

TRIBAL SUPREME COURT PROJECT

MEMORANDUM

NOVEMBER 9, 2007

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.

During its 2006-2007 term, the U.S. Supreme Court decided no cases relating to federal Indian law or tribal sovereignty. This was the first term since 1966 that the Court decided no Indian law cases. We view this as a sign of success for the Tribal Supreme Court Project, and it is the result of significant effort and coordination among tribes and their attorneys. Since its inception in 2001, one of the primary goals of the Tribal Supreme Court Project has been to reduce the number of Indian law cases that are heard by the Supreme Court by actively addressing cases at the certiorari stage and by encouraging tribes to carefully evaluate their cases.

There are currently no Indian law cases that have been granted review by the Supreme Court, although the Court is reviewing two important cases on voting rights and punitive damages that have implications for American Indians and Alaska Natives. A number of significant cases are pending on petitions for certiorari and in the lower courts and are summarized below. 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 not granted review in any Indian law case during the October 2007 Term. However, the Court has granted review in two cases with implications for American Indians and Alaska Natives:

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 State of Indiana law that requires voters to present either state or federal photo identification. This will be a test case, as nearly half of the states have adopted similar identification requirements. If the Indiana law is upheld, other states with substantial Indian populations will be encouraged to also adopt restrictive voter identification statutes. This would impose a great financial and administrative burden on tribal members' right to vote and disenfranchise many Indian voters who could not meet the identification requirement. It would also undermine the sovereign status of Indian tribal governments in issuing their own identification cards. NCAI has a long history in protecting the right of Indian people to vote, and the law firm of Dorsey and Whitney is assisting NCAI *pro bono* in writing an amicus brief to explain the impacts of voter identification laws on American Indians and Alaska Natives to the Supreme Court.

EXXON SHIPPING COMPANY V. BAKER (NO. 07-219) – On October 29, 2007, the Court granted review of an award of \$2.5 billion in punitive damages 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 fishing and subsistence hunting and gathering were among the most affected by the disaster, and their members are included among the large 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. NCAI and NARF are helping to coordinate a potential amicus brief on behalf of Alaska Native groups to emphasize the unique non-economic damages suffered by Alaska Natives because of their loss of subsistence and disruption of community life. The case is also important for the precedent it may set in 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.

PETITIONS FOR A WRIT OF CERTIORARI PENDING

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

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. We anticipate that a group of state Attorney Generals will submit an amicus brief in support of the State of Rhode Island as part of an 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 brief in opposition is due on November 23, 2007.

PLAINS COMMERCE BANK V. LONG FAMILY LAND & CATTLE COMPANY (NO. 06-3093) – On September 21, 2007, the Plains Commerce Bank filed a petition for cert seeking 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. In the tribal court proceedings, a unanimous jury had found in favor of the Long family, and the verdict was upheld by the tribal court of appeals based on traditional common law of the Tribe. 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 *Montana*. The Project is in contact with and has offered assistance to the attorneys representing the Long family in the preparation of the brief in opposition which is due on November 26, 2007.

AROOSTOOK BAND OF MICMACS V. RYAN (NO. 07-357) AND HOULTON BAND OF MALISEET INDIANS V. RYAN (NO. 07-354) – On September 14, 2007, the Aroostook Band of Micmacs and the Houlton Band of

Maliseet Indians filed their petitions for cert seeking review of the decisions by the U.S. Court of Appeals for the First Circuit in two related cases in which the Tribes 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 3-judge panel held 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). The respondents have waived their right to a response brief and the case has been scheduled for conference on November 20, 2007.

JONES V. MINNESOTA (NO. 07-412) – On August 13, 2007, Jones, an enrolled member of the Leech Lake Band of Ojibwe who lives on the reservation, filed a petition for cert seeking review of the decision by the Minnesota Supreme Court which held that his failure 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. On October 5, 2007, the state filed a waiver of right of response. However, the Court has requested a response brief from the state which is now due November 23, 2007.

PETITIONS FOR WRIT OF CERTIORARI DENIED

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 is in contact with the attorneys representing the United States and the Kickapoo Tribe who were granted an extension of time to file a petition for rehearing en banc which is due November 9, 2006.

NAVAJO NATION ET. AL. V. U.S. FOREST SERVICE (NO. 06-15455) – The Ninth Circuit has decided to rehear, en banc, a recent 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. NARF has submitted an amicus brief in this case on behalf of a group of Indian religious practitioners.

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 is due on December 10, 2007. The Tribal Supreme Court Project is working with the attorneys for the Oneida tribes and the United States to develop a tribal amicus strategy and to coordinate tribal amicus briefs in support of the tribal position in this case.

MACARTHUR V. SAN JUAN COUNTY (Nos. 05-4295, 05-4310) – On August 14, 2007, the U.S. Court of Appeals for the Tenth Circuit denied the petition for rehearing en banc of its July 3, 2007 opinion 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. Unless the plaintiffs seek an extension of time, the petition for cert is due on November 13, 2007.

MAINE V. JOHNSON (ENVIRONMENTAL PROTECTION AGENCY) (No. 04-1363) – On August 8, 2007, a three-judge panel of the U.S. Court of Appeals for the First Circuit found that under the terms of the Maine Indian Claims Settlement Act, the Penobscot and Passamaquoddy tribes have been divested of sovereign immunity and are subject to the general civil and criminal laws of the State of Maine (with limited exceptions), even with respect to activities on tribal lands. Thus, the First Circuit held that under the provisions of the Clean Water Act, the State of Maine may assume pollutant discharge permitting (NPDES) authority over discharge facilities owned by non-Indians but discharging within tribal territory, as well as over tribally-owned discharge facilities located within tribal territory. No petition for rehearing/rehearing en banc was filed by the deadline of September 24, 2007.

ONEIDA TRIBE OF WISCONSIN V. VILLAGE OF HOBART (No. 06-C-1302) - In this case pending in the Eastern District of Wisconsin, the Oneida Tribe is seeking declaratory and injunctive relief against the Village of Hobart's 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 Hobart with an argument based on the 2005 Supreme Court decision in *City of Sherrill*. NCAI and NARF are working closely with the Great Lakes Intertribal Council to develop 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).