



Legal Review

NATIVE AMERICAN RIGHTS FUND

NARF Expands its Work to Protect and Advance the Indian Vote

Back in 2006, NARF was asked to prepare a report on the impact of the Voting Rights Act (VRA) in Alaska. This opened a new chapter in NARF’s work. While NARF had litigated some VRA cases in the Dakotas in the 1980s, voting cases are highly technical and highly specialized and when certain litigators moved on, the work naturally slowed in this area. However, as NARF delved into this issue, it discovered that Alaska had been violating the VRA since the very day it passed in 1975. For more than 30 years, the needs of the indigenous language speakers in Alaska (Yup’ik, Inupiaq, and Gwich’in among others) had been ignored. All elections were all English, all the time despite a clear requirement in the VRA to translate all voting materials into Native languages. As a result, voter registration and turnout were low, and many of those who were voting would later tell us they did not really understand what they were voting for. This article looks back and examines the renaissance in NARF’s voting work, and shares its plans for the future.

The first major voting case NARF brought during this renaissance was the *Nick v. Bethel* case. We have detailed this case in previous articles and so will not repeat the full case history here. Suffice it to say, this was the first salvo in an overhaul of Alaska’s electoral system and NARF’s first step. ▶



All Alaska photos by Jenni Monet.

- ▶ NARF Expands its Work to Protect and Advance the Indian Vote page 1
- ▶ Case Updates
 - Indigenous Peoples and the Paris Climate Change Agreement page 7
 - Pamunkey Tribe’s federal recognition finalized page 9
 - Tribal Supreme Court Project update page 9
- ▶ National Indian Law Library page 13
- ▶ Calling Tribes to Action! page 14
- ▶ NARF page 15
- ▶ NARF Board page 16



Native Languages

The plaintiffs, four individual voters and four tribal councils, represented the thousands of voters who had been denied the Yup'ik translations of voting materials required by the VRA. They won a preliminary injunction in July 2008 and, seeing the writing on the wall, the State of Alaska settled with the Plaintiffs in January 2010. The settlement included what the plaintiffs thought was comprehensive relief in the form of translated materials from registration to casting a ballot. Little did they know, their neighbors would have to bring the exact same case for the exact same language asking for the exact same relief just three years later.

In July 2013, NARF and co-counsel Morgan, Lewis & Bockius LLP and Armstrong Teasdale LLP, acting on behalf of two tribal councils and two Alaska Native voters, filed suit in federal court charging state elections officials with ongoing violations of the federal Voting Rights Act (VRA) and the United States Constitution. The case, called *Toyukak v. Treadwell*, claimed state officials failed to provide language assistance to

citizens whose first language is Yup'ik, the primary language of many Alaska Natives in the Dillingham and Wade Hampton census areas. Notably, these two census areas are directly north and south of the Bethel Census Area that had been litigated in the first case. In essence, the State of Alaska had limited the relief agreed to in the Nick case to just the Bethel Census Area in the case, despite identical language needs in the adjacent census areas.

Trial was held from June 23 to July 3, 2014 and the court rendered an oral decision on September 3, 2014. The Court held that the Defendants had in fact violated Section 203 of the VRA in all the census areas at issue. The Court further found that the Defendants had improperly relied on what they called "outreach workers" in villages to translate the entire Official Election Pamphlet themselves, even though these workers had never been asked to do so and there was no evidence showing they could do this. The Court found that the end result was an absence of all pre-election information such as candidate statements,



Voting Translations

ballot measures, pro and con statements for ballot measures and all other information available to English speaking voters before an election. After briefing, the Court ordered broad remedial relief including the written and audio translation of all pre-election materials distributed in English, posting of bilingual translators at all polling places, and also ordered Defendants to report back to the Court on their progress after the November 2014 election, which was submitted shortly before Christmas 2014.

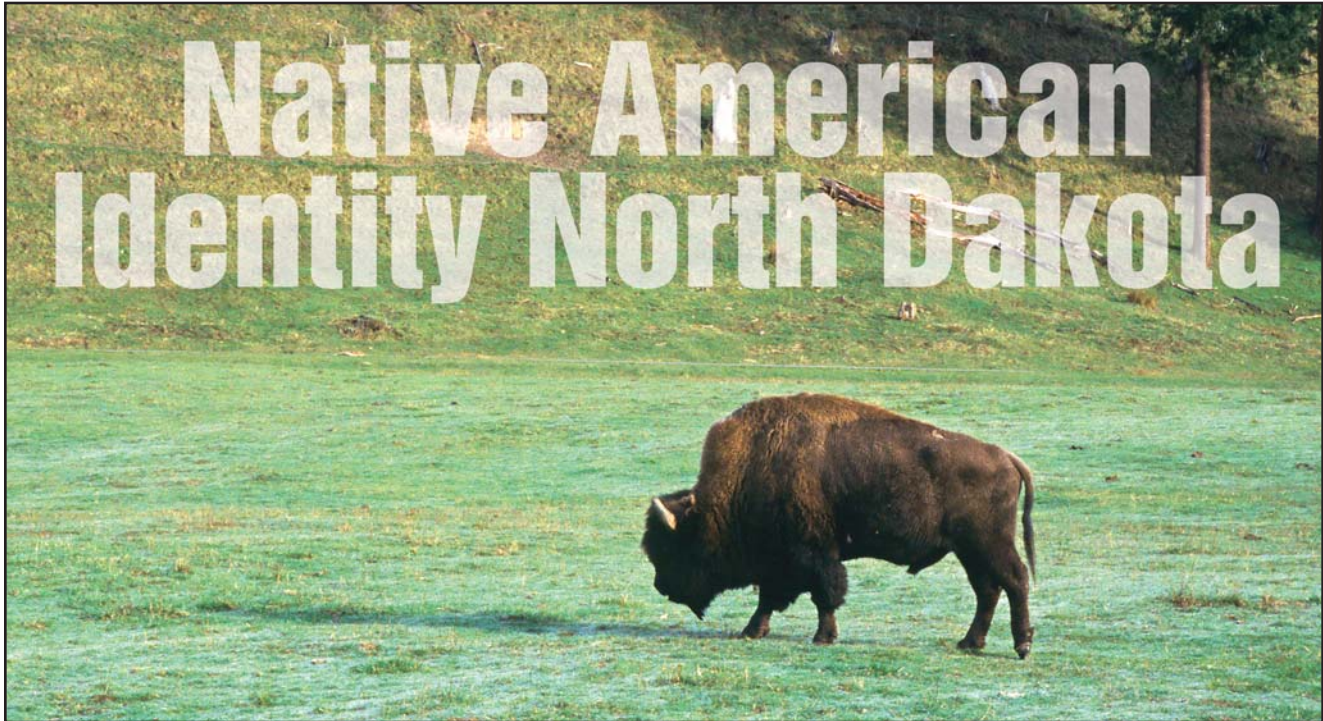
In 2015, NARF and the plaintiffs spent several months in an extended negotiation with the State of Alaska to settle the case. On September 30, 2015, the Court approved a settlement agreement with the Defendants that provides broad relief in the form of a comprehensive language assistance program, including the appointment of federal observers through the 2020 elections, translation of all pre-election information into the Yup'ik and Gwich'in languages, the creation of a new state-level position specifically devoted to language assistance, and court oversight and reporting

through 2020. In addition, apart from the case, the new Alaska Native Lieutenant Governor has replaced the leadership at the Division of Elections and NARF is optimistic its work in this area will have lasting, positive impacts.

Next, on January 20, 2016, in *Brakebill, et al. v. Jaeger*, seven Native Americans from North Dakota filed suit under the Voting Rights Act and the U.S. and North Dakota Constitutions challenging North Dakota's recently enacted voter ID law on the grounds it disproportionately burdens Native Americans and denies qualified voters the right to vote. This is one of those laws passed after the *Shelby County v. Holder* decision by the Supreme Court gutted the VRA.

The *Brakebill* plaintiffs are challenging North Dakota House Bills 1332 and 1333, which require North Dakota voters to present one of only four qualifying IDs with a current residential address printed on it in order to vote. Before enactment of these laws, North Dakota required a poll clerk to request an ID, but a voter without one could





still vote if the clerk vouched for their qualifications or the voter signed an affidavit of identity. While other states also have voter ID requirements, North Dakota is the only state without a fail-safe provision, such as provisional balloting that allows a voter to produce their ID within a few days of the election or an affidavit of identity. Additionally, North Dakota’s list of acceptable IDs is much more limited than other states, which allow U.S. passports and military IDs to be used.

Many Native Americans living on Indian reservations in North Dakota do not have qualifying IDs, such as driver’s licenses or state ID cards containing a residential address. Thus, in both the primary and general election in 2014, many qualified North Dakota Native American voters were disenfranchised because their IDs did not list their residential address.

The lawsuit alleges that North Dakota’s new voter ID requirements arbitrarily and unnecessarily limit the right to vote and disproportionately burden Native American voters in North Dakota. The burdens are substantial for a number of Native Americans who cannot afford to drive to the nearest driver’s license site (“DMV”). There are no DMV locations on any Indian reservations

in North Dakota, and for many Native Americans, a DMV location may be over 60 miles away. Many Native Americans live below the poverty line, and do not have dependable access to transportation or cannot afford travel to a distant DMV location.

The State of North Dakota moved to dismiss the case for failure to state a claim, but the Court denied the motion on April 5, 2016 and denied the Motion for Reconsideration shortly thereafter. The Court has now set a schedule and briefing on a motion for a preliminary injunction will begin in June, and plaintiffs have requested a ruling prior to the 2016 general election.

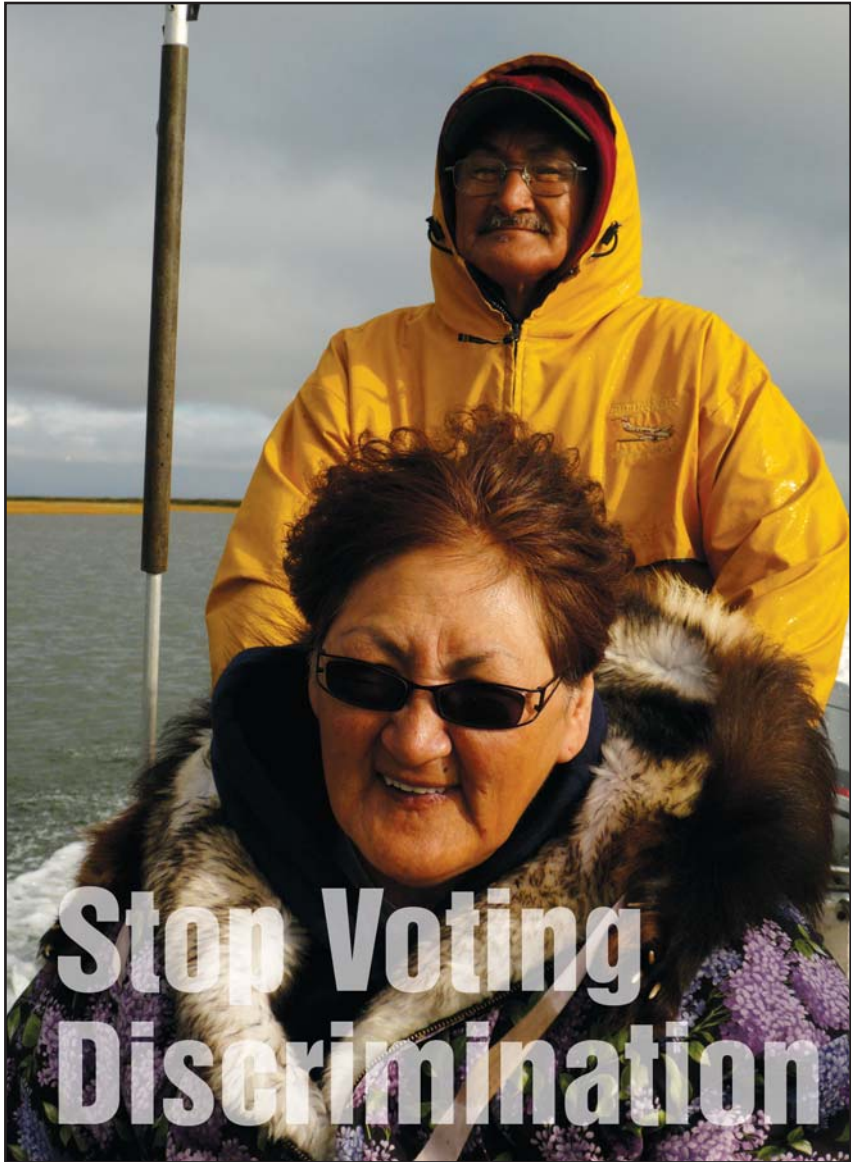
In addition to these two cases, NARF expects a significant increase in litigation to protect the Native vote. This is because in 2013, the U. S. Supreme Court in the *Shelby County* case invalidated Section 4 of the Voting Rights Act which required preclearance (or pre-approval) by the U.S. Justice Department of changes in state voting laws in certain states with histories of discrimination. Make no mistake, this decision gutted a critical provision of the VRA that protected voters *before* discrimination occurred. The preclearance process had prevented several discriminatory changes from being implemented in

Alaska alone, and was a key tool to protect the Native vote. NARF has fought hard to prevent this and filed an amicus brief in that case.

Once the damage was done however, NARF shifted gears and on behalf of Bristol Bay Native Corporation and the Alaska Federation of Natives, developed a Congressional amendment to the Voting Rights Act that would protect Alaska Natives and American Indians from the kinds of voting discrimination they have faced across the country since 2013. This is colloquially called “the Shelby Fix,” in reference to the fact that it is meant to undo the damage done by the Shelby case. In addition, Senator Mark Begich introduced the NatiVRA (S.2399) in an attempt to remedy some of the long-standing issues such as the lack of language assistance, lack of polling places, and lack of early voting, but it did not pass before expiration of the 2013-2014 congressional term.

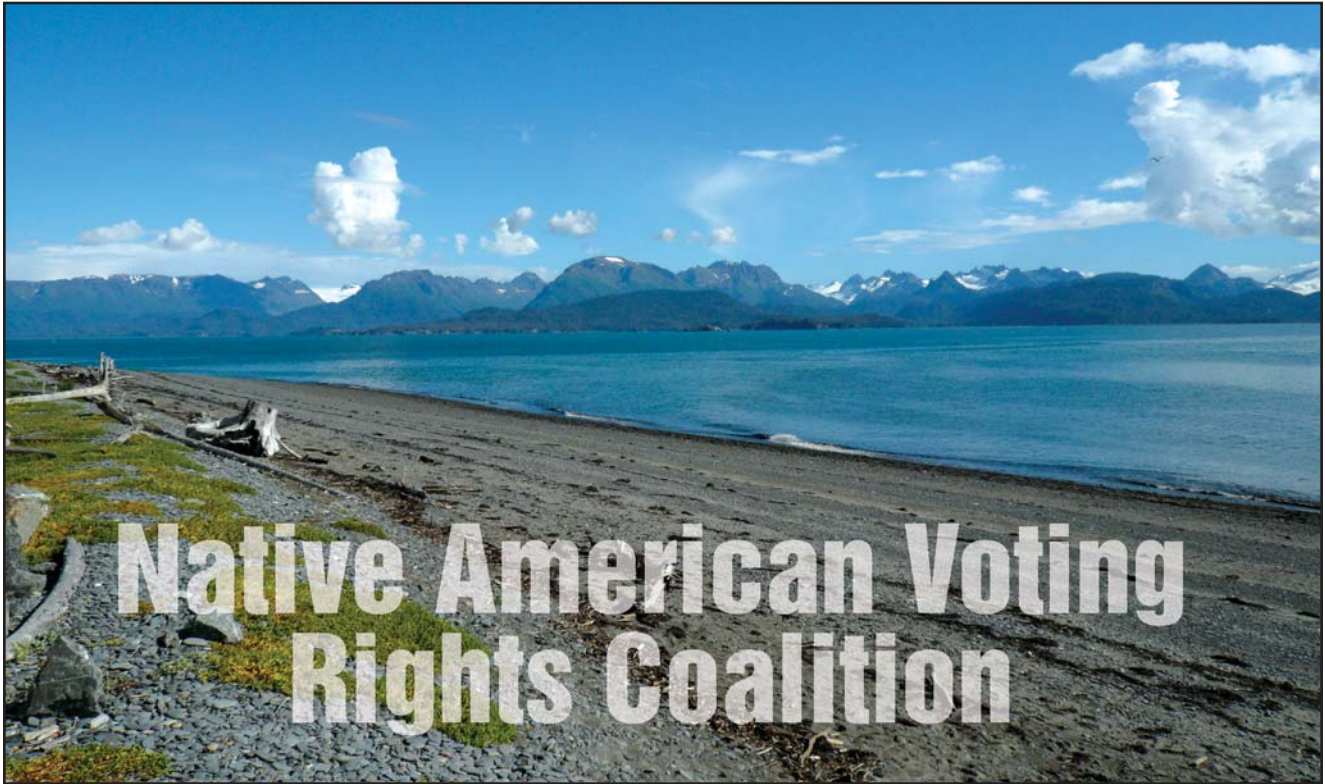
On June 24, 2015, Senator Leahy and approximately 30 co-sponsors introduced the Voting Rights Advancement Act, a broad-based bill that prevents specific practices wherever they may occur in the country. That bill also includes a new Section 2 called “Voting on Indian lands” that mandates equal access to early voting, absentee voting and in-person polling locations on all Indian lands, which is very broadly defined in the bill. NARF helped author these sections in response to comments and complaints from Indian reservations and Native villages. Senator Murkowski (AK) signed on as the first Republican co-sponsor on September 10, 2015.

Additionally, in August 2015, Senator Tester introduced S 1912, a voting bill specifically



directed at election problems in Indian Country. NARF submitted some comments and suggested changes to the bill to ensure that while Tribes have an opportunity to designate polling locations, states should not be permitted to shift their expenses and burdens for these matters onto the Tribes.

Facing an increase in voting rights litigation and uncertain if a remedial bill would pass anytime soon, in January 2015 NARF proposed an ambitious new project: to gather voting rights advocates, lawyers, experts, and tribal advocates into one room to discuss current problems with voting in Indian Country and begin to develop



solutions to these problems. The meeting was held May 27-28, 2015 in Washington, DC. It was convened in part because the 2016 election cycle promises to be an unusually important one at the national, state and local levels. The national elections include the selection of a new President, and 34 Senate seats. Six of these Senate seats are in states with significant (and potentially determinative) American Indian/Alaska Native (AIAN) populations: Alaska, Arizona, California, North Dakota, Oklahoma, and South Dakota. There are also eleven gubernatorial races in 2016, three of which are in states where the Native vote may play a significant role (North Dakota, Montana and Washington).

In addition, in the wake of the U.S. Supreme Court’s decision in *Shelby County*, numerous state legislatures have passed new election laws that impose significant barriers to AIAN voters. Currently, individuals and organizations working on AIAN voting rights issues do so independent of one another with no coordinated strategy in place to address voting rights issues in Indian Country. To date, this work has been generally (but not exclusively) reactive – in response to an immediate

threat – rather than proactive or planned in advance of a specific election. That is what this project hopes to change.

This meeting was conceived and planned specifically to address the shifting and increasingly complex issues surrounding AIAN voting. The participants spent two full days and developed a list of more than 100 challenges currently faced by Indian voters. They quickly realized this problem was much more expansive and complex than had been imagined by any one of us and thus the one meeting has turned into an ongoing project called the Native American Voting Rights Coalition (NAVRC). It meets on a monthly basis, as do its subgroups on redistricting, litigation, capacity building and data gathering. The NAVRC is actively working on a multi-pronged strategic plan for the 2016 elections, and has already formed 8 new partnerships to address some of the issues, including the first comprehensive, multi-state survey of Indian voters.

NARF is committed to litigating, advocating and organizing to protect and advance the Native vote. ❁

CASE UPDATES

Indigenous Peoples and the Paris Climate Change Agreement

The state members of the United Nations met in Paris for COP 21 (Conference of the Parties 21) for two weeks and arrived at the first ever universally binding accord on climate change – the Paris Agreement. This Agreement was adopted under the United Nations Framework Convention on Climate Change (UNFCCC), and achieves the universality which was missing from the last attempt at such an agreement – the Kyoto Protocol. The International Indigenous Peoples Forum on Climate Change (IIPFCC or indigenous caucus) has been involved in the UNFCCC process for years. The IIPFCC has representatives from indigenous peoples from around the world. Starting in Copenhagen in 2009, the Native American Rights Fund (NARF) has represented first the National Tribal Environmental Council (NTEC) and more recently the National Congress of American Indians (NCAI) in this process.

In preparation for Paris, the Norwegian government donated funding to the United Nations Development Program (UNDP) to enable greater indigenous participation in the process. Regional consultations of indigenous peoples took place in seven regions of the world and the funding was also used to bring dozens of indigenous representatives from around the world to Paris. Numerous representatives from Tribes in the United States attended and were crucial in lobbying for language concerning indigenous issues in the Agreement itself and the Decision adopting it. (The Agreement deals with overarching commitments, durable provisions, and standard provisions for an agreement. The Decision covers details of implementation, provisions likely to change over time, provisions related to pre 2020 actions and interim arrangements pending entry into force of the Agreement.)



Language in the Agreement

The indigenous caucus pushed for inclusion of several issues in the Agreement. One of the most important asks was a provision in the operative section of the Agreement recognizing that climate change policies and procedures had to respect, protect, promote, and fulfill the rights of indigenous peoples within a broad human rights framework. The caucus worked on this effort with a broad inter-constituency group. While the goal was to get language in the operative section of the Agreement, the effort only resulted in a provision in the preamble. It states as follows:

Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the rights to development, as well as gender equality, empowerment of women and intergenerational equity.



This is far from perfect, being in the preamble, using “should” instead of shall, using “consider” instead of “protect and fulfill,” not using our preferred language of “human rights, including the rights of indigenous peoples,” and in referring to respective obligations. Nevertheless, it is important that the rights of Indigenous Peoples have been recognized in a universal, legally binding international climate change agreement. It provides a basis to build on going forward.

A second issue of primary importance to the indigenous caucus was the recognition of the importance of indigenous peoples’ knowledge in relation to climate change. Article 7.5 of the Agreement provides that adaptation action “should be based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems....” While the caucus had pushed for a broader scope for indigenous peoples’ knowledge, calling for it also to be included in the mitigation section, and for the deletion of the limiting phrase “where appropriate” it is a milestone, to have the importance of the knowledge of indigenous peoples recognized in a universal legally-binding instrument.

The caucuses also pushed for a more aggressive mitigation goal than the no more than 2°C increase the developed countries advocated for. Their effort, coinciding with the efforts of the inter-constituency group and many developing countries led to language in the Article 2(b) to hold “...the increase in the global average temperatures to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels....”

Language in the Decision

An identical paragraph relating to human rights and the rights of indigenous peoples appears in the preamble of the Decision. There is also a preambular paragraph in the Decision stating as follows:

Agreeing to uphold and promote regional and international cooperation in order to mobilize stronger and more ambitious climate

action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples.

Paragraph 135 provides:

Recognizes the need to strengthen knowledge, technologies, practices and efforts of local communities and indigenous peoples related to addressing and responding to climate change, and *establishes* a platform for the exchange of experiences and sharing of best practices on mitigation and adaptation in a holistic and integrated manner.

Going Forward

Without the presence of Indigenous Peoples’ representatives, the Agreement and Decision would have had no reference to Indigenous Peoples. While the indigenous caucus did not achieve all that it sought, it did achieve some very significant references which can be built on going forward. The task facing Indigenous Peoples is to ensure that the provisions supporting their rights are implemented on the ground.

The Paris Agreement opened for signature on April 22, 2016. To mark the first day of that the Agreement was open to signing, the UN held a signing ceremony where world leaders and government representatives signed the Agreement and were given the opportunity to deliver national comments. 175 countries signed on April 22. Fifteen of the signers also ratified the Agreement the same day and one more on the 29th. In order to enter into force, 55 countries that produce at least 55% of the world’s greenhouse gas emissions must adopt the Agreement within their own legal systems through ratification, acceptance, approval, or accession. These steps are beyond mere signing and will take more time to accomplish. For the United States, signing the agreement will be done through executive action without Congressional approval. The State Department is currently going through this process, but has not announced a precise timeline.

Pamunkey Tribe’s federal recognition finalized

The Pamunkey Indian Tribe, located on the Pamunkey Homeland in Virginia, has a rich and well-documented history. Established no later than 1646, the Tribe’s Reservation is located next to the Pamunkey River, and adjacent to King William County. The Reservation comprises approximately 1,200 acres and is the oldest inhabited Indian reservation in America. NARF has represented the Tribe since the mid-1970s and in this effort since 1988; and now is co-counsel with former NARF attorney Mark Tilden.



In an historic day for the Pamunkey Indian Tribe, on July 2, 2015, after decades of research and participation in the federal acknowledgment regulatory process, the Assistant Secretary – Indian Affairs, U.S. Department of the Interior published a Final Determination acknowledging that the Tribe exists as an Indian tribe within the meaning of Federal law. However, a request for reconsideration was filed by Stand Up for California! on October 6, 2015, with the Indian Board of Indian Appeals (IBIA), an independent appellate review body within the Department’s Office of Hearings and Appeals. On January 28,

2015, the Pamunkey Indian Tribe’s Final Determination became effective as a result of the IBIA’s final dismissal of the request for reconsideration. The IBIA ruled that Stand Up for California!, an organization that focuses on gambling issues affecting California, failed to show that it is an “interested party” to the Final Determination within the meaning of the Federal acknowledgment regulations, and was therefore not entitled to seek reconsideration of the Final Determination.

Tribal Supreme Court Project update

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).

The Court has still not issued a decision in *Dollar General v. Mississippi Band of Choctaw Indians*, and has not granted review in any new Indian law cases for consideration next term. However, on April 19, 2016, the Court heard oral argument in *U.S. v. Bryant*, a challenge by the United States to the decision of the Ninth Circuit (in direct conflict with the Eighth and Tenth Circuits) which held that it is constitutionally impermissible (violation of Sixth Amendment right to counsel) to use uncounseled tribal court convictions to establish an element of the offense as a habitual domestic violence offender in a subsequent prosecution under 18 U.S.C. § 117(a). Based on the limited questions from the Court (Thomas, Alito and Kagan did not ask any questions), it appears that the Court should issue a favorable result for the United States and





Indian tribes. The transcript is available at http://sct.narf.org/caseindexes/us_v_bryant.html.

There are also no new developments on President Obama’s nomination of Chief Judge Merrick Garland, United States Court of Appeals for the D.C. Circuit, to fill a vacancy on the Court created by the sudden death of Justice Antonin Scalia. The Republican leadership in the U.S. Senate has determined that the Senate Judiciary Committee will not hold any confirmation hearings prior to the November 2016 national elections. Garland has a very limited record on issues effecting Indian tribes, having only participated in five Indian law cases during his tenure on the D.C. Circuit, authoring only two opinions. His vote against tribal interests in *San Manuel v. NLRB* raises specific concerns for Indian tribes, especially as the Court considers the petitions filed in *Little River Band v. NLRB* and *Soaring Eagle Casino v. NLRB*.

With the Court operating with eight Justices, only a handful of petitions have been granted review next term thus far, and the issuance of opinions has slowed with mainly unanimous opinions being announced. However, Justice Scalia’s absence will likely affect many of the major cases currently pending before the Court. By way of reminder, if a tie vote (4-4) occurs among the Chief Justice and the other seven remaining justices, there are several potential outcomes: (1) an evenly divided Court results in affirmance of the lower court decision with no opinion issued by the Court; (2) the Court could schedule the case for re-argument next term (in

anticipation that Chief Judge Garland would be confirmed by that time); or (3) the Court could issue a decision on narrow or procedural grounds to avoid setting precedent.

Indian Law Cases Decided by the Supreme Court

Nebraska v. Parker – On March 22, 2016, the Court issued a unanimous (8-0) opinion written by Justice Thomas which affirmed the decisions of the U.S. Court of Appeals for the Eighth Circuit and the U.S. District Court for the District of Nebraska which had held that an 1882 Act of Congress did not diminish the Omaha Indian Reservation. The State of Nebraska and the Village of Pender had challenged whether the establishments in Pender which serve alcoholic beverages are subject to the Omaha Tribe’s liquor licensing and tax regulations. The Court declined the invitation of the State and Village to depart from its long-standing *Solem* test to evaluate whether a surplus land act diminished a federal Indian reservation and to adopt a test of *de facto* diminishment based on whether an area has lost its “Indian character.” The Court reiterated the first prong of the *Solem* test that only Congress can diminish the boundaries of an Indian reservation and that its intent to do so must be clear from the statutory text and history. In this case, the Court found that the 1882 Act bore none of the textual “hallmarks of diminishment” and the history surrounding its passage does not unequivocally support a finding of diminishment. However, at the conclusion of the opinion, the Court cited to *City of Sherrill* and stated: “Because petitioners have raised only the single question of diminishment, we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe’s power to tax the retailers of Pender in light of the Tribe’s century-long absence from the disputed lands.”

The Project worked closely with the attorneys for the Omaha Tribe and prepared two amicus briefs in support: (1) Amicus Brief of the National Congress of American Indians (joined by two intertribal organizations and twenty Indian tribes) focused on the negative impacts of a *de facto* diminishment rule; and (2) Amicus Brief of

Historical and Legal Scholars clarifying the legal and historical circumstances surrounding treaty-making and allotment statutes.

Sturgeon v. Masica – On March 22, 2016, the Court issued a unanimous (8-0) opinion written by Chief Justice Roberts which vacated an Indian-law related decision of the U.S. Court of Appeals for the Ninth Circuit which had held that the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) did not prevent the National Park Service from imposing its generally applicable regulations on non-federal lands within conservation system units in Alaska. The Court held that the Ninth Circuit’s interpretation was inconsistent with both the text and context of ANILCA, but the Court declined to provide its own interpretation and remanded the case back to the lower courts for consideration of whether (1) the Nation River qualifies as “public land” for purposes of ANILCA; (2) whether the Park Service has authority under ANILCA over both “public” and “non-public” lands within the boundaries of conservation system units in Alaska.

Menominee Indian Tribe Of Wisconsin v. United States – On January 25, 2016, the Court issued its decision in *Menominee Indian Tribe v. United States* to resolve a conflict between the U.S. Courts of Appeals for the DC Circuit and the Federal Circuit regarding the appropriate standard for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service for unpaid contract support costs. In a unanimous (9-0) opinion written by Justice Alito, the Court held that equitable tolling is not available to preserve contract claims that were not timely presented to a federal contracting officer because there were no extraordinary circumstances beyond the tribe’s control.

Background: On June 30, 2015, following the recommendation of the United States to grant cert, the Court granted review of a decision by the U.S. Court of Appeals for the District of Columbia which held that the Tribe did not establish the necessary grounds for obtaining equitable tolling of the statute of limitations for filing claims against the Indian Health Service for unpaid contract support costs. The Tribe maintains that this

decision is in direct conflict with the Federal Circuit’s 2012 decision in *Arctic Slope Native Ass’n Ltd. v. Sebelius (ASNA)*. In its response, the United States recommended that the Court grant cert to address “the uncertainty created by the Federal Circuit’s erroneous decision in ASNA—and the increasing volume of untimely claims inspired by it—[which] have con-founded the government’s attempts to achieve orderly resolution of the ongoing litigation over tribal contract support costs. . . . This Court’s review is warranted to resolve that conflict, as well as to ensure that the proper equitable tolling framework is applied to Contract Disputes Act claims generally.”

Petitions Granted

United States v. Bryant – On April 19, 2016, the Court heard oral argument on review of a petition filed by the United States seeking reversal of a decision by the U.S. Court of Appeals for the Ninth Circuit which had held that tribal court criminal convictions for domestic violence may be used in federal court prosecutions as a habitual offender under 18 USC §117 only if the tribal court guarantees a right to counsel. The Ninth Circuit concluded that it is constitutionally impermissible to use uncounseled convictions to establish an element of the offense in a subsequent prosecution under § 117(a), which created a direct conflict with the Eighth and Tenth Circuits. The case presents an extremely important issue for the safety of Native victims of domestic violence, and raises the question of indigent counsel in tribal court systems.

The opening brief of the United States was filed on January 28, 2016. The Project worked with the Solicitor General’s office and prepared three amicus briefs in support of the United States: (1) Amicus Brief of the National Congress of American Indians on discussing the reliability of tribal court decisions and deference to Congress; (2) Amicus Brief of the National Indigenous Women’s Resource Center focused on the severe problem of escalation of repeat domestic violence offenders; and (3) Amicus Brief of former U.S. Attorneys supporting the need for the habitual domestic violence statute as an important prosecutorial tool to protect Indian women and

children within Indian country. The response brief was filed on March 7, 2016. Four amicus briefs in support of respondent were filed: (1) Criminal Justice Organizations and Scholars; (2) National Association of Criminal Defense Lawyers; (3) Citizens Equal Rights Foundation; and (4) Professor Barbara Creel and The Tribal Defender Network.

Dollar General Corporation v. Mississippi Band of Choctaw Indians – On December 7, 2015, the Court heard oral argument in *Dollar General v. Mississippi Band of Choctaw Indians* which challenges Tribal Court jurisdiction over tort claims brought by a tribal member against a non-Indian corporation doing business on trust lands leased from the Tribe. The Question Presented is: “Whether Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.” During argument, the scope of tribal inherent sovereign authority over non-Indians and the source of Congress’ authority over Indian affairs were taken up by the Court where at least four Justices openly questioned the protections in place for non-Indians in tribal courts, and the source of Congress’ authority in these matters under the U.S. Constitution. It is difficult to discern from oral argument how the Justices may vote and ultimately decide this case, but the outcome has significant implications for all of Indian country.

Background: On June 15, 2015, contrary to the recommendation of the U.S. Solicitor General to deny cert, the Court granted review. The Dollar General store is located on tribal trust land within the reservation. The store agreed to participate in a youth job training program operated by the Tribe. A tribal member who participated in the youth program and his parents brought an action in Tribal court alleging that the young man was sexually assaulted by the store’s manager. The Supreme Court of the Mississippi Band of Choctaw Indians, the U.S. Federal District Court for the Southern District of Mississippi, and the U.S. Court of Appeals for the Fifth Circuit had all upheld the Tribal Court’s jurisdiction over the tort claims against Dollar General.

Petitioner Dollar General filed its opening brief on August 31, 2015. Four amicus briefs were filed in support of Dollar General: (1) Amicus Brief of the State of Oklahoma (joined by Wyoming, Utah, Michigan, Arizona and Alabama); (2) Amicus Brief of the Association of American Railroads; (3) Amicus Brief of the Retail Litigation Center, Inc.; and (4) Amicus Brief of the South Dakota Bankers’ Association. Dollar General and its amici aggressively attack the fairness of tribal courts and tribal law to non-Indians and are asking the Court to ignore its precedent, reverse the lower courts, and establish either: (i) an *Oliphant*-style civil jurisdiction rule (*i.e.*, no tribal civil jurisdiction over non-Indians); or (ii) a rule that Tribes have no civil jurisdiction over torts committed by non-Indians; or (iii) a rule requiring “express and unequivocal” consent by a non-Indian to the jurisdiction of the Tribal court or Congressional authorization of such jurisdiction.

The Project worked closely with the attorneys for the Tribe to develop and coordinate a robust amicus brief strategy in support of Tribal court jurisdiction. The Tribe filed its response brief on October 15, 2015, and eight amicus briefs in support of the Tribe were filed on October 22, 2015: (1) Amicus Brief of the United States; (2) Amicus Brief of the State of Mississippi (joined by Colorado, New Mexico, North Dakota, Oregon and Washington); (3) Amicus Brief of NCAI (joined by USET, ITAA, CTAG, and 58 federally-recognized Indian tribes); (4) Amicus Brief of National American Indian Court Judges Association (joined by numerous Tribal and Intertribal Court Systems); (5) Amicus Brief of the Oklahoma Tribes; (6) Amicus Brief of the National Indigenous Women’s Resource Center (joined by over 100 Domestic Violence and Sexual Assault Organizations); (7) Amicus Brief of Historical and Legal Scholars; (8) Amicus Brief of the American Civil Liberties Union. Each amicus brief is focused on its own unique message, with an overall presentation to the Court of the inherent nature of Tribal sovereignty and the scope of Tribal governing authority over non-Indians within the reservation. ❁

National Indian Law Library

Justice Through Knowledge!

Free Weekly

Indian Law Updates

Each week, The National Indian Law Library provides free updates on Indian law through the Indian Law Bulletins. Researchers in the library uncover the latest legal developments and information relevant to Native Americans, including recent cases, legal news and scholarship, federal legislation, and regulatory action from agencies and departments such as the Environmental Protection Agency, the Bureau of Indian Affairs and the Department of Education. The updates are distributed via email, on our blog, and on the NARF Facebook page.

To receive the Indian Law Bulletins by email, please sign up through the NILL website: <http://narf.org/nill/bulletins/index.html>

Free Searchable Database of Indian Law and News

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Most cases, legislation and regulatory actions are available in full-text. Many news and law review articles are also available online. If the item you would like to see is not available online, you can use the Research Help link (<http://www.narf.org/nill/asknill.html>) to request it from the library.



Free Access to Tribal Codes and Constitutions at our Tribal Law Gateway

Find tribal law by name of tribe or search the Gateway using terms for law on a topic. Over 100 tribal codes and constitutions are available in full-text and content from over one hundred more are available by request. Just browse the detailed table of contents provided and use the *askNILL* request form to receive an emailed copy of the content you need. The Tribal Law Gateway is constantly being updated and improved and we believe the best place to start if you are looking for tribal law. In an effort to make the Gateway more practical, we are now adding audio clips to help with tribal name pronunciation on each individual tribal nation page.

Support the National Indian Law Library

Your contributions help ensure that the library can continue to supply free access to Indian law resources and that it has the financial means necessary to pursue innovative and groundbreaking projects to serve you better. Please visit <http://www.narf.org/nill/donate.html> for more information on how you can support this mission. 🌟

CALLING TRIBES TO ACTION

It has been made abundantly clear that non-Indian philanthropy can no longer sustain NARF's work. Federal funds for specific projects have also been reduced. Our ability to provide legal advocacy in a wide variety of areas such as religious freedom, the Tribal Supreme Court Project, tribal recognition, human rights, trust responsibility, tribal water rights, Indian Child Welfare Act, and on Alaska tribal sovereignty issues has been compromised. NARF is now turning to the tribes to provide this crucial funding to continue our legal advocacy on behalf of Indian Country. It is an honor to list those Tribes and Native organizations whom have chosen to share their good fortunes with

the Native American Rights Fund and the thousands of Indian clients we have served.

The generosity of tribes is crucial in NARF's struggle to ensure the freedoms and rights of all Native Americans. Contributions from these tribes should be an example for every Native American Tribe and organization. We encourage other Tribes to become contributors and partners with NARF in fighting for justice for our people and in keeping the vision of our ancestors alive. We thank the following tribes and Native organizations for their generous support of NARF for our 2016 fiscal year – October 1, 2015 to September 30, 2016:

Ak-Chin Indian Community
American Indian Youth Running Strong, Inc.
Asa'carsarmiut Tribal Council
Chickasaw Nation
Confederated Tribes of Siletz Indians
First Nations Development Institute
Fond du Lac Band of Lake Superior Chippewa
Isleta Pueblo
Klamath Tribes
Mohegan Sun
National Indian Gaming Association

Nottawaseppi Huron Band of the Potawatomi
Poarch Band of Creek Indians
San Manuel Band of Mission Indians
San Pasqual Band of Mission Indians
Seminole Tribe of Florida
Seven Cedars Casino/Jamestown S'Klallam
Shakopee Mdewakanton Sioux Community
Suquamish Tribe
Tanana Chiefs Conference
Yavapai-Prescott Indian Tribe
Yoche Dehe Wintun Nation



THE NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund (NARF) is the oldest and largest nonprofit national Indian rights organization in the country devoting all its efforts to defending and promoting the legal rights of Indian people on issues essential to their tribal sovereignty, their natural resources and their human rights. NARF believes in empowering individuals and communities whose rights, economic self-sufficiency, and political participation have been systematically or systemically eroded or undermined.

Native Americans have been subjugated and dominated. Having been stripped of their land, resources and dignity, tribes today are controlled by a myriad of federal treaties, statutes, and case law. Yet it is within these laws that Native Americans place their hope and faith for justice and the protection of their way of life. With NARF's help, Native people can go on to provide leadership in their communities and serve as catalysts for just policies and practices towards Native peoples nationwide. From a historical standpoint Native Americans have, for numerous reasons, been targets of discriminatory practices.

Since its inception in 1970, NARF has represented over 250 Tribes in 31 states in such areas as tribal jurisdiction and recognition, land claims, hunting and fishing rights, the protection of Indian religious freedom, and many others. In addition to the great strides NARF has made in achieving justice on behalf of Native American people, perhaps NARF's greatest distinguishing attribute has been its ability to bring excellent, highly ethical legal representation to dispossessed tribes. NARF has been successful in representing Indian tribes and individuals in cases that have encompassed every area and issue in the field of Indian law. The accomplishments and growth of NARF over the years confirmed the great need for Indian legal representation on a national basis. This legal advocacy on behalf of Native Americans continues to play a vital role in the survival of tribes and their way of life. NARF strives to protect the most important rights of Indian people within the limit of available resources.

One of the initial responsibilities of NARF's first Board of Directors was to develop priorities that would guide the Native American Rights Fund in its mission to preserve and enforce the legal rights of Native Americans. The Committee developed five priorities that continue to lead NARF today:

- Preservation of tribal existence
- Protection of tribal natural resources
- Promotion of Native American human rights
- Accountability of governments to Native Americans
- Development of Indian law and educating the public about Indian rights, laws, and issues

NARF Annual Report: This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request. Ray Ramirez Editor, ramirez@narf.org.

The NARF Legal Review is published biannually by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Ray Ramirez, Editor, ramirez@narf.org. There is no charge for subscriptions, however, contributions are appreciated.

Tax Status: The Native American Rights Fund is a nonprofit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the provisions of Section 501 C (3) of the Internal Revenue Code, and contributions to NARF are tax deductible. The Internal Revenue Service has

ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

Under the priority of the *preservation of tribal existence*, NARF works to construct the foundations that are necessary to empower tribes so that they can continue to live according to their Native traditions, to enforce their treaty rights, to insure their independence on reservations and to protect their sovereignty.

Throughout the process of European conquest and colonization of North America, Indian tribes experienced a steady diminishment of their land base to a mere 2.3 percent of its original size. Currently, there are approximately 55 million acres of Indian-controlled land in the continental United States and about 44 million acres of Native-owned land in Alaska. An adequate land base and control over natural resources are central components of economic self-sufficiency and self-determination, and as such, are vital to the very existence of tribes. Thus, much of NARF's work involves the *protection of tribal natural resources*.

Although basic human rights are considered a universal and inalienable entitlement, Native Americans face an ongoing threat of having their rights undermined by the United States government, states, and others who seek to limit these rights. Under the priority of the *promotion of human rights*, NARF strives to enforce and strengthen laws which are designed to protect the rights of Native Americans to practice their traditional religion, to use their own language, and to enjoy their culture.

Contained within the unique trust relationship between the United States and Indian nations is the inherent duty for all levels of government to recognize and responsibly enforce the many laws and regulations applicable to Indian peoples. Because such laws impact virtually every aspect of tribal life, NARF maintains its involvement in the legal matters pertaining to *accountability of governments* to Native Americans.

The coordinated *development of Indian law and educating the public about Indian rights, laws, and issues* is essential for the continued protection of Indian rights. This primarily involves establishing favorable court precedents, distributing information and law materials, encouraging and fostering Indian legal education, and forming alliances with Indian law practitioners and other Indian organizations.

Requests for legal assistance should be addressed to the Litigation Management Committee at NARF's main office, 1506 Broadway, Boulder, Colorado 80302. NARF's clients are expected to pay whatever they can toward the costs of legal representation. ☼



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Main Office: Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302 (303-447-8760) (FAX 303-443-7776). <http://www.narf.org>

Washington, D.C. Office: Native American Rights Fund, 1514 P Street, NW (Rear) Suite D, Washington, D.C. 20005 (202-785-4166) (FAX 202-822-0068).

Alaska Office: Native American Rights Fund, 745 W. 4th Avenue, Suite 502, Anchorage, Alaska 99501 (907-276-0680) (FAX 907-276-2466).

Workplace Campaigns: NARF is a member of America's Charities, a national workplace giving federation. Giving through your workplace is as easy as checking off NARF's box, #10350 on the Combined Federal Campaign (CFC) pledge form authorizing automatic payroll deduction.

Native American Rights Fund

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