brief supporting the Prairie Band Potawatomi Nation. The Tribe's Response Brief and all supporting amici briefs are due July 14, 2005. Oral arguments will likely be heard in late Fall 2005.

GONZALES V. O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL (NO. 04-1084) – On April 18, 2005, the Supreme Court granted certiorari in *Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal* (the "UDV"). The UDV is a religious organization, an outgrowth of a church in Brazil which uses a hallucinogenic called *hoasca* in religious ceremonies. UDV filed suit against the U.S. Attorney General challenging the confiscation of its *hoasca* under the Controlled Substances Act. The UDV claims that (1) the government's interpretation of the Controlled Substances Act violates the Religious Freedom Restoration Act ("RFRA"), and (2) if its members are not allowed access to *hoasca* for religious uses, the U.S. exemption for the religious use of peyote by Indians who are members of the Native American Church ("NAC") denies their members' constitutional rights to Equal Protection of the laws under the Fifth and Fourteenth Amendments to the U.S. Constitution.

The federal district court granted and the 10th Circuit upheld UDV's request for an injunction on the basis of its RFRA claims, but denied their equal protection claim. In denying the equal protection claim, the District Court relied on the trust relationship between the United States and Indian tribes, and the government's obligation to protect Indian culture and religion as an attribute of sovereignty and the trust relationship. The Supreme Court has granted review of the issuance of the preliminary injunction at the request of the U.S. Attorney General. Although the equal protection issues are not squarely before the Supreme Court, the Tribal Supreme Court Project is closely following the issue because of concerns that the Court could revisit *Morton v. Mancari* in this context. The Native American Rights Fund is working closely with the attorneys representing the Native American Church and is consulting with the U.S. Solicitor General's Office and U.S. Department of Justice on the equal protection issue.

CASES RECENTLY DECIDED BY THE U.S. SUPREME COURT

CITY OF SHERRILL V. ONEIDA NATION OF NEW YORK (NO. 03-855) - On March 28, 2005, the U.S. Supreme Court issued its decision in *City of Sherrill v. Oneida Indian Nation of New York*, a case that has been closely monitored by many Indian tribes for its impact on tribal land claims and its application of a number of important principles of federal Indian law. In a difficult loss for Indian country, the Supreme Court ruled against the Oneida Nation, holding that while the Nation maintains a valid claim for damages for reservation lands sold in violation of the Nonintercourse Act, it may not assert tax immunity on repurchased lands within the reservation boundaries until those lands are placed into trust by the Secretary of Interior.

Justice Ginsburg wrote the opinion in the 8-1 decision against the Nation, stating: "Given the longstanding distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders."

The Court's decision invoked the equitable doctrine of laches – that the long passage of time and the Oneida's inaction during that time prevents the Nation from asserting its tax immunity. The Court made clear that it was not invalidating the land claim, but only one of the remedies available for the claim. The Court's reliance on this doctrine, which was never presented or briefed by the parties, betrayed a deep lack of understanding of the legal and historical realities that prevented many tribes from being able to vindicate their rights until recent decades. While the decision should be construed as a narrow decision

regarding the remedies that are available for land claims under the Nonintercourse Act, it raises concerns that states will try to use the laches doctrine to diminish the remedies available in other tribal claims.

The Court based its decision on concerns of "disruptive practical consequences." The Court specifically noted that other tribes in New York had already sought to invalidate local zoning and land use laws to build a bingo hall "located within 300 yards of a school." The decision shows again that that the presentation of the facts and equitable issues to the Court is extremely important and often outweighs reliance on longstanding principles of law. Also important to the opinion, the Court found that Congress has provided a mechanism for reasserting tribal jurisdiction over lands through 25 U.S.C. §465, the Secretarial land to trust acquisition process. Essentially, this finding by the Court reaffirms the validity and purposes of the land to trust statute and regulations – a subject of considerable litigation in the lower courts.

CHEROKEE NATION CASES (NOS. 02-1472 AND 03-853) – On March 1, 2005, in a significant victory for Indian tribes, a unanimous U.S. Supreme Court held that Indian self-determination contracts are "legally binding" agreements – enforceable promises by the federal government similar in nature to other procurement contracts. The United States had taken the position that Indian tribes are not entitled to the same protections afforded other government contractors, and self-determination contracts are merely "governmental funding arrangements."

This was the first opportunity for the U.S. Supreme Court to review and consider the enforceability of the Indian Self Determination Act. In the first case, C*herokee Nation of Oklahoma and Shoshone-Paiute Tribes of the Duck Valley Reservation v. Thompson*, the Tenth Circuit Court of Appeals had held that the federal government was immune from any liability for its failure to pay full contract support costs to Indian tribes, during a period in the mid 1990's in which Congress did not place a statutory cap on the amounts the Indian Health Service (IHS) could pay tribal contractors. In the second case, *Thompson v. Cherokee Nation of Oklahoma*, the Federal Circuit Court of Appeals had reached the opposite conclusion, awarding the Cherokee Nation $8.5 million in damages for the failure to fully pay contract support costs. NCAI, through the Tribal Supreme Court Project, prepared an amicus brief in support of Cherokee Nation and Shoshone Paiute.

The Supreme Court affirmed the judgment of the Federal Circuit, reversed the judgment of the Tenth Circuit and remanded the cases for the further proceedings consistent with their opinion. Justice Breyer, delivering the opinion for the unanimous Court, accepted the view of "the Tribes and their *amici* . . . that as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the government cannot normally 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" (emphasis in original). In usual fashion, Justice Scalia, while largely joining the opinion, wrote separately to repeat his dislike for the use of legislative history, but the other seven Justices (Rehnquist did not participate in the proceedings) found the legislative history, which was the subject of our amicus brief, worth of note. A copy of the opinion is available at http://doc.narf.org/sc/okvthompson/opinion.pdf.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Below is a sample of petitions for a writ of certiorari which have been filed and are being monitored by the Tribal Supreme Court:

Wyoming Sawmills, Inc. v. U.S. Forest Service (No. 04-1175) (whether the U.S. Forest Service's decision to manage the Medicine Wheel National Historic Landmark as an important traditional cultural property, in recognition of its cultural, historic and religious importance of the to many Native Americans, violates the Establishment Clause of the First Amendment);

Kahawaiolaa v. Norton (No. 04-1041) (whether the regulations governing federal recognition, 25 CFR part 83, violate the Equal Protection Clause of the Fifth Amendment by precluding the Native Hawaiians);

PETITIONS FOR A WRIT OF CERTIORARI DENIED

EASTERN SHOSHONE CASES (NOS. 04-731 AND 04-929) – On April 18, 2005, the Supreme Court denied review in *Shoshone Tribe of the Wind River Reservation, et al. v. United States,* a case which considered impact of Public Law No. 108-7 on the Tribes' claims (dating back to 1946) against the United States for mismanagement of the Tribes' natural resources and the income derived from those resources. Public Law No. 108-7 provides in pertinent part:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

In interpreting this law, the Federal Circuit held that the "clear intent of the Act is that the statute of limitations will not begin to run on a tribe's claims until an accounting is completed." In a mixed decision for Indian country, the Federal Circuit held that the Supreme Court's decision in *United States v. Navajo Nation* moots the Tribes' claims relating to a breach of trust for asset mismanagement under the Indian Mineral Leasing Act of 1938. However, the United States is liable for mismanagement of trust funds after collection and for losses to trust funds resulting from the failure to collect. Finally, the Federal Circuit held that the Tribes are entitled to interest on the amounts of funds that the government was obligated to collect or delayed in collecting. After consulting with the attorneys representing the Tribes, the Tribal Supreme Court Project stayed with its strategy of discouraging tribal amicus briefs at the opposition to cert stage.

HAMMOND V. COEUR D'ALENE TRIBE OF IDAHO, ET AL. (NO. 04-624) -- On February 28, 2005, the Supreme Court denied review in *Hammond v. Coeur d'Alene Tribe of Idaho, et al.,* but accepted review in *Richards v. Prairie Band Potawatomi Nation* (see above). Both cases involve each state's attempts to impose its motor fuel tax on gasoline supplied to and sold by Indian tribes at tribally owned gas stations.

In *Hammond,* the Ninth Circuit held that the incidence of the Idaho motor fuel tax impermissibly falls on the Tribes, notwithstanding the state legislature's declared intent to shift the incidence of the tax to the non-Indian distributors. Further, the Ninth Circuit held that the Hayden Cartwright Act, which authorizes

states to tax motor fuel sales on "United States military or other reservations," does not manifest sufficiently clear congressional intent to abrogate tribal immunity and allow states to tax gasoline sales on Indian reservations. The Tribal Supreme Court Project worked closely with the attorneys representing the Coeur d'Alene Tribe, the Nez Perce Tribe and the Shoshone-Bannock Tribe to coordinate resources and to prepare the opposition brief.

SOUTH DAKOTA V. CUMMINGS (NO. 04-74) – In an excellent result for tribal sovereignty, early this term the Supreme Court denied review of *South Dakota v. Cummings,* a case where the South Dakota Supreme Court held that a county sheriff may not exercise criminal jurisdiction over an Indian in Indian country, even when in hot pursuit for a crime committed off-reservation. The State of South Dakota had asked the U.S. Supreme Court to overturn the case and expand the *Nevada v. Hicks* decision to increase the jurisdiction of states to enter Indian reservations. It was a great team effort in Indian country on this issue. Mr. Cummings was represented by Rena Hymans in the lower courts, and through the Supreme Court Project, she teamed up with Ian Gershengorn, a respected Supreme Court expert, on the opposition to cert. We received a lot of help from attorneys for the Cheyenne River Sioux Tribe and the Standing Rock Sioux Tribe, and our thanks go out to everyone who pitched in with information and advice. The result in this case emphasizes once again that the certiorari stage is where we have our best opportunity to influence the course of Supreme Court decisionmaking.

Even with this good result, it would be a mistake to believe that the issue of "hot pursuit" is resolved. It is certainly possible that this issue will make its way back to the Supreme Court, and if it does it will be a tough challenge to tribal sovereignty. Moreover, it is in the interests of tribes to minimize incentives for high speed chases to the reservation border. We thus urge tribes to consider developing reciprocal hot pursuit agreements with surrounding jurisdictions. Jurisdictional rules vary from place to place, and your tribe may have a hot pursuit or cross-deputization agreement in place already, but nevertheless this is a good time to review the issue. Please contact us if you would like more information.

CASES BEFORE THE U.S. COURTS OF APPEAL

SKOKOMISH V. UNITED STATES (NO. 01-35028) – On March 9, 2005, a majority of an en banc panel of the Ninth Circuit issued a disastrous opinion in *Skokomish Indian Tribe v. United States, et al.* The Skokomish Indian Tribe had sued the United States, Tacoma Public Utilities and the City of Tacoma ("Tacoma") for monetary damages based on the harm caused by the construction and operation of the Cushman Hydroelectric Project. The district court dismissed the Tribe's claims by summary judgment. On appeal, a three judge panel affirmed the district court by a 2 to 1 vote, with a strong dissent, and the Ninth Circuit granted the Tribe's request for rehearing en banc.

Judge Kozinski, writing for a majority, held that a Northwest Tribe, whose members depended upon fishing for their livelihoods since treaty times, possessed no reserved water rights for fishing because, according to the court, agriculture, not fishing, was the primary purpose of the Reservation. In addition, the court established a new and unsupported precedent that courts may disallow federal reserved water rights for fishing if the fishing clause of the treaty did not expressly guarantee an "exclusive" right. Next, the court denied the Tribe a federal common law right to monetary relief against any party except a treaty signatory. According to the majority opinion, only injunctive relief is available against state, local governments, or private individuals who violate treaty protected property rights.

The Tribe filed a petition for rehearing by the en banc panel or review by the full panel of the en banc opinion. On March 31, 2005, the Ninth Circuit ordered the United States and Tacoma to respond to the

Tribe's petition by April 21, 2005. The Tribal Supreme Court Project coordinated and helped prepare a tribal amicus brief in support of the Tribe's petition which was signed on to by over 30 Indian tribe, the NCAI and 12 highly regarded law professors.

CARCIERI V. NORTON (NO. 03-2647) – On February 9, 2005, the U.S. Court of Appeals for the First Circuit announced its decision in *Carcieri v. Norton,* upholding the authority of the Secretary of Interior to take land into trust for the Narragansett Tribe under Section 5 of the Indian Reorganization Act (IRA). On March 28, 2005, the State of Rhode Island filed a Request for Rehearing En Banc (a copy of the brief is available on the NARF website http://doc.narf.org/sc/carcieri/index.html).

This case is significant victory for Indian tribes because of the significance of the IRA and the Secretary's land to trust authority. First, the court interpreted the definition of "Indian tribe" in the IRA, and rejected an argument that the IRA does not apply to any tribe was not "now under federal jurisdiction" in 1934. A significant number of tribes could have been hurt by the opposite ruling. Second, the court rejected a broad argument that Section 5 is an unconstitutional delegation of legislative authority.

Rhode Island was supported by a group of ten state Attorneys General, led by South Dakota and Connecticut. This was clearly part of a coordinated strategy by these states to mount more significant legal challenges to trust land acquisition and create a split in authority among the circuit courts. Fortunately this result was averted, although we will have to keep a watchful eye on Section 5 litigation.

The Tribal Supreme Court Project coordinated the writing of two amicus briefs in the case with the attorneys for the Narragansett Indian Tribe and the United States. The first amicus brief was prepared pro bono by the law firms of Jenner & Block and Kanji & Katzen in coordination with NCAI and NARF. On behalf of the member tribes of NCAI and USET, as well as 40 individually named Indian tribes, this amicus brief focused on the first two issues. The second amicus brief was prepared by attorneys representing the Mississippi Band of Choctaw. One significant note was that the U.S. consented to argument time for NCAI. The argument went very well and we hope to have more opportunities to work collaboratively with the federal government in the future in cases protecting the rights of tribes. We continue to monitor this case, anticipating a motion for rehearing en banc (full panel of the First Circuit) or a petition for writ of certiorari to be filed by the state of Rhode Island.

DOE V. MANN (NO.04-15477) - On September 29, 2003, the Federal District Court for the Northern District of California issued an opinion denying tribal exclusive jurisdiction over a child custody decision involving an Indian child within the boundaries of an Indian reservation. The district court held that under the Indian Child Welfare Act, tribes that fall under Public Law 280 do not have the "exclusive jurisdiction" provided by ICWA Section 1911(a). This decision has been appealed to the U.S Court of Appeals for the Ninth Circuit, and the Tribal Supreme Court Project worked to encourage the preparation of several amicus briefs in support of the tribal position. This is likely to be a very important case for the applicability of the Indian Child Welfare Act in P.L. 280 states. Oral arguments were held on October 6, 2004 and a decision is likely in the near future.

NARRAGANSETT TRIBE V. RHODE ISLAND – On May 12, 2005, the 1st Circuit issued its decision on the Narragansett Tribe's request for relief from the State's violent efforts to close down a tribal smoke shop – forcibly serving a search warrant, seizing unstamped cigarettes, and arresting tribal officials. Narragansett is subject to a unique federal statute that gives full civil and criminal jurisdiction to the State. The 1st Circuit held that the Narragansett Tribe is obligated to comply with the State's cigarette tax laws as they apply to non-Indian consumers. However, the State exceeded its authority in imposing a warrant on the

Narragansett tribal government because the Tribe retains its sovereign immunity and the State had less intrusive means available to enforce its laws. The State of Rhode Island has indicated that it plans to appeal. This issue of State authority to enforce warrants against Indian tribes is a very important issue that bears close monitoring in the future.

MORRIS V. TANNER; MEANS V. NAVAJO NATION – Both of these cases are pending before the Ninth Circuit and involve equal protection and due process challenges to the *Duro* amendment and tribal criminal jurisdiction over non-member Indians. In *U.S. v. Lara*, the U.S. Supreme Court upheld tribal criminal jurisdiction over nonmember Indians, holding that the Duro amendment is an affirmation of tribal inherent authority. However, the Court left open the issue of whether a tribal prosecution of nonmember Indian may be challenged based on an equal protection and/or lack of due process.

SMITH V. SALISH KOOTENAI COLLEGE – This case addresses whether an Indian tribe has civil jurisdiction over tort action that arose as a result of a traffic accident on a public highway within the Reservation which involved a non-member Indian who was a student at the tribal college and who was driving the vehicle as part of a vocational program at the college. The Ninth Circuit held that, under these facts, neither of the two *Montana* exceptions applies, and the tribal court did not have adjudicatory authority over this matter. Motions for rehearing and rehearing en banc were recently filed. On May 13, 2005, the Ninth Circuit issued an order granting en banc review.

FORD MOTOR CO. V. TODECHEENE – This case involves the scope of tribal civil jurisdiction over a products liability action arising out of an accident on the Navajo Reservation on a road wholly owned by the Nation. The family of Todecheene filed an action in Navajo tribal court, and Ford filed a complaint in US District Court challenging the Navajo court's jurisdiction. In an expansion of Strate v. A-1 Contractors, the 9th Circuit ruled that the Montana analysis applies even when on Indian land and ruled against tribal jurisdiction. A motion for rehearing is pending.

ATKINSON TRADING COMPANY V. MANYGOATS – This case involves the scope of tribal civil jurisdiction over non-Indian employers located on the Navajo Reservation. In this case, Manygoats filed a wrongful termination complaint with Navajo Nation Labor Commission. Atkinson filed a complaint in US District Court claiming that the Navajo Nation lacks civil regulatory jurisdiction over its employment practices. The U.S. District Court granted summary judgment in favor of Atkinson, finding that neither Montana exception applied. Currently, the case has been appealed to the Ninth Circuit and referred to a mediator.

U.S. V. BECERRA-GARCIA; U.S. V. TERRY – In *Becerra-Garcia*, the 9th Cir. refused to suppress evidence found by tribal rangers who detained a non-Indian, ruling that inherent tribal sovereignty includes the power to exclude trespassers and "necessarily entails investigating potential trespassers." Similarly in *U.S. v. Terry*, the 8th Cir. similarly upheld the tribal arrest and detention of a non-Indian while waiting to turn the defendant over to state authorities.

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, 1301 Connecticut Ave., NW, Suite 200, Washington, DC 20036.

Please contact us if you have any questions or if we can be of assistance. John Dossett, NCAI General Counsel, 503-248-0783 (jdossett@ncai.org) or Richard Guest, NARF Staff Attorney, 202-785-4166 (richardg@narf.org).