

# NARF Legal Review

Native American Rights Fund

## After 16 Years Nez Perce Tribe Water Rights Settlement Framework Announced

The Native American Rights Fund has represented the Nez Perce Tribe in its water rights claims in the State of Idaho's Snake River Basin Adjudication ("SRBA") since January 1988. The Tribe's claims to water rights for instream flows in the Snake River and its primary tributaries, the Salmon and Clearwater Rivers, to springs on lands ceded by the Tribe in 1863, and to on-reservation consumptive uses of water, were filed in the SRBA in 1993. The Nez Perce claims dispute has been the biggest outstanding dispute in the SRBA, which includes a legal inventory of about 180,000 water rights claims in 38 of Idaho's 44 counties. Since 1998, however, the Nez Perce Tribe, the United States, the State of Idaho, and local communities and water users in Idaho have engaged in court-ordered mediation, led by Duke University Law Professor Francis McGovern, to resolve the claims of the Nez Perce Tribe.

In a press release issued by the U. S. Department of the Interior on May 15, 2004, Interior Secretary Gale A. Norton, Idaho Governor Dirk Kempthorne and Nez Perce Tribal Executive Committee Chairman Anthony Johnson announced an agreement to settle the Nez Perce water rights claims in the Snake River Basin. "This framework agreement clears the

way for a long-term public water policy for Idaho and enables the United States to fulfill trust responsibilities for the Tribe," said Secretary Norton.

Nez Perce Tribal Executive Committee Chairman Anthony Johnson commended the hard work of the mediating parties. "We are pleased at the progress that has been made in resolving these difficult issues. The process can now move forward to closure with new momentum, for the benefit of all concerned."

Idaho Governor Dirk Kempthorne stated that "The agreement will enable the State of Idaho to more effectively address its responsibilities for water resource management and the needs of protected fish"

Among the major initiatives, the three sovereign parties and Idaho water users have agreed to a long-term flow augmentation plan for the Snake River above Hells Canyon, a major instream minimum

flow plan for important streams and rivers in the Salmon and Clearwater River basins, and an agreement to use 200,000 acre-feet of water in Dworshak Reservoir for a flow augmentation plan benefiting listed species in the Clearwater and Snake Rivers. The United States also will agree to tribal management of Kooskia National Fish Hatchery and tribal co-management of Dworshak National Fish Hatchery, establishment

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of a \$50 million fund for the Tribe to restore and improve fish habitat, develop water resources and other agricultural projects, and a \$23 million fund for improvements to the Tribe's drinking water and sewage systems.

The Nez Perce Tribe is located in northern Idaho near the confluence of the Snake and Clearwater Rivers. The current reservation boundaries contain approximately 700,000 acres, or about one-tenth of the original seven million acre reservation reserved in the Treaty of 1855 with the United States. That treaty also reserved to the Tribe off-reservation fishing rights at all "usual and accustomed" sites on and off the reservation. Subsequent treaties and agreements reduced the size of the reservation, but expressly left intact the Tribe's on and off-Reservation treaty fishing rights. These rights are exercised by the Tribe's members at ceremonial, subsistence and commercial fisheries.

In May of this year, all parties to the negotiations signed on to a comprehensive term sheet agreement, which also calls for the suspension of all litigation regarding Nez Perce claims in the SRBA. The parties created a coordinating committee and drafting subcommittees to implement a plan which included drafting federal and state approval legislation. The Idaho Supreme Court and the SRBA Court both agreed to suspend all litigation to permit settlement negotiations to proceed. The parties asked the SRBA Court and the Idaho Supreme Court to extend the stay of all appeals and litigation until March 31, 2005.

The agreement will launch a habitat restoration and management initiative in the Salmon and Clearwater River Basins to improve instream flows and fish habitat and passage to benefit ESA-listed fish. The parties will agree on minimum flows pursuant to a state law process for 184 Tribal Priority Rivers and Streams that are important for anadromous fish. These flows will be established in a manner that protects all existing uses of water and provides for limits to future water development. A Habitat Fund will support improvements under this program and the state will administer innovative cooperative agreements under the ESA to enhance riparian habitat.

The settlement also will include the transfer of scattered parcels of federal Bureau of Land Management lands within the present Nez Perce Reservation to the Tribe. The transferred units will be subject to all valid existing mineral claims, grazing leases, rights of way and other rights and permitted uses. The parcels, valued at \$7 million, will assist overall management and provide valuable compensation and benefit to the Tribe without incurring additional appropriations or costs. The Tribe's share of the settlement is about \$93 million over 30 years. This agreement is the first major step in the settlement process. State and federal legislation, final Nez Perce tribal approval, a court consent decree, and the drafting of ESA and NEPA documents also are needed.

#### **Agreement Background**

The Snake River Basin Adjudication (SRBA) is a water rights adjudication of the Snake River within the State of Idaho. As a part of that adjudication, the Nez Perce Tribe and the United States, as trustee for the Tribe, filed a variety of claims to water rights, based on treaties entered into between the United States and the Nez Perce Tribe. Among these, water rights were claimed for instream flows to protect the Tribe's treaty-reserved fisheries. Those claims were contested by the State of Idaho and certain Idaho water users because they could have affected the rights of Idaho water users to continue to divert water. By order of the SRBA Court in 1998, the parties have been attempting to resolve the issues. Negotiations to resolve the instream flow water right claims have focused on finding ways to protect fish habitat, including both flow and non-flow related issues, while preserving existing water uses.

The claims for the Tribe include not only the instream flow water right claims, but also claims to support the Tribe's consumptive water needs and claims to springs in the area ceded by the Tribe in 1863. The proposed settlement includes provisions resolving all of the issues relating to the Tribe's water right claims.

The parties to the mediation included the United States and the Tribe as claimants, as well as parties to the SRBA who filed legal objections



to the Tribal claims. These objectors include the State of Idaho, Idaho Power Company, and water users throughout the Snake River basin within Idaho. After several years of negotiations, the parties have developed a framework for a proposed settlement agreement (although not a party to the settlement, Idaho Power participated in the mediation and is expected to continue working with others on issues associated with the Hells Canyon Complex).

Specifically, the Agreement's framework is divided into three separate components: (1) the Nez Perce Tribal component to resolve issues relating to its water claims as well as related land and natural resource issues; (2) the Salmon/Clearwater component to protect flows and habitat within the Salmon and Clearwater River basins; and (3) the Snake River flow component to resolve issues involving the use of the Snake River above the Hells Canyon Complex.

The proposed settlement agreement would finally and fully determine the Tribal claims to water rights, set out the understandings and criteria necessary to provide long-term ESA compliance for water use in the Snake River basin in Idaho and for timber land management activities on state and private lands, and protect existing water uses.

#### **Nez Perce Tribal Component**

The Tribal component resolves water and other natural resource concerns raised by the Tribe in the SRBA. These resource concerns include water rights, development of water resources, hatchery management, certain BLM lands, and fisheries habitat. In exchange for the Tribe's agreement to resolve their water right claims, as well as to resolve any other Tribal water-based claims, the United States will provide financial compensation to the Tribe.



The specific provisions of this component include: (1) The Tribe's multiple-use water rights will be decreed in the amount of 50,000 acre-feet per year, primarily from Clearwater River sources. Water from other sources will be decreed only to the extent water is unappropriated and existing water rights are not injured. (2) The Tribe's "springs or fountains" water rights claims on federal lands within the 1863 Nez Perce Treaty ceded area will be decreed, while similar rights claimed on non-federal lands will be waived. (3) BLM lands valued at \$7 million will be transferred to the Tribe. BLM's recreational lands along the Clearwater River and Lolo Creek corridors will be excluded from this transfer. (4) The United States and the Tribe will enter into agreements providing for tribal management of the Kooskia National Fish Hatchery and tribal co-management of the Dworshak National Fish Hatchery. (5) The United States, the Tribe, and the State of Idaho will enter into an agreement regarding use of 200,000 acre-feet of water in Dworshak Reservoir as part of a flow augmentation plan for fish. (6) The United States will establish a \$50 million water and fisheries trust fund for use by the Tribe in acquiring lands and water rights, restoring and improving fish habitat, fish production, agricultural development, cultural preservation, and water resource development. (7) The United States will provide \$23 million for design and construction of sewer and water system projects for local Nez Perce tribal communities. (8) In lieu of contracting 45,000 acre-feet of Payette River storage space for a 30-year rental term, the United States will pay to the Tribe the \$10.1 million present rental value of that storage space. The agreement does not resolve, but looks to separate discussions for a potential resolution of issues relating to the Bureau of Reclamation's Lewiston Orchards Irrigation District water diversion system.

#### **Salmon/Clearwater Component**

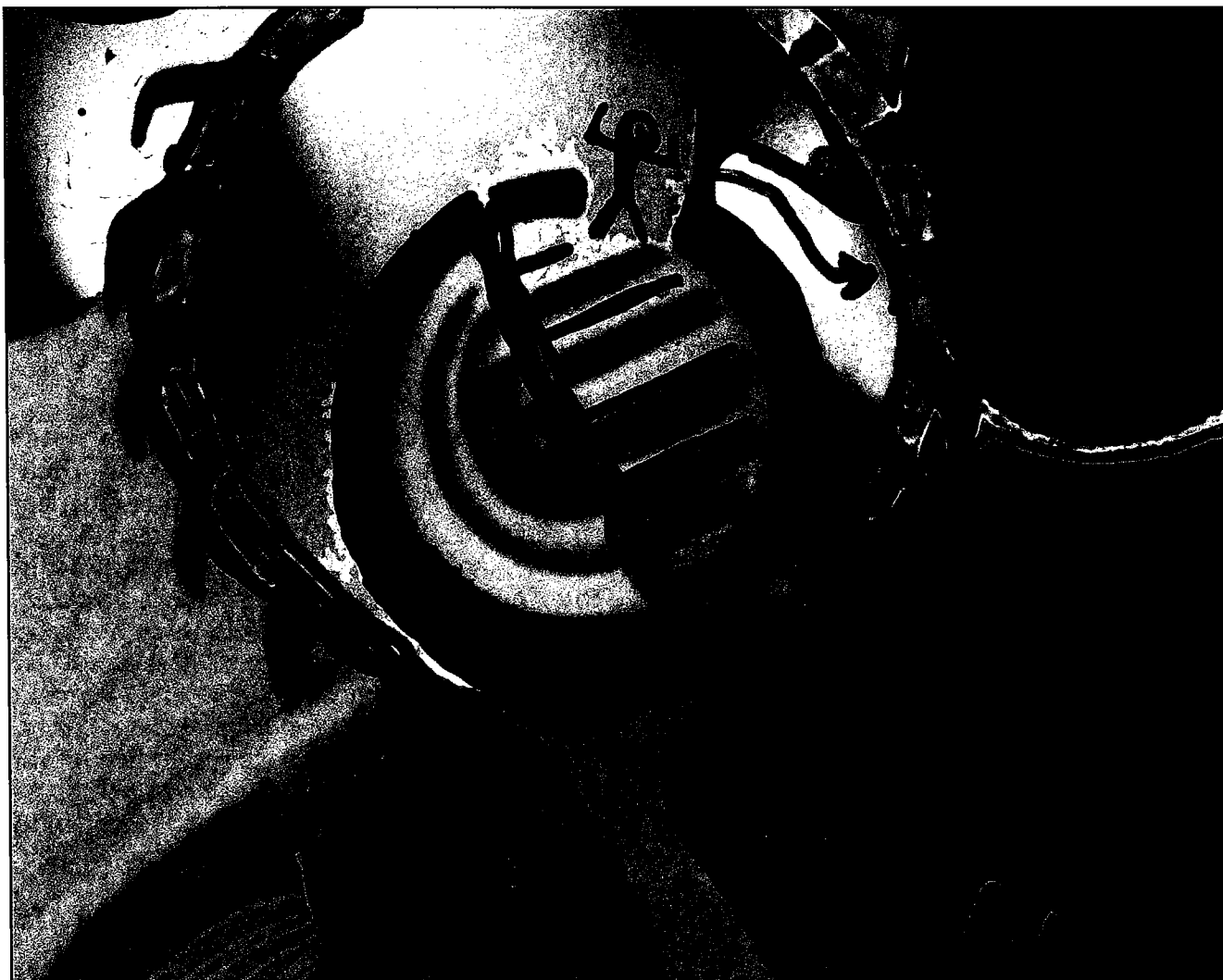
Many of the parties believe the Salmon/Clearwater component of the agreement will provide benefits for ESA listed species in several ways: improved instream flows, habitat, and passage. Instream flows will be established and held by the Idaho Water Resources Board for

selected streams of importance to the Nez Perce Tribe. These flows will provide for future domestic, commercial, municipal, and industrial uses and will allow for a certain level of future development of other water uses. The State will administer a cooperative agreement(s) under the Endangered Species Act to enhance riparian habitat and protect existing and future State-permitted uses.

Under the Forestry Component of the agreement, riparian/streambank protection measures will improve habitat for aquatic species on enrolled lands. This voluntary program supplements existing Idaho Forest Practice Rules and all State and private landowners in the Salmon/Clearwater River basins will be encouraged to participate. A Habitat Trust Fund will be established to provide funding for habitat improvement projects under both the flow and forestry programs described above.

#### **Snake River Flow Component**

The Snake River flow component anticipates 30-year Biological Opinions (BO) from NOAA Fisheries and USFWS under the Endangered Species Act on continued operation of the Bureau of Reclamation's projects in the upper Snake River basin. These BOs would address issues relating to flows from the Snake River above Brownlee Reservoir and the use of water for flow augmentation. The significant provisions of this component include Minimum flows defined by the Swan Falls Agreement will be decreed by the SRBA Court to the Idaho Water Resources Board. The State of Idaho will extend the provisions of State water law (Idaho Code 42-1763B) for the term of the agreement to allow Reclamation to lease up to 427,000 acre-feet of water from Idaho water banks for flow augmentation. Reclamation will be allowed to rent or acquire up to 60,000 acre-feet of consumptive natural flow water rights from the Snake River between Milner and Swan Falls for flow augmentation purposes. When added to the other rentals, this water may increase the total water available for flow augmentation to 487,000 acre-feet. The United States will compensate local governments for impacts caused by Reclamation's



acquisition of this additional 60,000 acre-feet.

The Settlement must be approved by the Tribe, Congress, and the State Legislature by March 31, 2005. In addition, a final judgment and decree must be entered by the SRBA court.

### **Concluding Thoughts**

The Nez Perce Tribe has been a prominent party to the SRBA. Having lived in what is now know as the State of Idaho for more than 10,000 years, and being a party to several treaties and other agreements with the United States relating to natural resource – land, water, fishery – allocations, the Tribe is keenly interested in restoring salmon stocks to levels which enable its members to harvest salmon for all purposes – commercial, subsistence and ceremonial.

After years of contentious litigation in the SRBA, and complex settlement negotiations, the Tribe, the United States, and numerous water user interests in Idaho have come together finally to forge a settlement agreement that moves Idaho, and its widely divergent interests, forward into a future where these divergent interests work together to solve Idaho's piece of a regional solution to water resource allocation and salmon recovery. This is consistent with the Tribe's legacy the past 200 years, since the arrival of Lewis and Clark, of working together with Euro-American settlers to share the resources of the earth provided by the Creator – to the Nez Perce people, the "Sacred Law." ☉

# The Tribal Supreme Court Project

## Introduction

Will we wait to be destroyed in our turn, without making an effort worthy of our race? Shall we give up our homes, our country, bequeathed to us by the Great Spirit, the graves of our dead, and everything that is dear and sacred to us, without a struggle? I know you will cry with me: Never! Never! Then... let us form one body, one heart, and defend to the last warrior our country, our homes, our liberty, and the graves of our fathers. – Tecumseh (*excerpt from article by Tracy Labin and John Dossett, "Vigilance through the Supreme Court Project," Indian Country Today, June 18, 2003*)

Tecumseh, Shawnee leader and warrior, spoke these words in 1811 in a speech called Sleep Not Longer O Chocktaws and Chickasaws. This was one of many speeches he gave in his mission to form a grand alliance of tribes – an alliance that would be strong enough to battle and defeat the American troops that were marching deeper and deeper into Indian territory to make room for migrating settlers. In Tecumseh's view, only a great Indian alliance could fight this devastating encroachment of white settlers into Indian country. Only by uniting, could Indian nations survive.

While these Indian wars may be over, it is time again for Indian nations to unite and fight. Today, Indians are fighting on a different battleground, but are fighting just as much for their survival as they were in 1811. Today, the battles happen in courtrooms. Judges, not soldiers, are threatening tribes' continued sovereign existence. Judges are ruling that Indian tribes lack authority to exercise criminal jurisdiction over nonmembers, that they lack the power to regulate hunting and fishing within certain parts of their reservations, that they lack the power to tax certain people within their reservations, that they lack authority to zone certain parts of their reservations, and that their courts lack the jurisdiction to settle certain on-reservation

disputes. Judges are also ruling in favor of state encroachment into Indian country by ruling that states may regulate certain activities within Indian reservations, that they have the authority to impose certain taxes on reservations, and even that they may impose certain requirements on the tribes to collect those taxes for them.

## What is the Tribal Supreme Court Project?

The Tribal Supreme Court Project is a joint project of the Native American Rights Fund (NARF) and the National Congress of American Indians (NCAI). The Project was created to coordinate and strengthen Indian advocacy before the United States Supreme Court and ultimately, to improve the deplorable win-loss record tribes have suffered before the Court in the past two decades. The theory behind the Tribal Supreme Court Project is that if tribes take a strong, consistent, coordinated approach before the Supreme Court, they will be able to reverse, or at least reduce, the erosion of tribal sovereignty and tribal jurisdiction by the Court.

## What Does the Supreme Court Project Do? The Tribal Supreme Court Project:

- Offers assistance to Tribes and tribal attorneys in determining whether to file a Petition for a Writ of Certiorari
- Offers assistance to Tribes and tribal attorneys in writing/editing Briefs in Opposition to Petitions for Certiorari – briefs aimed at keeping successful appellate court Indian law decisions out of the Supreme Court
- Fosters discussions among Indian law attorneys nation-wide about pending Indian law cases and issues
- Coordinates a tribal Amicus Brief writing network and writes briefs on Indian issues
- Works with States to gain their amicus brief support in favor of tribal jurisdiction
- Works with the United States' Solicitor General's Office on cases impacting tribal interests
- Coordinates and conducts Moot Court and



Roundtable opportunities for attorneys preparing for oral argument before the Supreme Court

- Provides convenient on-line access to briefs and information on pending Supreme Court cases
- Monitors and analyzes Indian cases in the state and federal appellate courts that have the potential to reach the Supreme Court

Information on Indian law cases in the United States Supreme Court, Federal Courts of Appeals, U.S. District Courts, and State Courts is located in the Indian Law Bulletins section of the National Indian Law Library website: <http://www.narf.org/nill/ilb.htm>

Briefs, including those at the Petition for Certiorari stage in pending and recent Supreme Court cases are located in the Tribal Supreme Court Project section of the NARF website: <http://www.narf.org/sc/index.html> documents located at: <http://doc.narf.org/sc/index.html>.

#### How is the Project Structured?

The Tribal Supreme Court Project is staffed by attorneys and support personnel from both NARF and NCAI. In an effort to foster greater coordination in advocacy, the Project has also established a Working Group of more than 200 noted attorneys and academics from across the nation who specialize in Indian law and other areas of law impacting Indian cases – areas like property law, trust law, and Supreme Court litigation. The Project coordinates regular conference calls with the Working Group to discuss case strategy in pending Supreme Court litigation and to coordinate the writing of amicus briefs. The group also hold calls to discuss issues and to make recommendations to Tribes considering seeking Supreme Court review. In making such recommendations, the Working Group helps Tribes analyze the merits and risks of their cases. The Group also offers help to those attempting to avoid Supreme Court review.

Attorneys are always welcome and strongly encouraged to join the Working Group and are asked to participate in the Project only as their time, interest, and resources allow. An Advisory Board comprised of NCAI Executive Committee members and other tribal leaders willing to volunteer their time also assists the Project. The Board's role is to provide necessary political and tribal perspective to the legal and academic expertise.

### Why is the Tribal Supreme Court Project Necessary?

A specific Supreme Court project is necessary both because Supreme Court litigation is unique and specialized, and because Supreme Court rulings have such broad effect. Unlike most other courts, the Supreme Court has broad discretion in determining which cases it hears, and in fact exercises that discretion to hear only a very small percentage of the cases that litigants ask it to review. As one treatise on Supreme Court litigation reports, the Court is asked to review more than 7,000 cases per year, but hears fewer than 100 of those. Also, the Supreme Court is not bound by precedent to the same degree that the federal appeals or district courts are, and thus, can and does focus more on policy considerations in rendering its decisions. And, Supreme Court rulings become the law of the country, which for Indian tribes in recent years is a very unfortunate fact.

Perhaps the greatest threat to continued tribal sovereign existence comes from the recent decisions of the United States Supreme Court. As noted Indian law scholar David Getches found, in the past two decades, Indian tribes have lost approximately 80% of their cases before the Supreme Court. (David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001)(providing an in-depth analysis of the Court's re-writing of Indian law.) And these losses have been severe. The Court has in recent years taken a very aggressive approach to eroding tribal sovereignty and jurisdiction. At the same time, the Court has also increased State jurisdiction over Reservations. Some of the more notable

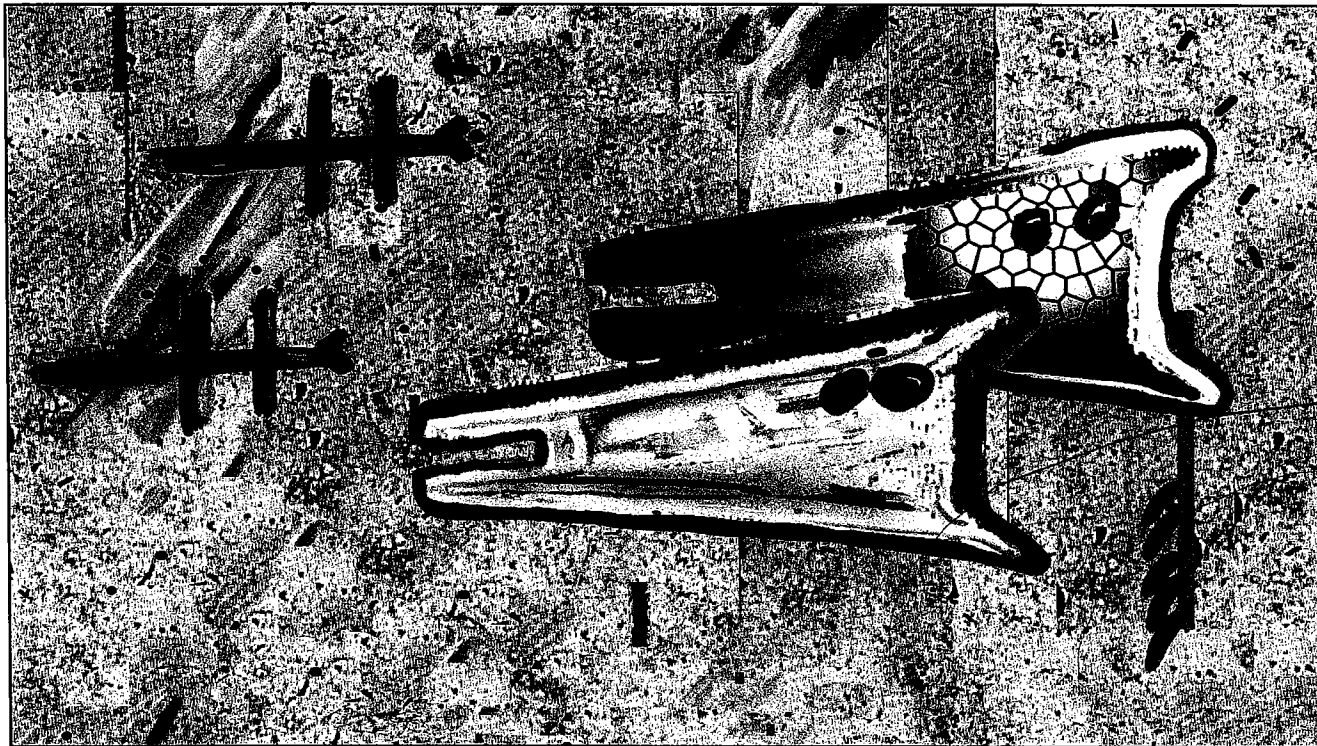
holdings have included:

- *Nevada v. Hicks* (2001) Restricted the Power of Tribal Courts The Court held that a tribal court did not have jurisdiction to adjudicate a claim brought by a tribal member for alleged harm done to him by state game wardens executing a search warrant at his home on tribal trust land.
- *Atkinson Trading Co. v. Shirley* (2001) Restricted Tribal Governmental Power The Court held that a Tribe lacked the authority to tax a hotel or its non-Indian guests where the hotel was located on fee land, even though the land was within the exterior boundaries of the Reservation and the Tribe provided the hotel and its guests with essential police, fire, and medical services.
- *Cass County v. Leech Lake Band of Mission Indians* (1998) Authorized the State to exercise Jurisdiction over a Tribe on-Reservation The Court upheld the authority of states and local governments to tax tribally owned fee land within the reservation
- *Alaska v. Native Village of Venetie* (1998) Restricted Tribal Governmental Power The Court held that Alaskan Native Villages lack the authority to tax non-members doing business on tribal lands because such lands are not "Indian Country"
- *Strate v. A-1 Contractors* (1997) Restricted the Power of Tribal Courts The Court held that a Tribal court did not have authority over an action arising out of an automobile accident involving non-Indians on a state highway right-of-way on the Reservation – even where the plaintiff was married to a tribal member, had children who were tribal members, had lived on the reservation her entire adult-life, and where the defendant was a contractor doing work for the Tribe.
- *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation* (1992) Authorized State Jurisdiction over Tribes and tribal members on-Reservation The Court held that the County could tax on-reservation fee land owned by reservation Indians or the Tribe itself where the members or Tribe had reacquired the land after it had been lost under the General Allotment Act.





- *Duro v. Reina* (1990) Restricted the Power of Tribal Courts The Court held that Tribes do not have criminal jurisdiction over Indians from other Tribes and thus may not prosecute such Indians when they commit crimes on the Reservation
- *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation* (1989) Restricted Tribal Governmental Power The Court held that while the Tribe could enact zoning regulations for certain parts of its Reservation, it lacked the authority to zone other parts of its Reservation
- *Cotton Petroleum Corp. v. New Mexico* (1989) Authorized State to exercise Jurisdiction on-Reservation The Court held that the State could tax non-Indian lessees for oil and gas production even where all production occurred on-reservation and where such taxation would make it more difficult for the Tribe to impose its own taxes.
- *Montana v. United States* (1981) Restricted Tribal Governmental Power The Court held that the Tribe could not regulate hunting and fishing by nonmembers on land held in fee within the Reservation boundaries because the exercise of tribal power over nonmembers "beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes."
- *Washington v. Confederated Tribes of the Colville Indian Reservation* (1980) Authorized State to exercise Jurisdiction on-Reservation The Court held that the State could tax on-Reservation cigarette sales to nonmembers, including nonmember Indians.
- *Oliphant v. Suquamish Indian Tribe* (1978) Restricted the Power of Tribal Courts The Court held that Tribes lack criminal



jurisdiction over non-Indians and hence may not prosecute non-Indians when they commit crimes on the Reservation.

#### Success of the Supreme Court Project

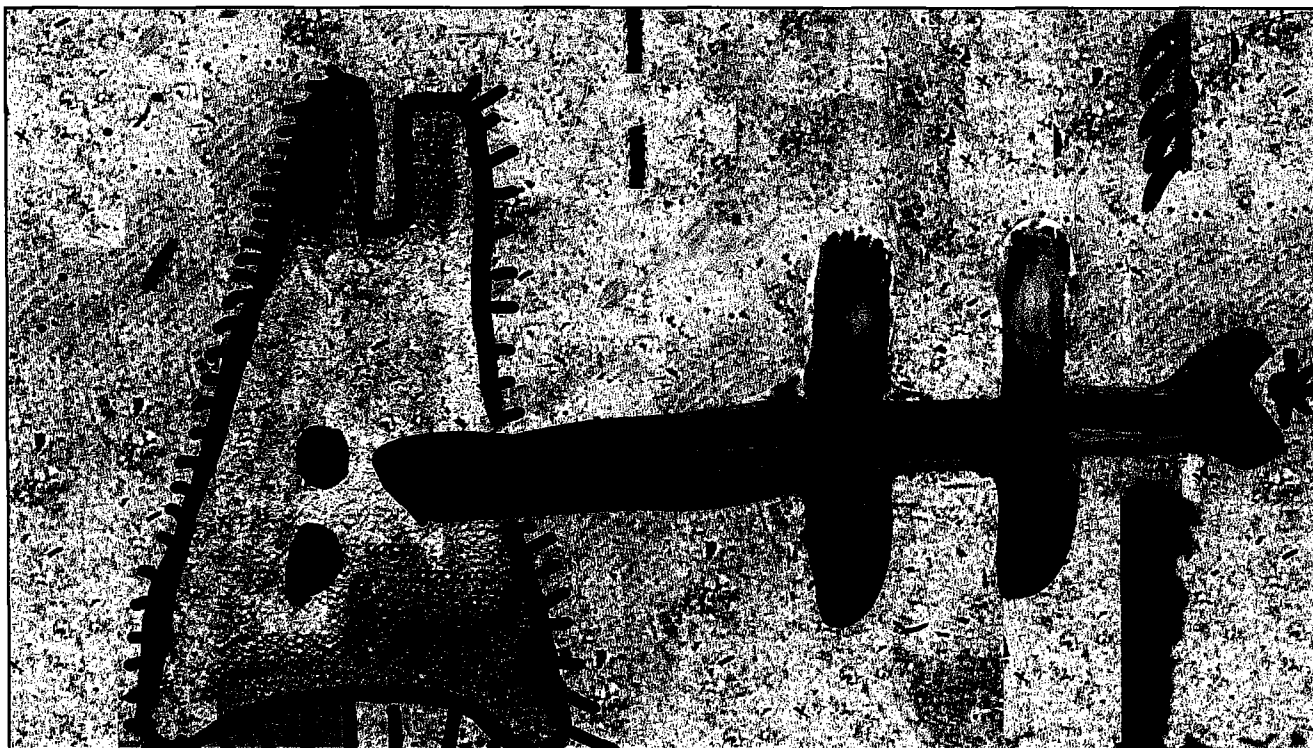
The success of the Supreme Court project has been appreciable. While only in existence for a few years, the Project has shown that by uniting and coordinating, tribes can improve tribal advocacy before the Supreme Court and can possibly even help shape the direction of Indian law made by Supreme Court. Since its inception, the Tribal Supreme Court Project has improved the win-loss record of Tribes before the United States Supreme Court. Out of four cases decided by the Court since the Project began, tribes have only lost one case! The Project succeeded in blocking efforts to have the Supreme Court review, and possibly overturn, favorable Indian law decisions. The unprecedented victory of convincing states to file amicus briefs in support of the tribal position, and in one case to disavow their support of the state position, was also achieved.

In the most recent U.S. Supreme Court decision, NARF and NCAI had contributed to the *United States v. Lara* case by submitting two

amicus briefs. Representing 18 Indian tribes, NARF submitted a brief focusing on the factual issues. NCAI's amicus brief then centered on the constitutional issues of the case. In its *Lara* decision, the Supreme Court cited both briefs.

The Supreme Court heard oral arguments on February 3, 2004 and issued its opinion on April 19, 2004. Central questions to the case existed in the source of tribes' power to punish nonmember Indian offenders and in Congress' authority to relax restrictions on tribes' exercise of inherent prosecutorial power. The Court held that Indian tribes possess criminal jurisdiction over non-member Indians arising from their inherent sovereign power. Additionally, the Court acknowledged that the Constitution authorizes Congress to relax restrictions placed on tribes' inherent sovereignty.

Billy Jo Lara, a member of the Turtle Mountain Band of Chippewa Indians, married a member of the Spirit Lake Tribe and resided on the Spirit Lake Reservation with his wife and their two children. After repeated offenses of domestic violence, public intoxication, and resisting arrest, the Spirit Lake Tribe issued an exclusion order, prohibiting Mr. Lara from entering the reservation. Mr. Lara violated this



exclusion order and tribal police arrested him for public intoxication, resisting lawful arrest, and violence to a police officer. Mr. Lara pled guilty to all three charges in tribal court. The United States then indicted Mr. Lara for the offenses against the BIA officer, a federal employee.

In response to the United States' indictment, Mr. Lara asserted double jeopardy as his defense because the government may not prosecute a person for the same crime twice. While *United States v. Wheeler* stated that an Indian tribe acts as a sovereign when prosecuting its own members, in *Duro v. Reina*, the Supreme Court held that an Indian tribe no longer possessed the inherent right to prosecute a nonmember Indian. However, Congress reacted to the *Duro* decision by passing new legislation, an amendment to the Indian Civil Rights Act known as the "*Duro* fix," specifically recognizing the inherent authority of Indian tribes to exercise criminal jurisdiction over all Indians. The question then arose about the source of this authority and the applicability of the double jeopardy defense. In *Lara*, the Court recognized that this authority was indeed inherent, and

thus, not delegated to the Indian tribes by the federal government. Moreover, the Court recognized the authority of Congress to relax restrictions placed on the rights of Indian tribes through the passage of its legislation. Congress asserted the authority from the Constitution's Indian Commerce Clause and the Treaty Clause. Therefore, the Supreme Court found that the Spirit Lake Tribe may prosecute Mr. Lara, a nonmember, for crimes committed on the reservation. Furthermore, the double jeopardy clause cannot bar a subsequent prosecution by the federal government because the Spirit Lake Tribe acted as a separate sovereign in its prosecution.

The *Lara* decision sidestepped the question of whether the *Duro* fix legislation violated the Due Process and Equal Protection rights of nonmember Indians prosecuted in tribal courts. Notably absent was any discussion over recognition of inherent powers over non-Indians. Thus, the importance of the Tribal Supreme Court Project in the area of criminal jurisdiction will continue to call upon the collective efforts of Indian tribes, legal scholars, and Indian law firms. ☉

## CASE UPDATES

### BJA Grant to Fund Indian Legal Services

The Bureau of Justice Assistance/Office of Justice Programs has indicated to NARF that it will provide a grant in the amount of \$1,987,000 to fund Indian Legal Services (ILS) programs throughout Indian country. The grant will be utilized to provide funding to thirty ILS programs for civil and criminal representation in tribal courts and to develop tribal court projects on a host of areas in justice administration. Funding will also be provided for training and technical assistance to train legal services personnel and the tribal court personnel with whom they will be working with.

Indian Legal Services programs serve a vital role in the administration of and access to justice for Indian people in Indian Country. These programs both provide legal representation to individual Indian people and to tribal governments, and assist with the development of tribal courts through the provision of their legal expertise and resources. While a majority of ILS assistance is civil, some ILS programs also provide tribal court criminal defense and public defender representation.

This grant would be used to supplement resources provided through the Legal Services Corporation to continue and expand the kinds of civil and criminal representation and assistance to tribal court systems currently conducted by ILS programs, including representation on a wide range of civil and criminal matters before tribal courts; lay advocate, judicial and law enforcement training; serving as a clearing-house to compile tribal laws; assisting with the development of tribal bar associations; development of tribal, juvenile and peacemaking codes; and assistance to pro se litigants. Funds would also be used to expand program capacity to address unmet needs for legal representation in

Indian country, including in the areas of energy and natural resource development, economic development, domestic violence, technology and the "digital divide," and environmental issues.

ILS programs are some of the longest-standing programs in Indian reservation communities, with an excellent track record for service to individual Indian people and small tribes. Collectively, these programs today serve reservation communities in the following states: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin and Wyoming.

It is unquestioned that Indian country today – and especially Indian people living below federal poverty guidelines – suffers from a tremendous lack of access to legal resources. Too many Indian tribes also suffer from the lack of resources to enhance the infrastructure necessary to improve the administration of criminal and civil justice. This grant will increase substantially the advocacy resources available to Indian reservation communities to redress the numerous and significant problems identified in an extensive survey by the National Association of Indian Legal Services (NAILS), of the ILS programs, asking each to identify additional needs/projects/goals to be undertaken with additional resources derived from this grant.

The infusion of \$1.9 million into the thirty ILS programs will enable each of these programs to add valuable staff which in turn will enable the programs to broaden the scope of the activities they are already engaged in, plus take on additional advocacy projects identified via the recent NAILS survey results to assist their client individuals and tribes.

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### President Signs Executive Order on Indian Education

The three original directors of the Tribal Education Departments National Assembly (TEDNA) were among the attendees at the sign-

ing on April 30, 2004 by President George W. Bush of the Executive Order on American Indian and Alaska Native Education. Jerome Jainga,

Education Director for the Suquamish Indian Tribe in Washington; Quinton Roman Nose, Education Director for the Cheyenne-Arapaho Tribes of Oklahoma; and, Joyce Silverthorne, Education Director for the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana were among the one hundred tribal leaders, Indian educators, and federal officials to attend the signing ceremony which was held at the Eisenhower Executive Office Building in Washington, DC.

The Executive Order recognizes "the unique educational and culturally related academic needs of American Indian and Alaska Native students consistent with the unique political and legal relationship of the Federal Government with tribal governments..." In the Executive Order, the Administration affirms its commitment "to continuing to work with... Federally recognized tribal governments on a government-to-government basis, and... [to supporting] tribal sovereignty and self-determination." The purpose of the Executive Order is "to assist American Indian and Alaska Native students in meeting the challenging student academic standards of the No Child Left Behind Act of 2001 (Public law 107-110) in a manner that is consistent with tribal traditions, languages, and cultures."

The Executive Order establishes an Inter-Agency Working Group to oversee its implementation. The Working Group consists of the Departments of Education, the Interior, Health and Human Services, Agriculture, Justice, Labor, and other departments, agencies, or offices as designated. Within ninety days of April 30, 2004, the Working Group must develop a federal interagency plan that recommends initiatives, strategies, and ideas for future interagency actions that promote the Executive Order's purpose. The Working Group also must conduct a multi-year study of American Indian and Alaska Native students that comprehensively describes their educational status and progress with respect to meeting the goals of No Child Left Behind, and report the study results to the President.

Other activities called for by the Executive Order include the enhancement of research

capabilities of tribal educational institutions and the convening of a national conference on American Indian and Alaska Native education.

The 2004 Executive Order supercedes the Executive Order on American Indian and Alaska Native Education signed by President William J. Clinton in August 1998. The 1998 Executive Order was the result of a proposal to the White House by the National Indian Education Association (NIEA) and the National Congress of American Indians (NCAI) for improved administration of federal Indian education programs and funding. Many of the strategies and activities developed under the 1998 Executive Order, however, will be resurrected by the 2004 Executive Order. They include the Inter-Agency Working Group, the consultation between the Working Group and Indian tribes and organizations, and a focus on comprehensive Indian education research and reporting. NIEA and NCAI specifically had sought to reactivate these activities with the new Executive Order.

"This Executive Order is actually stronger than the first one with respect to the importance of Native language and culture when educating tribal students," said TEDNA Director Joyce Silverthorne. "NIEA did an excellent job of advocating for and securing that," she added.

The signing was preceded by an overview by Deputy Under Secretary and Office of Indian Education Director Victoria Vasques of the Department of Education's Indian education programs and activities in the last eighteen months. Her report on national activities included the contract with the Native American Rights Fund to establish TEDNA. She affirmed the Department's commitment to support and work with Tribal Education Departments. TEDNA Director Jerome Jainga pointed out that, "the Executive Order clearly recognizes the importance of enhancing tribal governance in education generally, and specifically with respect to education research."

TEDNA Director Quinton Roman Nose concluded that the new Executive Order "is a very good document. We only wish that it had been done two or three years ago so that we all could have been working under it for that time." ☉

# National Indian Law Library

## Your Information Partner!

### About the Library

The National Indian Law Library (NILL) located at the Native American Rights Fund in Boulder, Colorado is a national public library serving people across the United States. Over the past thirty-two years NILL has collected nearly 10,000 resource materials that relate to federal Indian and tribal law. The Library's holdings include the largest collection of tribal codes, ordinances and constitutions in the United States; legal pleadings from major American Indian cases; law review articles on Indian law topics; handbooks; conference materials; and government documents.

### Library Services

**Information access and delivery:** Library users can access the searchable catalog which includes bibliographic descriptions of the library holdings by going directly to: <http://nillcat.narf.org/> or by accessing the catalog through the National Indian Law Library/Catalog link on the Native American Rights Fund website at [www.narf.org](http://www.narf.org). Once relevant materials are identified, library patrons can then choose to request copies or borrow materials through interlibrary loan for a nominal fee.

**Research assistance:** In addition to making its catalog and extensive collection available to the public, the National Indian Law Library provides reference and research assistance relating to Indian law and tribal law. The library offers free assistance as well as customized research for a nominal fee.

**Keep up with changes in Indian law with NILL's Indian Law Bulletins:** The Indian Law Bulletins are published by NILL in an effort keep NARF and the public informed about Indian law developments, NILL publishes timely bulletins covering new Indian law cases, U.S. regulatory action, law review articles, and news on its web site. (See: <http://www.narf.org/nill/ilb.htm>) New bulletins are published on a regular basis, usually every week and older information is moved to the bulletin archive pages. When new information is published, NILL sends out brief announcements



and a link to the newly revised bulletin page via e-mail. Send an e-mail to David Selden at [dselden@narf.org](mailto:dselden@narf.org) if you would like to subscribe to the Indian Law Bulletin service. The service is free of charge!

**Support the Library:** The National Indian Law Library is unique in that it serves the public but is not supported by local or federal tax revenue. NILL is a project of the Native American Rights Fund and relies on private contributions from people like you. For information on how you can support the library or become a sponsor of a special project, please contact David Selden, the Law Librarian at 303-447-8760 or [dselden@narf.org](mailto:dselden@narf.org). For more information about NILL, visit: <http://www.narf.org/nill/nillindex.html>. Local patrons can visit the library at 1522 Broadway, Boulder, Colorado. ☺

# THE NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund (NARF) was founded in 1970 to address the need for legal assistance on the major issues facing Indian country. The critical Indian issues of survival of the tribes and Native American people are not new, but are the same issues of survival that have merely evolved over the centuries. As NARF is in its thirty-fourth year of existence, it can be acknowledged that many of the gains achieved in Indian country over those years are directly attributable to the efforts and commitment of the present and past clients and members of NARF's Board and staff. However, no matter how many gains have been achieved, NARF is still addressing the same basic issues that caused NARF to be founded originally. Since the inception of this Nation, there has been a systematic attack on tribal rights that continues to this day. For every victory, a new challenge to tribal sovereignty arises from state and local governments, Congress, or the courts. The continuing lack of understanding, and in some cases lack of respect, for the sovereign attributes of Indian nations has made it necessary for NARF to continue fighting.

NARF strives to protect the most important rights of Indian people within the limit of available resources. To achieve this goal, NARF's Board of Directors defined five priority areas for NARF's work: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law and educating the public about Indian rights, laws, and issues. Requests for legal assistance should be addressed to NARF's main office at 1506 Broadway, Boulder, Colorado 80302. NARF's clients are expected to pay whatever they can toward the costs of legal representation.

NARF's success could not have been achieved without the financial support that we have received from throughout the nation. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. ☺

**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. Editor, Ray Ramirez [ramirez@narf.org](mailto:ramirez@narf.org).

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**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.

**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, 1712 N Street, NW, Washington, D.C. 20036 (202-785-4166) (FAX 202-822 0068).

**Alaska Office:** Native American Rights Fund, 420 L Street, Suite 505, Anchorage, Alaska 99501 (907-276-0680) (FAX 907-276-2466).



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