

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

FEBRUARY 11, 2008

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.

In a major development, on January 4, 2008, the Supreme Court granted review in *Plains Commerce Bank v. Long Family Land and Cattle Company*, No. 07-411, to review a decision by the U.S. Court of Appeals for the Eighth Circuit which held that the Cheyenne River Sioux Tribal Court has jurisdiction over claims by tribal members against a non-Indian bank doing business on the reservation. The question presented by the petitioner, Plains Commerce Bank, is: “Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an ‘other means’ of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member owned corporation.” Throughout the proceeding in the federal courts, the Bank has only challenged the tribal court’s jurisdiction over the discrimination (tort) claim, leaving the breach of contract and bad faith claims unchallenged. NARF is representing the Long family as pro-bono co-counsel before the Supreme Court and the Project is working with co-counsel in the preparation of the merits brief. The Project is also working with the attorneys representing the Cheyenne River Sioux Tribe and others to develop a tribal amicus brief strategy in support of affirming tribal court jurisdiction. The Bank’s opening brief is due on February 14, 2008, and the Long family’s response brief is due March 12, 2008. Oral arguments will be heard on April 14, 2008.

The Project is closely monitoring the *Carcieri v. Kempthorne*, a case which involves another challenge to the Secretary’s authority to take land into trust for the benefit of Indians and Indian tribes and is currently pending before the Court on a petition for cert. The Tribal Supreme Court Project has also been busy preparing amicus (“friend of the court”) briefs in two important cases the Court is reviewing that have serious implications for American Indians and Alaska Natives: *Crawford v. Marion County Election Board* (challenging the constitutionality of state voter identification laws which require voters to show state or federal photo identification as a requirement to vote) which was argued on January 9, 2008; and *Exxon Shipping Company v. Baker* (defending award of punitive damages against Exxon for destruction of subsistence fishing and hunting as result of Exxon Valdez oil spill) which will be argued on February 27, 2008. The Tribal Supreme Court Project has also been busy in the U.S. Circuit Courts of Appeal and other courts, working closely with a number of Indian tribes and their attorneys to prepare tribal amicus briefs in their cases, including *Texas v. United States (Kickapoo Traditional Tribe of Texas)*, *Oneida Nation of New York v. Oneida County* and *Oneida Tribe of Wisconsin v. Village of Hobart*.

You can find copies of briefs and opinions on the major cases we track on the NARF website (www.narf.org/sct/index.html).

PETITIONS FOR WRIT OF CERTIORARI GRANTED

The Court has granted review in one Indian law case and two cases with implications for American Indians and Alaska Natives:

PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE COMPANY (NO. 06-3093) – On January 4, 2008, the Supreme Court granted review of a decision by the U.S. Court of Appeals for the Eighth Circuit which affirmed the district court’s holding that the Cheyenne River Sioux Tribal Court has jurisdiction over a discrimination action by tribal members against a non-Indian bank who had entered into a number of loan transactions with the Long family farming and ranching business. The question presented by the petitioner, Plains Commerce Bank, is: “Whether Indian tribal courts have subject matter jurisdiction to adjudicate civil tort claims as an “other means” of regulating the conduct of a nonmember bank owning fee-land on a reservation that entered into a private commercial agreement with a member owned corporation.” In the tribal court proceedings, a unanimous jury had found in favor of the Long family on their breach of contract, bad faith and discrimination claims, and the general verdict was upheld by the Cheyenne River Sioux Tribal Court of Appeals. The federal district court and the U.S. Court of Appeals for the Eighth Circuit found that the bank had formed concrete commercial relationships with the business and its Indian owners, had taken advantage of the BIA loan guarantees and, therefore, had engaged in the kind of consensual relationship contemplated by the U.S. Supreme Court in *Montana v. U.S.*, the pathmarking case on tribal civil jurisdiction over non-Indians. The Project is working with the attorneys representing the Long family in the preparation of the merits brief which is due March 12, 2008. The Project is also working with the attorneys representing the Cheyenne River Sioux Tribe and others to develop and coordinate a strategy for tribal amicus briefs which are due on March 19, 2008. Oral arguments will be heard on April 14, 2008.

CRAWFORD V. MARION COUNTY ELECTION BOARD (NO. 07-21); INDIANA DEMOCRATIC PARTY V. ROKITA (NO. 07-25) – On September 25, 2007, the Court granted review of a decision by the U.S. Court of Appeals for the Seventh Circuit which upheld a law enacted by the State of Indiana that requires voters to present state or federal photo identification in order to vote. In essence, this case is a test case which will impact a number of states who have adopted similar photo identification requirements. If the decision of the Seventh Circuit is affirmed and the law is upheld, other states with substantial Indian populations may be encouraged to adopt restrictive voter identification statutes. In turn, this would impose significant financial and administrative burdens on the ability of Indians to exercise their right to vote in state and federal elections, and would undermine the sovereign status of Indian tribal governments in issuing tribal identification cards. The Tribal Supreme Court Project, with the *pro bono* assistance of the law firm of Dorsey & Whitney, has prepared and filed a tribal amicus brief on behalf of NCAI and the Navajo Nation to explain the impacts of voter identification laws on American Indians and Alaska Natives to the Supreme Court. The case has been fully briefed and oral arguments were heard on January 9, 2008.

EXXON SHIPPING COMPANY V. BAKER (NO. 07-219) – On October 29, 2007, the Court granted review of a decision by the U.S. Court of Appeals for the Ninth Circuit upholding an award of \$2.5 billion in punitive damages in a class action lawsuit against Exxon as a result of the 1989 Exxon Valdez oil spill in Prince William Sound. A number of Alaska Native villages that depend on subsistence fishing, hunting and gathering were among the most affected by the disaster, and their members are included within a larger group of class action plaintiffs. Among other issues, the Supreme Court will be reviewing whether the punitive damages award is “excessive” under federal maritime law. The Tribal Supreme Court Project,

in coordination with NCAI, NARF and AFN, is helping to prepare an amicus brief on behalf of Alaska Native groups to describe the unique non-economic damages suffered by Alaska Natives as a result of their loss of subsistence and disruption of community life. This case is also important for the precedent it may establish in relation to the ability of Alaska Natives to recover damages, including punitive damages when necessary, for loss of the subsistence way of life due to environmental degradation caused by development. The respondents-class plaintiffs' brief was filed on January 22, 2008, and the tribal amicus brief was filed on January 29, 2008. Oral argument is scheduled for February 27, 2008.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

Petitions for a writ of certiorari have been filed and are currently pending before the Court in two Indian law cases:

MACARTHUR V. SAN JUAN COUNTY (NOS. 05-4295, 05-4310) – On November 13, 2007, attorneys representing individual tribal members filed a petition for cert seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the Navajo Tribal Courts do not have subject matter jurisdiction over employment related claims against the San Juan Health Services District which operates a clinic within the exterior boundaries of the Navajo Nation. In *MacArthur*, the tribal member plaintiffs sought to enforce the tribal court's preliminary injunction orders against clinic and county officials through the federal courts. In applying the analysis of *Montana* and its progeny, the Tenth Circuit found that *Montana's* consensual relationship exception does apply to a nonmember who enters into an employment relationship with a member of the tribe on the Reservation. However, based on its understanding of *Nevada v. Hicks*, the Tenth Circuit held that *Montana's* consensual relationship exception only applies to "private" consensual relations, not to consensual relations by the state or state officials acting in their official capacity on the Reservation. The San Juan Health Services District filed their brief in opposition is on December 20, 2007. The case is scheduled for conference on February 15, 2008.

CARCIERI V. KEMPTHORNE (NO. 03-2647) – On October 18, 2007, the State of Rhode Island filed a petition for cert seeking review of the en banc panel decision of the U.S. Court of Appeals for the First Circuit upholding the Secretary's authority to take land into trust on behalf of Indians and Indian tribes. The questions presented within the petition are" (1) "Whether the 1934 Act empowers the Secretary to take land into trust for Indian tribes that were not recognized and under federal jurisdiction in 1934"; (2) "Whether an act of Congress that extinguishes aboriginal title and all claims based on Indian rights and interests in land precludes the Secretary from creating Indian country there"; and (3) "Whether providing land 'for Indians' in the 1934 Act establishes a sufficiently intelligible principle upon which to delegate the power to take land into trust." In its en banc decision, the First Circuit rejected all of the state's arguments and upheld the Secretary's authority to take land into trust on behalf of the Narragansett Tribe. The Tribal Supreme Court Project will continue to work closely with the attorneys for the Narragansett Indian Tribe and the United States. As we anticipated, on November 21, 2007, a group of sixteen (16) state Attorney Generals filed an amicus brief prepared by the State of Connecticut in support of the State of Rhode Island as part of their on-going coordinated strategy to mount additional legal challenges to the acquisition of trust land for the benefit of Indians and Indian tribes. The United States filed their brief in opposition was filed on January 25, 2008. This case is scheduled for conference on February 22, 2008.

PETITIONS FOR WRIT OF CERTIORARI DENIED

MANN V. NORTH DAKOTA TAX COMMISSIONER (NO. 07-671) – On January 7, 2007, the Court denied review of a decision by the North Dakota Supreme Court which upheld a motor fuel tax refund procedure for Indians residing on their Reservations as reasonable and not unduly burdensome. Plaintiff Indians had claimed that the refund procedure established by the state legislature violates due process for its failure to provide for a hearing to challenge a denial and violates equal protection by denying a refund unless the claimant provides original receipts.

JONES V. MINNESOTA (NO. 07-412) – On January 7, 2008, the Court denied review of a decision by the Minnesota Supreme Court which held that a tribal member who failed to register as a sex offender was a violation of the state’s predatory-offender registration statute, and thus under P.L. 280, the state has subject matter jurisdiction to prosecute tribal member who lives on the reservation for failure to register. The court found that, under the analytical framework established under *California v. Cabazon Band of Mission Indians*, failure to register as a sex offender is *criminal/prohibitory* conduct, not *civil/regulatory* conduct and is subject to prosecution by the state.

AROOSTOOK BAND OF MICMACS V. RYAN (NO. 07-357) AND HOULTON BAND OF MALISEET INDIANS V. RYAN (NO. 07-354) – On November 26, 2007, the Supreme Court denied review of a decisions by the U.S. Court of Appeals for the First Circuit in two related cases in which the Aroostook Band of Micmacs and the Houlton Band of Maliseet Indians sought to enjoin proceedings before the Maine Human Rights Commission, the state agency which has jurisdiction over complaints of employment discrimination brought under state law, involving claims of discrimination by former tribal employees. The denial leaves in place the decision that the Maine Claims Settlement Act of 1980, a federal statute, allows Maine to enforce its employment discrimination laws against Maine Tribes, including the Aroostook Band and Houlton Band (and other than the Penobscot Nation and the Passamaquoddy Tribe

REBER V. UTAH (NO. 07-103) – On October 29, 2007, the Supreme Court denied review of a decision by the Utah Supreme Court which held that members of a terminated Indian tribe are “non-Indians” subject to prosecution by the state for hunting on Indian lands. In part, the petitioners contended that they were denied due process and a fair trial based on the fact that they were denied the right to present a “good faith” defense before the jury that they undertook the prohibited conduct in reliance upon a published interpretation of law by the federal courts that terminated tribes retain treaty hunting and fishing rights.

CATAWBA INDIAN TRIBE V. SOUTH CAROLINA (NO. 07-69) – On October 1, 2007, the Supreme Court denied review of the decision by the South Carolina Supreme Court which reversed the lower circuit court’s grant of summary judgment in favor of the Tribe on the issue of whether the Tribe has a present and continuing right to operate video poker and other electronic devices on its Reservation under the terms of the Settlement Act and the state law. The South Carolina Supreme Court held that the language of the Settlement Act authorizing the Tribe to permit or operate video poker only “to the same extent the devices are authorized by state law” will bind the Tribe to any future state legislation such as the statewide ban on the devices.

GROS VENTRE TRIBES V. U.S. (NO. 06-1672) – On October 1, 2007, the Supreme Court denied review of the decision by the U.S. Court of Appeals for the Ninth Circuit in a case that involved a breach of trust claim against the United States for permitting the operation of two cyanide heap-leach gold mines located adjacent to the Reservation that have had, and continue to have, devastating impacts on the Tribes’ water

and cultural resources. According to the Ninth Circuit opinion, Tribal claims for breach of trust, which arise from the treaties signed decades ago, must be raised in the context of other federal statutes. The Ninth Circuit held that even if the federal government has a common law trust obligation that could be tied to a statutorily mandated duty, there is no affirmative duty here requiring the federal agency to regulate third parties to protect what the Court termed to be “non-Tribal” resources.

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION V. CONFEDERATED TRIBES OF THE COLVILLE RESERVATION (NO. 06-1588) – On October 1, 2007, the Supreme Court denied review the decision by the U.S. Court of Appeals for the Ninth Circuit which reversed the district court and held that the Colville Tribes are not foreclosed by res judicata from asserting a claim on behalf of the Wenatchi Tribe to fishing rights at the Wenatshapam Fishery on Icicle Creek, a tributary to the Columbia River. The federal district court had issued an injunction preventing members of the Wenatchi Tribe from fishing at that location based on the Colville Tribes’ earlier failed efforts to intervene in earlier litigation involving off-reservation fishing rights in the area.

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

STATE OF TEXAS V. U.S. AND THE KICKAPOO TRADITIONAL TRIBE OF TEXAS (NO. 05-50754). On August 17, 2007, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit issued a fragmented opinion which held that the Secretarial Procedures Regulation (25 C.F.R. Part 291), promulgated pursuant to the Indian Gaming Regulatory Act, is invalid. The Secretarial Procedures Regulation was adopted following the Supreme Court’s decision in *Seminole Tribe of Florida v. Florida* which held that Congress has no authority to abrogate a state’s Eleventh Amendment immunity from suit under the Indian Commerce Clause of Article I of the U.S. Constitution. Based on *Seminole Tribe*, absent a waiver of immunity, a state cannot be sued in federal court for refusing to negotiate a Class III gaming compact in good faith with an Indian Tribe. In such a case, the Secretarial Procedures Regulation provided an alternative process for approval of a Class III gaming compact. The Project worked with the attorneys representing the United States and the Kickapoo Tribe to coordinate the preparation of two amicus briefs in support of their petitions for rehearing en banc. The petitions for rehearing en banc were denied on November 28, 2007.

NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (NO. 06-15455) – On December 13, 2007, the Ninth Circuit, sitting en banc, reheard a case involving a recent three-judge panel decision ruling that the Forest Service failed to comply with the Religious Freedom Restoration Act in permitting the use of recycled sewage water to manufacture snow for a ski resort on the San Francisco Peaks. The San Francisco Peaks are a sacred mountain very important to the Indian people of the Southwest. The Forest Service argues that its proposal to expand a marginal ski resort using recycled sewage to manufacture snow is a compelling government interest that justifies overriding tribal religious traditions. The Supreme Court decision in *Gonzales v. O Centro Espirita Beneficente Unia Do Vegetal*, 546 U.S. 418 (2006) defined a test under RFRA where the burden on religious practice is weighed together with the nature of the governmental interest. In this case the Forest Service chose to dismiss legitimate religious concerns, hold other prerogatives as paramount, and refuse to make any accommodation of religious beliefs. The Religious Freedom Restoration Act is an important federal law, and Indian tribes worked very hard on its passage.

ONEIDA INDIAN NATION V. ONEIDA COUNTY (NOS. 07-2730-CV(L); 07-2548-CV(XAP); 07-2550-CV(XAP)) – On May 21 2007, the United States District Court for the Northern District of New York

issued a decision granting in part and denying in part the State and County defendants' motion to dismiss the land claim complaints filed by the plaintiff Oneida tribes and the United States as intervenor on the basis of the Second Circuit's opinion in *Cayuga Indian Nation v. Pataki*. The district court agreed with defendants that *Cayuga* required dismissal of the claims for trespass damages premised on a continuing right of possession unaffected by land purchases that were not approved by the United States in accord with the Nonintercourse Act. However, the district court also ruled that the Oneida tribes had sufficiently pleaded and could pursue claims for fair compensation based on the State's payment to the Oneidas of far less than the true value of the land. The district court certified the order for interlocutory appeal and the Second Circuit granted the State's petition to appeal and the conditional cross-petitions filed by the Oneidas and the United States. The State's opening brief was filed on October 9, 2007, and the Oneidas' initial brief was filed on December 10, 2007. The Tribal Supreme Court Project, with the *pro bono* assistance of NARF as lead counsel, prepared the NCAI-Tribal amicus brief in support of the Oneida tribes' position in this case.

ONEIDA TRIBE OF WISCONSIN V. VILLAGE OF HOBART (NO. 06-C-1302) - In this case pending in the U.S. Federal District Court for the Eastern District of Wisconsin, the Oneida Tribe is seeking declaratory and injunctive relief against the Village of Hobart in its efforts to condemn and take tribally owned fee land within the reservation boundaries. An amicus brief submitted by a group of non-Indian landowners is supporting the Village of Hobart with an argument based on the 2005 Supreme Court decision in *City of Sherrill* – that the only way for Indian tribes to exercise sovereignty over reacquired lands on their reservations is by have the land taken into trust by the United States pursuant to section 5 of the Indian Reorganization Act. The Tribal Supreme Court Project, working closely with the Great Lakes Intertribal Council and with the *pro bono* assistance of NARF as lead counsel, prepared and filed a countering tribal amicus brief regarding the purposes of the Indian Reorganization Act in restoring the tribal land base.

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, 202-255-7042 (jdossett@ncai.org) or Richard Guest, NARF Senior Staff Attorney, 202-785-4166 (richardg@narf.org).