



Legal Review

NATIVE AMERICAN RIGHTS FUND

Judicial Termination: The *Carcieri* Crisis

In his 2009 article, “Motherhood and Apple Pie: Judicial Termination and the Roberts’ Court,” Native American Rights Fund senior staff attorney Richard Guest posed the question whether “Indian country may be facing another era of judicial termination—courts poised to ‘whittle’ away tribal sovereignty one case at a time in the name of ‘motherhood and apple pie.’” Unfortunately, Indian country did not have to wait for the ink to dry on that article before getting an answer. Based on its 2009 opinion in *Carcieri v. Salazar*, and its recent opinion in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians (Gun Lake Tribe) v. Salazar*, it appears that the Roberts Court may not be satisfied to simply “whittle” away, but may have instead set its course towards “carving” out chunks of tribal sovereignty one case at a time.

The *Carcieri v. Salazar* Decision

In February 2009, the Supreme Court issued its devastating opinion in *Carcieri v. Salazar* — a case that involved a challenge by the State of Rhode Island to the authority of the Secretary of the Interior (“Secretary”) to take land into trust for the Narragansett Tribe under the provisions of the Indian Reorganization Act (“IRA”). For over 75 years, the Department of the Interior (“Department”) had exercised its authority under the IRA to take land in trust for all federally recognized Indian tribes and had consistently interpreted the phrase “now under Federal jurisdiction” in the IRA’s definition of “Indian” to mean the present, or the time of the exercise of the Secretary’s authority to approve the trust land acquisition.

But contrary to every federal judge who had reviewed the matter in the courts below, and who had deferred to the Department’s interpretation of the IRA, eight of nine Justices on the Supreme Court found that the term “now” in the phrase

“now under Federal jurisdiction” is unambiguous and limits the authority of the Secretary to take land in trust only for Indian tribes that were “under Federal jurisdiction” on June 4, 1934, the date the IRA was enacted. Yet the Court failed to provide any definition of the phrase, “under Federal jurisdiction.” Rather, writing for the majority, Justice Thomas, joined by Chief Justice Roberts and Justices Scalia, Kennedy, Breyer and Alito, reversed the decision of the U.S. Court of Appeals for the First Circuit and simply found that “the record in this case establishes that the ▶



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Narragansett Tribe was not under federal jurisdiction when the IRA was enacted.”

In concurrence, Justice Breyer wrote separately to make the point that Indian tribes recognized after 1934 may still have been “under federal jurisdiction” in 1934, particularly where the Department made a mistake about their status or where there was a federal treaty in place. Justice Souter, joined by Justice Ginsberg, concurred with Justice Breyer on this point, and concurred in part with the majority (i.e. the term “now” is unambiguous), but dissented to the Court’s straight reversal, finding instead that the case should be remanded to the lower courts to provide an opportunity for the United States and the Narragansett Tribe to pursue a claim that the Tribe was under federal jurisdiction in 1934. Justice Stevens dissented from the majority’s opinion stating that he could not find any “temporal limitation on the definition of ‘Indian tribe’” within the IRA.

The Court’s ruling in *Carcieri* is an affront to the most basic policies underlying the IRA. The fundamental purpose of the IRA was to restore tribal homelands and to help Indian tribes—torn apart by prior federal policies of allotment and assimilation—to re-organize their governments. Therefore, in addition to the authority to acquire lands in trust for all tribes, the IRA also provides authority for the Secretary to approve tribal constitutions in order to assist tribes in their efforts towards self-determination and to establish tribal business corporations in order to help tribes become economically self-sufficient. In the short-term, the *Carcieri* decision has been destabilizing for a significant number of Indian tribes whose status in 1934 is uncertain. *Carcieri* invites expensive and previously unnecessary litigation over the IRA’s most basic terms, allowing litigants to raise even more questions regarding the status of those tribes.

And as discussed below, in the long-run, the impacts of *Carcieri* will ripple across Indian country wreaking havoc for all Indian tribes. Indian country needs Congress to step up and tell the Court that it got it wrong in *Carcieri*. If Congress remains silent, or continues to delay resolution, the Court will fill the void with its current prevailing view that there is nothing exceptional about Indian law and that there is

nothing special to protect in the relationship between the United States and its Indian people.

The Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe) v. Patchak Decision

The first direct evidence of the ripple-effect of *Carcieri*, and the Roberts Court’s further unraveling of Indian law, was supplied recently in the June 2012 decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (Gun Lake Tribe) v. Patchak*. The *Patchak* litigation resulted in two distinct holdings, both of which will have long term negative impacts for all Indian tribes. First, the Court in *Patchak* trampled over the sovereign immunity of the United States and eviscerated the once-broad protections for Indian lands under the Quiet Title Act. Second, through its finding of prudential standing, the Court widened the court room doors to most any challenge by any person who may feel “harmed” by a decision of the Secretary made under the authority of the IRA that benefits an Indian tribe.

The long saga for the Gun Lake Tribe goes back to time of the IRA’s passage, when the Bureau of Indian Affairs decided to withhold federal recognition from the Lower Peninsula of Michigan Tribes. The Tribe submitted its petition for federal recognition in the 1980’s, and the United States finally acknowledged the Gun Lake Tribe in 1998. In 2001, the Tribe submitted an application requesting that the Secretary acquire 147 acres of land located in Wayland Township, Michigan (the “Bradley Property”) in trust for the purposes of gaming. In 2005, after an extensive administrative review process, the Secretary announced her decision to take the Bradley Property in trust for the Tribe.

A group known as the Michigan Gambling Opposition (MichGO) immediately sued the Secretary. MichGO challenged the decision on the grounds that her decision violated the Indian Gaming Regulatory Act and the National Environmental Protection Act, and that Section 5 of the IRA was an unconstitutional delegation of legislative authority. But MichGO did not raise a *Carcieri* challenge until after the federal district court rejected all of its claims. In 2008, after oral argument on appeal to the D.C. Circuit, MichGO sought to add the *Carcieri* claim. But the motion

to supplement the issues on appeal was denied and the D.C. Circuit affirmed the judgment of the district court. The Supreme Court denied review, and after the issuance of the mandate by the D.C. Circuit the Secretary acquired the land in trust for the Tribe on January 30, 2009.

However, one week after the D.C. Circuit denied MichGO's petition for en banc review—and over three years after MichGO had filed its complaint—Mr. Patchak, a non-Indian landowner who lived in “close proximity” to the Bradley Property, filed a *Carcieri* claim in federal district court under the Administrative Procedures Act (APA). This district court dismissed his claim based on the provisions of the Quiet Title Act (QTA) and questioned whether he had prudential standing to sue. But in this case, the DC Circuit reversed the district court's judgment, setting the stage for review by the Supreme Court with the United States and the Tribe seeking certiorari.

Up to this point in time, four other Circuits—the Seventh, Ninth, Tenth, and Eleventh Circuits—had held—contrary to the D.C. Circuit—that the QTA's reservation of the United States' sovereign immunity in suits involving “trust or restricted Indian lands” applies to all suits concerning land in which the United States “claims an interest.” But the Supreme Court rejected the majority view of the Circuits. In an 8-1 majority opinion written by Justice Kagan, the Court held that the QTA as a whole only applies to actions seeking to quiet title in a party with a competing ownership interest in the land and therefore “addresses a kind of grievance different from the one Patchak advances.” Although the Court conceded that Patchak was contesting the United States' title to the land, since he was not claiming any competing ownership interest in the land the Court found that the QTA and the Indian lands exception in the QTA were not applicable to the litigation.

The Court also rejected the arguments of the United States and the Tribe that Mr. Patchak could not bring a *Carcieri* challenge because he lacked prudential standing under the IRA (i.e. is within the statute's “zone of interests”). The Court found that, although Section 5 of the IRA only specifically addresses land acquisition, decisions made by the Secretary under Section 5 “are closely enough and often enough entwined with consid-

erations of land use” to allow neighboring landowners to bring “economic, environmental or aesthetic” challenges to the those decisions.

In her sole dissent, Justice Sotomayor provided a concise synopsis of how detrimental the Court's decision is going to be for Indian tribes:

After today, any person may sue under the APA to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land.

Justice Sotomayor pointed out that the Court's decision works against one of the primary goals of the IRA—new economic development and financial investment in Indian country. Now, trust land acquisitions for the benefit of Indian tribes will be subject to judicial challenge under the APA's six-year statute of limitations—not the 30-day period provided for under the federal regulations—substantially constraining the ability of all Indian tribes to acquire and develop lands. Accordingly, lands taken into trust for Indian tribes pursuant to the IRA prior to the *Patchak* decision could still be challenged if they fall within this six-year window.

Most importantly, had Congress' response to *Carcieri* been swifter, Mr. Patchak would have had no claim, and the Roberts' Court no platform.

A Judicially-Created Crisis Which Can Only be Abated by Congress

Only Congress can clarify its intent for the Court. In the weeks and months after the Court's decision in *Carcieri*, Indian country worked hard to get legislation introduced in the 111th Congress to simply amend the IRA to return to the status quo—a “clean” *Carcieri*-fix to reaffirm the authority of the Secretary of the Interior to take land in to trust for all federally-recognized Indian tribes. Although the House passed its version of the *Carcieri*-fix, and the Senate Committee for Indian Affairs reported out its legislation, neither bill enacted in to law by the end of the session in December 2010.

At the start of the 112th Congress, Indian country moved quickly to resolve the problems being created by *Carcieri*. On March 20, 2011, Senator



Akaka, as the new Chairman of the Senate Committee on Indian Affairs, introduced S. 676, cosponsored by Senators Conrad (D-ND), Franken (D-MN), Inouye (D-HI), Johnson (D-SD), Kerry (D-MA.), Tester (D-MT) and Udall (D-NM). Senators Baucus (D-MT) and Stabenow (D-MN) were later added as co-sponsors. In announcing that the “clean” *Carcieri*-fix would be one of his two top priorities for the 112th Congress, Chairman Akaka and the Senate Committee on Indian Affairs favorably reported out S. 676 less than three weeks later on April 7, 2011. S. 676 has the express support of President Obama as well as Secretary Salazar.

But the *Carcieri*-fix legislation has stalled in the 112th Congress over a few members’ concerns regarding the expansion of Indian gaming and the exemption of Indian trust lands from local property taxes. However, true to his word, Chairman Akaka held three hearings to keep the need for a *Carcieri*-fix at the forefront of the Congressional leadership’s priorities. Equally important, Chairman Akaka submitted his forceful and complete Senate Report 112-166 (“Report”) to accompany S. 676. The Report provides a detailed background on the history of Indian land losses, the destructive effects of federal allotment policies, and the remedial intent of Congress in enacting the IRA. Further, the Report thoroughly examines the government-to-government relationship between the United States and Indian tribes and the Congressional policies and laws furthering that relationship. In particular, the Report focused on the 1994 amendments to the IRA—amendments overlooked by the Court in *Carcieri*—wherein Congress, we thought, had made it abundantly clear that all federally recognized Indian tribes are entitled to the same privileges and benefits under federal law:

The 1994 Amendments put an end to the discriminatory practices that had been developing within [the Department of the Interior (DOI)]. DOI had begun to classify tribes as either “historic” and entitled to the full panoply of inherent sovereign powers not otherwise divested by treaty or congressional action or “created” and therefore possessing limited sovereign powers. By enacting the 1994 amendments and broad-

ening the definition of “tribe” in other federal statutes, Congress explicitly rejected DOI’s classifications. The amendments ensured that DOI upheld the original intent of the IRA to promote tribal sovereignty by allowing all federally recognized tribes to organize and self-govern.

* * *

Congress enacted the 1994 legislation to ensure that DOI upheld the original intent of the IRA to allow tribes to organize and self-govern, and to ensure that tribal sovereignty was not eroded by creating differing levels of sovereignty. Signed into law by President Clinton on May 31, 1994, the amendments overruled prior practices of classifying tribes based on date of their date of recognition or manner of recognition. These amendments are direct declarations from Congress that the federal agencies do not have the authority to discriminate between tribes based on the history of how a federally recognized tribe reached that status. Congress has made it clear that “if a tribe is federally recognized, they possess the full panoply of powers of sovereign Indian tribes unless specifically divested by treaty or Congressional action.”

In the first oversight hearing held on June 23, 2011, the Committee heard testimony on “The Indian Reorganization Act-75 Years Later: Renewing our Commitment to Restore Tribal Homelands and Promote Self-Determination.” John Echohawk, Executive Director of the Native American Rights Fund, was invited to testify, and he cautioned the Committee:

By calling into question which federally recognized tribes are or are not eligible for the IRA’s provisions, the Court’s ruling in *Carcieri* threatens the validity of tribal business organizations, subsequent contracts and loans, tribal reservations and lands, and could affect jurisdiction, public safety and provision of services on reservations across the country.

Mr. Echohawk provided the Committee with summaries of the 15 *Carcieri*-related challenges already pending before the courts and the Department, giving particular heed to the potential damage awaiting Indian country in the *Patchak* litigation.

Then, on October 13, 2011, the Committee held its second oversight hearing on “The *Carcieri* Crisis: The Ripple Effect on Jobs, Economic Development and Public Safety in Indian Country.” As the senior staff attorney with the Native American Rights Fund who oversees the work of the Tribal Supreme Court Project, Richard Guest was invited to testify and testified:

In my oral testimony here today, I want to simply make one point – the Supreme Court’s decision in *Carcieri* requires a prompt and clear response from Congress to stop the harm being done to Indian tribes who are pursuing their right to self-preservation—their right to become self-governing and their right to be economically self-sufficient.

To be clear—a clean *Carcieri*-fix does not advance any issue or cause for Indian country. A clean *Carcieri*-fix—such as S. 676—simply restores Indian tribes to the status quo—to the status quo of 75-years of practice by the Secretary of the Interior to acquire lands in trust for all federally-recognized Indian tribes—regardless of the date of their federal recognition.

Mr. Chairman, you have heard here today, and will continue to hear about the ripple effect of the *Carcieri* decision on jobs, economic development and public safety in Indian country. Without a clean *Carcieri*-fix by Congress, litigation—much of it frivolous litigation—over the meaning of the phrase “now under Federal jurisdiction” will continue to flourish.

In early 2004, NARF flagged *Carcieri* as a potential threat to tribal sovereignty. Early on, we understood the potential “ripple effects” of an adverse decision in *Carcieri*. The acquisition of trust lands has been the lifeblood for many Indian tribes who have made tremendous progress after decades of assimilation and termination policies threatened their very existence.

And with still no action by the Congress 11 months later, the Committee held its final oversight hearing on September 13, 2012, entitled “Addressing the Costly Administrative Burdens and Negative Impacts of the *Carcieri* and *Patchak*

Decisions.” Once again, John Echohawk was invited and testified:

Last year, NARF came before this Committee on two separate occasions to discuss the *Carcieri* crisis—a judicially-created crisis precipitated by the Court’s 2009 decision in *Carcieri v. Salazar*.

Today, we are here because of the Court’s more recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians (Gun Lake Tribe) v. Patchak*. But make no mistake: the *Patchak* decision is direct evidence of the judicially-created *Carcieri* crisis. In other words, *Patchak* is but a symptom of the larger *Carcieri* problem—a problem which can only be solved by Congress.

* * *

Through our prior testimony, we warned this Committee, and this Congress, that *Patchak* and a significant number of other cases were moving through the federal courts and the administrative process where *Carcieri* is being used to harass Indian tribes and delay trust land acquisitions.

In several cases, the claims are being expanded beyond the question of whether an Indian tribe was “under Federal jurisdiction” in 1934. For example, there are now challenges as to whether a tribe also had to be “federally recognized” in 1934; whether the tribe even existed as an Indian tribe in 1934; or whether the tribe today is even “Indian” and should have ever been federally recognized.

Thus the Report, together with the testimony from the three hearings, captures the real costs of *Carcieri*. As the Report concludes:

Although the *Carcieri* decision involved only one tribe, the devastating effects resulting from the decision impact all tribes. Failing to enact S. 676 will deprive tribal governments of important rights and benefits that the IRA intended to provide; including the ability to restore and protect their homelands through the acquisition of tribal trust lands and the potential to develop and sustain tribal economic development through the creation of businesses that provide jobs and other economic opportunities for tribal members and residents of the surrounding communities.

Passage of S. 676 will cost taxpayers nothing.



The costs to taxpayers if S. 676 is not passed will, however, continue to grow. Congressional inaction has also generated significant costs of time and money for the federal government and tribes—merely to defend the challenges brought as a result of *Carcieri*. Expending time and resources examining issues that have already been settled is a misallocation of federal and tribal resources that could be used to promote and develop tribal self-determination and self-government.

Conclusion

At the time of this writing, Congress is out of session and the national elections are just a couple of weeks away. There is great hope for a clean Carieri-fix during the lame-duck session, but Indian country has had more than its fair share of disappointment. As reported in the media recently, Chairman Akaka released a press-release stating:

I am determined to pass a *Carcieri*-fix this Congress. I have been working hard for the past nineteen months to make sure that my Senate colleagues understand that a *Carcieri*-fix is the number one priority of tribes, the Administration, and the Committee on Indian Affairs. I am happy to report that Majority Leader Reid has committed to working with me to ensure that the *Carcieri*-fix is enacted in this Congress—and signed into law by President Obama.

Unfortunately, even successful passage of a *Carcieri* fix would not address all the new problems caused by the Roberts' Court in *Patchak*. Congress must eventually act to secure the Secretary's ability to carry out his federal responsibilities under the IRA without having to defend his administrative judgment to neighboring landowners up to six years after a decision was made. 🌀

CASE UPDATES

Tribal Supreme Court Project

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 October 2012 Term of the Supreme Court began recently and will require close attention from tribal leaders and tribal attorneys. The fate of the Cobell Settlement rests with the Supreme



Court this term, as several Indian account holders have challenged the fairness of the settlement. A significant number of parties opposed to Indian tribes have also petitioned the Supreme Court for review, and we anticipate that others will petition in the near future. Cases challenging tribal sovereign immunity are prominent, and we have attached an addendum of Carcieri-related litigation which is a continuing significant concern. As usual, the Project encourages tribes to look for ways to minimize or avoid federal litigation as the current makeup of the Supreme Court is not generally supportive of tribal government issues.

As always, the individualized facts and legal issues of each case will drive litigation strategy and the Court's decisions.

Petitions For A Writ Of Certiorari Granted

At present, one Indian law case has been granted review by the Court during the October Term 2012, and an important voting rights case with a tribal party will also be heard:

United States v. Samish Indian Nation (No. 11-1448) – On October 9, 2012, the Court issued an order granting the petition of the United States, vacating the judgment with respect to all matters relating to the Samish Tribe's Revenue Sharing Act claim, and remanding the case to the U.S. Court of Appeals for the Federal Circuit with instructions to dismiss that claim as moot. This case arose from a series of suits brought by the Samish Tribe to obtain treaty rights and statutory benefits from the United States as a result of its efforts to be a "federally recognized" Indian tribe which began in 1972. The U.S. had sought review by the Court of a decision by the Federal Circuit which held that the Samish Tribe may pursue its claims for money damages under the State and Local Fiscal Assistance Act of 1972 (Revenue Sharing Act). The Federal Circuit had held that the Revenue Sharing Act is a "money mandating statute" and is not limited by operation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

Arizona v. Arizona Inter Tribal Council Et. Al. (No. 12-71) – On October 15, 2012, the Supreme Court agreed to decide whether Arizona law may require proof of citizenship in order to register to vote in federal elections. Although this is not a federal Indian law case and many other parties are involved, the Arizona Inter Tribal Council is a named lead party and it is likely that the voting rights of American Indians will feature prominently in the briefing. The Supreme Court will hear arguments in the case early next year, and the law will remain suspended in the meantime.

The state law requires prospective voters to prove citizenship by providing documents such as birth certificates, passports or Arizona drivers' licenses. The federal law, the National Voter Registration Act of 1993, allows voters to register using a federal form where each voter certifies U.S. citizenship. The question for the Supreme Court is whether the state is entitled to supple-

ment federal voter registration requirements with its own requirements. The Tribal Supreme Court Project and NCAI are considering the development of an amicus brief.

Petitions For A Writ Of Certiorari Pending

Several petitions for a writ of certiorari have been filed in Indian law and Indian law-related cases and are pending before the Court.

Adoptive Couple v. Baby Girl, Birth Father And Cherokee Nation (No. 12-399) – On October 1, 2012, a non-Indian couple filed a petition seeking review of a decision by the South Carolina Supreme Court which affirmed the state family court denying the adoption and requiring the adoptive parents to transfer the child to the biological father who is a member of the Cherokee Nation. The South Carolina Supreme Court held: (1) the Indian Child Welfare Act (ICWA) extends greater rights to unwed fathers than state law in the determination of whether an unwed father is a "parent"; and (2) state courts must consider the heightened federal requirements to terminate parental rights as to ICWA parents. The briefs in opposition are due on October 31, 2012. The Project has coordinated with the father's attorneys and the Cherokee Nation attorneys on the development of the certiorari opposition brief.

Furry v. Miccosukee Tribe (No. 12-376) – On September 21, 2012, Mr. Furry, as personal representative of the estate for his daughter, filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that his wrongful death suit against the Miccosukee Tribe was barred by the doctrine of tribal sovereign immunity. Mr. Furry's complaint alleged that the Miccosukee Tribe violated 18 U.S.C. § 1161 and Florida's dram shop law by knowingly serving excessive amounts of alcohol to his daughter, who drove while intoxicated, and ended up in a fatal head-on collision with another vehicle. The Tribe's brief in opposition is due on October 26, 2012.

Contour Spa At Hard Rock v. Seminole Tribe Of Florida (No. 12-372) – On September 21, 2012, Contour Spa filed a petition seeking review of a decision by the U.S. Court of Appeals for the Eleventh Circuit which held that its breach-of-lease suit against the Seminole Tribe is barred by the doctrine of tribal sovereign immunity. ▶

The Eleventh Circuit rejected the arguments of Contour Spa that the Tribe's immunity was: (1) voluntarily waived by the Tribe in its removal of the case from state to federal court; (2) impliedly waived under the Indian Civil Rights Act; and (3) foreclosed under the principles of equitable estoppel. The Tribe's brief in opposition is due on October 25, 2012.

Goodbear v. Cobell (No. 12-355) – On September 19, 2012, Carol Eve Good Bear, Charles Colombe and Mary Aurella Johns, members of the Cobell plaintiffs' class, filed a petition seeking review of the decision of the U.S. Court of Appeals for the D.C. Circuit which affirmed the district court's judgment approving the Cobell class action settlement agreement. The petitioners are challenging the lower court's finding of "commonality" in certifying the class certification and its ruling that no opt out procedure was required for the mandatory Historical Accounting Class within the settlement. The U.S. filed its response brief on October 12, 2012, and the Cobell brief in opposition is due on October 22, 2012.

Young v. Fitzpatrick (No. 11-1485) – On June 4, 2012, Mr. Young, as representative of the estate of his brother, filed a petition seeking review of an unpublished decision by the Washington State Court of Appeals which held that, based on the doctrine of tribal sovereign immunity, state courts do not have subject matter jurisdiction over claims against tribal police officers acting in their official capacity on tribal lands. The tribal police officers filed their brief in opposition on July 9, 2012, and the petition was scheduled for conference on September 24, 2012. On October 1, 2012, the court issued a CVSG, inviting the Solicitor General to file a brief expressing the views of the United States.

Marceau v. Blackfeet Housing Authority (No. 12-278) – On August 26, 2012, tribal members who had bought or leased defective homes built under the auspices of the U.S. Department of Housing and Urban Development ("HUD") by the Blackfeet Housing Authority filed a second petition seeking review of a decision by the U.S. Court of Appeals for the Ninth Circuit which affirmed the district court decision dismissing their Administrative Procedure Act claims relating to the construction of homes using wooden

foundations based on the six year statute of limitations. The Ninth Circuit also found that HUD is only legally required to respond to requests for repairs from the Tribe's housing authority, not from individual homeowners. The Ninth Circuit did not revisit its previous decision that a trust relationship was not created by HUD's involvement in the construction of the homes. The U.S. and Tribe's briefs in opposition are due on November 5, 2012.

New 49'ers, Inc. v. Karuk Tribe Of California (No. 12-289) – On August 29, 2012, the New 49'ers, a recreational mining company which owns and leases numerous mining claims in and around the Klamath and Six Rivers National Forests, filed a petition seeking review of an en banc decision of the U.S. Court of Appeals for the Ninth Circuit which held that U.S. Forest Service violated the Endangered Species Act ("ESA") by not consulting with the appropriate wildlife agencies before allowing suction dredge mining activities to proceed under a Notice of Intent ("NOI") in Coho salmon critical habitat within the Klamath National Forest. On September 12, 2012, the Tribe filed a waiver of its right to respond, and the petition was scheduled for conference on October 5, 2012. However, on October 4, 2012, the Court extended the time to file a response to November 8, 2012, as amicus briefs in support of the petition were filed by the Northwest Mining Association and the Eastern Oregon Mining Association.

Oravec v. Cole (No 12-222) – On August 20, 2012, Mr. Oravec, an agent with the Federal Bureau of Investigation, filed a petition seeking review of a decision by the U.S. Circuit Court of Appeals for the Ninth Circuit which held that he was not entitled to qualified immunity in a *Bivens* action brought by the relatives of two deceased Native American men. In their amended complaint, the relatives alleged that Mr. Oravec violated their right to equal protection when he failed to conduct a sufficiently thorough investigation of the deaths out of an alleged animus toward Native Americans. The relatives alleged that Mr. Oravec provided the family with less investigatory services than he would have proved to a non-Native family. No brief in opposition has been filed, and the petition has been scheduled for conference on October 26, 2012. 🌸

National Indian Law Library

Justice Through Knowledge!

The National Indian Law Library needs your financial support

You probably are familiar with the great work NARF does in court rooms and the halls of Congress relating to tribal recognition, treaty enforcement, trust fund settlements, NAGPRA, and more. Did you know that NARF also is the go-to resource for legal research in Indian law?

Advance Justice through Knowledge! Support the National Indian Law Library!

Historically, Indian people and advocates fighting for indigenous rights have found themselves limited by their ability to access relevant federal, state, and tribal Indian law resources. In direct response to this challenge, the National Indian Law Library (NILL) was established over forty years ago as a core part of the Native American Rights Fund (NARF). Today the library continues to serve as an essential resource for those working to advance Native American justice. As the only public library devoted to Indian law, we supply much-needed access to Indian law research, news updates, and tribal law documents. To extend the tradition of free public access to these services we ask for your financial support.

Each year, NILL responds to more than 1,000 individual research requests and receives several hundred thousand visits to its online resources. Whether it's through updates to the online *Guide to Indian Child Welfare* or additions to the extensive tribal law collection, NILL is committed to providing visitors with resources that are not available anywhere else! Additionally, our *Indian Law Bulletins* and news blog deliver timely updates about developments in Indian law and ensure that you have the information you need to fight for indigenous rights. However, we are not



resting on our laurels; we are constantly improving our online resources and access to tribal law materials. With your support we plan to develop an innovative and valuable community based wiki-source for Indian law information and greatly broaden the scope of the Tribal Law gateway.

The bulletins, research resources, extensive catalog, and personal one-on-one librarian assistance can only exist with your help. The National Indian Law Library operates on an annual budget of \$190,000—primarily from the donations of concerned and motivated individuals, firms, businesses, and tribes who recognize NARF and NILL as indispensable resources for Native American justice.

By donating, you stand with the National Indian Law Library in its effort to fight injustice through access to knowledge. You help ensure that the library continues 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 www.narf.org/nill/donate now 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 who 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 future of all Native Americans.

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 2012 fiscal year – October 1, 2011 to September 30, 2012:

- Aleut Corporation
- Arctic Slope Regional Corporation
- Asa'carsarmiut Tribal Council
- Bad River Band of Lake Superior Chippewa Indians
- Bering Straits Native Corporation
- Bristol Bay Native Corporation
- Colorado River Indian Tribes
- Confederated Salish & Kootenai Tribes
- Confederated Tribes of Siletz Indians
- Cook Inlet Regional, Inc.
- Curyung Tribal Council
- Forest County Potawatomi Foundation
- Hualapai Tribe
- Keweenaw Bay Indian Community
- Koniag, Inc.
- Lac Courte Oreilles Band of Ojibwe
- Minnesota Chippewa Tribe
- Muckleshoot Tribe
- Native Village of Eyak
- Native Village of Port Lions
- Nez Perce Tribe
- Old Harbor Tribal Council
- Pechanga Band of Luiseño Indians
- Poarch Band of Creek Indians
- Pokagon Band of Potawatomi Indians
- Pueblo of Pojoaque
- Puyallup Tribe of Indians
- Rincon Band of Luiseño Mission Indians
- San Manuel Band of Mission Indians
- Santee Sioux Tribe
- Seminole Tribe of Florida
- Seven Cedars Casino/Jamestown S'Klallam
- Shakopee Mdewakanton Sioux Community
- Spokane Tribe
- Suquamish Indian Tribe
- Sycuan Band of Kumeyaay
- Tanana Chiefs Conference
- Tulalip Tribes
- Tule River Indian Tribe
- Ute Mountain Ute 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.

For the past 42 years, 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.

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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

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.

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, 1514 P Street, NW (Rear) Suite D, Washington, D.C. 20005 (202-785-4166) (FAX 202-822-0068).

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