TRIBAL SUPREME COURT PROJECT MEMORANDUM

AUGUST 24, 2010

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).

As expected, on August 5, 2010, the U.S. Senate confirmed Elena Kagan to replace Justice John Paul Stevens. At age 50, Justice Kagan will likely have a long tenure on the Court, but is not viewed as having any immediate impact on the current ideological makeup of the Court which often splits 5-4 on major decisions. NARF has prepared a memo which provides more background information and a summary of Kagan's Indian law experience. A copy can be obtained by contacting Richard Guest at richardg@narf.org.

The U.S. Supreme Court is in summer recess, with the October 2010 Term scheduled to start on Monday, October 4, 2010. After a relatively quiet October 2009 Term in which the Court did not issue a single Indian law decision, Indian country may be facing rough waters once again with the upcoming October 2010 Term. The Court has already granted review in *United States v. Tohono O'odham Nation*–to review a decision by the U.S. Court of Appeals for the Federal Circuit involving claims for breach of fiduciary duties–which could impact a number of other "companion" cases filed by Indian tribes against the United States in both the Court of Federal Claims and the Federal District Court. The Court has specifically directed the Eastern Shawnee Tribe to submit a response to the U.S. petition for writ of certiorari on the same question (see below). The Court will likely hold the petition in the *United States v. Eastern Shawnee Tribe* case pending its decision in the *Tohono O'odham* case.

At present, there are 11 petitions pending before the Court, four of which are scheduled for the Court's opening conference on September 27, 2010. The Project has been closely monitoring two petitions (not yet scheduled for conference) in which the tribal interests prevailed in the lower courts. The Project is working with the Tribes and their attorneys in securing those victories through the denial of certiorari. First, the State of Alaska has filed a petition in *Hogan v. Kaltag Tribal Council* asking the Court to review a Ninth Circuit decision which upheld the authority of the Kaltag Tribal Court over a tribal member-child placement proceeding. In the view of the State of Alaska, since there are no reservations (with one exception) in Alaska, Native villages have no authority under the Indian Child Welfare Act over child placement proceedings, except the authority to request transfer of tribal member-child placement proceedings from state courts. The Court invited the U.S. Solicitor General to file a brief expressing the views of the United States which will likely be filed before the start of the term.

Second, a petition was filed in *Madison County v. Oneida Indian Nation of New York* seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that the Tribe is immune from suit in foreclosure proceedings involving property owned by the Tribe for non-payment of county taxes. This petition is the latest chapter of a lengthy dispute over payment of taxes addressed by the Supreme Court in 2005 in *City of Sherrill v. Oneida Indian Nation of New York*. Five amicus briefs, including an amicus brief on behalf of the State of New York joined by seven other states, have been filed in support of the petition.

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PETITIONS FOR WRIT OF CERTIORARI GRANTED

Currently, a writ of certiorari has been granted in one Indian law case:

UNITED STATES V. TOHONO O'ODHAM NATION (NO. 09-846) – On April 19, 2010, the Supreme Court granted review of a decision by the U.S. Court of Appeals for the Federal Circuit in *Tohono O'odham Nation v. United States*. In *Tohono O'odham,* the Federal Circuit found that 28 U.S.C. § 1500 does not preclude jurisdiction in the Court of Federal Claims when a Indian tribe has also filed an action in Federal District Court seeking different relief (*e.g.* money damages versus historical accounting). Specifically, the question presented is:

> Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

A number of Indian tribes have filed identical claims for breach of fiduciary duties in both the Court of Federal Claims and the Federal District Court seeking separate relief. The United States filed its opening brief on the merits on July 1, 2010. The Tribe's response brief on the merits is due on August 27, 2010.

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:

EAGLE V. PERINGTON PAIUTE TRIBE (NO. 10-5764) – On August 2, 2010, Leslie Dawn Eagle filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that Indian status, although a requirement of tribal jurisdiction, is not an element of the crime which must be proven beyond a reasonable doubt. Ms. Eagle had argued that the she was denied due process when the Tribe failed to allege or prove that she was "Indian." The Tribe's brief in opposition is due on September 7, 2010.

GOULD V. CAYUGA INDIAN NATION (NO. 10-206) – On August 9, 2010, the Sheriff of Cayuga County filed a petition seeking review of a decision by the Court of Appeals of New York which held that the

Tribe's convenience stores are located on a "qualified reservation" (as defined under state tax law) and are thus exempt from the collection of state cigarette sales taxes. The Tribe's brief in opposition is due on September 13, 2010.

FORT PECK HOUSING AUTHORITY V. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (NO. 10-195) – On August 4, 2010, the Fort Peck Housing Authority filed a petition seeking review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the regulation adopted by HUD implementing the block grant funding formula does not violate the provisions of the Native American Housing Assistance and Self-Determination Act of 1996. The U.S. brief in opposition is due on September 10, 2010.

MADISON COUNTY V. ONEIDA NATION OF NEW YORK (NO. 10-72) – On July 9, 2010, Madison County filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which held that the Tribe is immune from suit under the doctrine of tribal sovereign immunity, thus preventing the County from foreclosing on property owned by the Tribe for non-payment of county taxes. This petition is the latest chapter of a lengthy dispute over payment of taxes addressed by the Supreme Court in 2005 in *City of Sherrill v. Oneida Indian Nation of New York.* The Tribe's brief in opposition is due on September 13, 2010.

SUQUAMISH INDIAN TRIBE V. UPPER SKAGIT INDIAN TRIBE, ET AL. (NO. 10-33) – On July 1, 2010, the Suquamish Indian Tribe filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which held that the Suquamish's usual and accustomed fishing grounds ("U&A) do not include Saratoga Passage and Skagit Bay on the eastern side of Whidbey Island. This case is a sub-proceeding of *U.S. v. Washington,* a case decided in 1974 where Judge Boldt determined the U&A grounds for the Puget Sound Indian tribes. The Court granted the respondents' request for extension of time to file a brief in opposition which is now due on September 17, 2010.

HOFFMAN V. SANDIA RESORT AND CASINO (NO. 10-4) – On June 21, 2010, Gary Hoffman, a non-Indian patron of the Sandia Resort and Casino, filed a petition seeking review of a decision by the Court of Appeals of New Mexico which held that the doctrine of tribal sovereign immunity barred his claims related to a $1.5 million jackpot payout from a slot machine that "malfunctioned." The Court of Appeals held that the limited waiver of immunity within the tribal-state gaming compact for physical injury to persons or property did not apply to his claims. The Tribe filed its brief in opposition on July 29, 2010, and the petition is scheduled for the Court's opening conference on September 27, 2010.

UNITED STATES V. EASTERN SHAWNEE TRIBE OF OKLAHOMA (NO. 09-1521) – On June 15, 2010, the United States filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which held that, based its recent decision in *Tohono O'odham,* 28 U.S.C. § 1500 is not a bar to the Tribe in seeking relief in the Court of Federal Claims where it seeks different relief and the relief sought could not be awarded in the Federal District Court. Although the Tribe filed a waiver of its response, the Court has requested a response which is due on September 15, 2010. The petition is scheduled for the Court's opening conference on September 27, 2010.

METLAKATLA INDIAN COMMUNITY V. SEBELIUS (NO. 09-1466) – On June 1, 2010, the Metlakatla Indian Community filed a petition seeking review of a decision by the U.S. Court of Appeals for the Federal Circuit which held that the filing of a class action against the government does not toll the statute of limitations for asserted class members to exhaust their administrative remedies. The underlying class

action lawsuit was filed in 2001 against the Indian Health Service for failure to pay contract support costs to tribal contractors. The U.S. brief in opposition is due on August 27, 2010.

MAYBEE V. STATE OF IDAHO (NO. 09-1471) – On June 1, 2010, Scott Maybee, an enrolled tribal member of the Seneca Nation who resides on the Seneca Reservation in New York and who is sole proprietor of the websites smartsmoker.com, ordersmokesdirect.com, and buycheapcigarettes.com, filed a petition seeking review of a decision by the Idaho Supreme Court. The court held that his sale of unstamped cigarettes shipped from the Seneca Reservation to consumers in Idaho was in violation of state law as adopted pursuant to the Master Settlement Agreement with the four largest tobacco manufacturers in the United States. Idaho's brief in opposition was filed on June 25, 2010. The petition is scheduled for the Court's opening conference on September 27, 2010.

SCHAGHTICOKE TRIBAL NATION V. KEMPTHORNE (NO. 09-1433) – On May 24, 2010, the Schaghticoke Tribal Nation filed a petition seeking review of a decision by the U.S. Court of Appeals for the Second Circuit which rejected the Tribe's argument that the Reconsidered Final Determination, denying federal acknowledgement, resulted from undue (and improper) political influence and was issued by an unauthorized decision-maker in violation of the Vacancies Reform Act. On June 21, 2010, the U.S. filed a waiver of its right to respond. The petition is scheduled for the Court's opening conference on September 27, 2010.

HOGAN V. KALTAG TRIBAL COUNCIL (NO. 09-960) – On February 11, 2010, the State of Alaska filed a petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which upheld the authority of the Kaltag Tribal Court over a tribal member-child placement proceeding. The Ninth Circuit held that under ICWA, the State is required to extend full faith and credit to the Tribal Court's adoption judgment. The Tribe filed its brief in opposition on March 25, 2010. After consideration in conference, on April 26, 2010, the Court invited the Solicitor General to file a brief expressing the views of the United States.

PETITIONS FOR WRIT OF CERTIORARI DENIED/DISMISSED

The Court's opening conference for the October 2010 Term is scheduled for September 27, 2010.

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

PATCHAK V. SALAZAR (D.C. CIR. NO. 09-5324) – On May 10, 2010, the United States and the Match-E-Be-Nash-She-Wish Tribe filed their answering briefs in response to an appeal from the decision of the U.S. District Court for the District of Colombia which dismissed a challenge to the Secretary's decision to take land in trust for the Tribe. Mr. Patchak filed his lawsuit three years after the Secretary's decision to take the land in trust was published in the Federal Register, and after the Supreme Court granted review in *Carcieri v. Salazar.* The suit claimed that the Secretary lacks authority to take the land in trust under the provisions of the Indian Reorganization Act (IRA) since the Tribe was not a "federally recognized tribe" in 1934. The district court never addressed the merits of the lawsuit, holding that Mr. Patchak's alleged injury does not fall within the "zone of interests" protected by the IRA and, therefore, he lacks standing to challenge the Secretary's decision. The district court also observed that its subject matter jurisdiction was "seriously in doubt" after the land was taken in trust and the waiver of immunity by the United States under the Quiet Title Act does not apply to Indian trust or restricted lands. The Project prepared and filed an amicus brief in support of the United States and the Tribe on behalf of the National Congress of American Indians. Oral argument has been scheduled for September 14, 2010.

OSAGE NATION V. IRBY (OKLAHOMA TAX COMMISSION) (10TH CIR. NO. 09-5050) – On May 25, 2010, the U.S Court of Appeals for the Tenth Circuit denied the Osage Nation's combined petition for rehearing and rehearing en banc of the three-judge panel decision which affirmed the district court's grant of summary judgment in favor of the State of Oklahoma, concluding that the Osage Reservation has been disestablished by Congress. The Osage Nation sued the state seeking declaratory and injunctive relief: a declaration that Osage County, Oklahoma, formed the boundaries of the Osage Reservation and that the Osage Reservation was "Indian country" within the meaning of 18 U.S.C.S. § 1151; and an order enjoining state agents from imposing or collecting taxes on members of the tribe who lived in Osage County. Although the three-judge panel of the Tenth Circuit found that the Osage Allotment Act did not have any specific language indicating Congress's intent to disestablish the reservation, the panel held that such intent is manifested by subsequent events (*e.g.* opening of reservation to non-Indians) and modern demographics (*e.g.* high percentage of non-Indians living within reservation). The Osage Nation is considering its options, including a possible petition for writ of certiorari to the Supreme Court.

WATER WHEEL CAMP RECREATIONAL AREA, INC. V. LARANCE (9TH CIR. NOS. 09-17349; 09-17357) – On September 23, 2009, the United States District Court for the District of Arizona issued a decision in a case involving non-Indian holdover tenants of tribal lands on the California portion of the Colorado River Indian Reservation who sought a declaration that the Tribal Court had no jurisdiction over an eviction suit filed by the Tribe. The district court judge denied relief to Water Wheel holding that there was a consensual relationship between the Tribe and its corporate tenant sufficient to meet the first exception to the rule in *Montana v. United States.* But the district court held that Tribe did not have jurisdiction over Robert Johnson, the President of Water Wheel under the Montana test, and enjoined Judge LaRance from exercising jurisdiction over Mr. Johnson. The Tribal Court had sanctioned Mr. Johnson, holding him individually liable to any judgment against Water Wheel, for his refusal to comply with discovery requests and tribal court orders compelling compliance with discovery requests. Parts of the judgment were, in effect, sanctions against the defendants for violation of court orders. The Tribal Court of Appeals affirmed the judgment evicting Water Wheel and Johnson, and awarded over $3 million for unpaid rent, trespass damages, and attorney fees. The Tribal Court appealed the district court's decision with respect to jurisdiction over Mr. Johnson and Water Wheel has cross-appealed the denial of relief as to it. The Tribal Court filed its opening brief on May 14, 2010. The Project helped develop and coordinate the filing of several amicus briefs in support of the Tribal Court which were filed on May 21, 2010, including a brief on behalf of the Colorado River Indian Tribe; a brief on behalf of the National Congress of American Indian and individual Indian tribes; and a brief on behalf of the National American Indian Court Judges Association.

CASH ADVANCE V. STATE OF COLORADO (COLORADO SUPREME COURT NO. 2008SC639) – On January 21, 2010, the Colorado Supreme Court heard oral argument in a case involving an appeal by the Santee Sioux Nation and the Miami Nation of Oklahoma who own and operate pay-day loan companies doing business in Colorado. The State had received complaints from consumers and sought to enforce administrative subpoenas against the tribal enterprises. The Tribes filed motions to dismiss based on the lack of subject matter jurisdiction and tribal sovereign immunity. The court of appeals affirmed the lower court's denial of the motion, and its finding that the State's power to investigate violations of state law effectively trumps tribal sovereign immunity. The Colorado Supreme Court issued an order *sua sponte* inviting several Native organizations to file amicus briefs on the nature and scope of tribal sovereign immunity. The Tribal Supreme Court Project worked with the attorneys representing the Tribe and the attorneys representing *amici* Colorado Indian Bar Association, Ute Mountain Ute Tribe, American Indian

Law Center and the University of Colorado School of Law American Indian Law Clinic in the preparation of amicus briefs and moot court oral argument.

A.A. V. NEEDVILLE INDEPENDENT SCHOOL DISTRICT (5TH CIR. NO. 09-20091) – On July 9, 2010, the U.S. Court of Appeals for the Fifth Circuit issued its decision. In a split decision (2-1), the Fifth Circuit held that the school district's requirement that A.A., a Native American boy in kindergarten, either cut his braided long hair, wear it in a "bun," or wear a single braid tucked inside his shirt offends his sincere religious belief and is invalid under the Texas Religious Freedom Restoration Act. The Fifth Circuit upheld the district court's issuance of a permanent injunction enjoining the school district from enforcing its grooming policy against A.A. Judge Jolly, in dissent, contends that the school district's "off the collar" policy would not impose a substantial burden on A.A.'s belief that he should not cut his hair. The Fifth Circuit issued its mandate on August 2, 2010, and any petition seeking review by the U.S. Supreme Court would be due on October 7, 2010.

ONEIDA INDIAN NATION V. ONEIDA COUNTY (2ND CIR. NOS. 07-2430-CV(L); 07-2548-CV(XAP); 07-2550-CV(XAP) – On August 9, 2010, the United States Court of Appeals for the Second Circuit issued its decision. In a split decision (2-1), the Second Circuit affirmed the district court's dismissal of the possessory land claims (*e.g.* trespass damages) filed by the Oneida tribes and the United States based on the equitable considerations (*i.e.* "indisputably disruptive" nature of the claims) discussed in *Cayuga Indian Nation v. Pataki* and the Supreme Court's opinion in *City of Sherrill v. Oneida Indian Nation.* The Second Circuit reversed the district court and held that the Oneida tribes are also barred from pursuing their non-possessory claims for fair compensation based on the State's payment to the Oneidas of far less than the true value of the land. Judge Gershon, in dissent, finds that the tribes and the United States are not foreclosed from pursuing their non-possessory claims. In particular, the United States should be allowed to pursue its claim against the State for violation of the Non-intercourse Act based on the State's failure to pay a fair price for the tribes' lands. At present, the Tribes are considering their options, including whether to seek rehearing en banc before the Second Circuit, or to seek review before the Supreme Court.

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).