



Legal Review

NATIVE AMERICAN RIGHTS FUND

Voting Rights Protected for Native Voters in North Dakota

Earlier this year, the Spirit Lake Nation, the Standing Rock Sioux Tribe, the individual plaintiffs, and the North Dakota Secretary of State in *Brakebill, et. al v. Jaeger and Spirit Lake et. al v. Jaeger* announced an agreement to settle the two federal cases and address issues related to using tribal IDs for voting in North Dakota. The parties are working together to ensure that Native Americans who are qualified electors will be able to vote in 2020 and beyond.

“This fight has been ongoing for over four years, and we are delighted to come to an agreement that protects Native voters,” said Native American Rights Fund (NARF) Staff Attorney Matthew Campbell, who represented plaintiffs in both cases. “It has always been our goal to ensure that every Native person in North Dakota has an equal opportunity to vote, and we have achieved that today.”

Not Able to Vote

In 2014, veteran and Turtle Mountain Band of Chippewa Indians member Elvis Norquay went to his local polling station to vote as usual. Unlike years past, that year Mr. Norquay was turned away from the polls and not allowed to vote. The reason given was that he did not have an ID that met the state’s new restrictive specifications. The law required voters to present identification listing their residential street address. Like many of his neighbors in the Turtle Mountain community, Mr. Norquay did not have that.

The new street address requirement was a substantial hurdle for many Native Americans because North Dakota has a broken addressing



NARF attorneys with plaintiff Elvis Norquay at the US Court of Appeals in September 2018.

system. The state had failed to assign residential street addresses to many tribal reservation homes. Many Native Americans living on reservations do not have or do not know their residential addresses. Tribal citizens often must use PO Boxes to conduct their affairs. Therefore, they are more likely to have an ID that lists a PO Box rather than the residential address that was required by the North Dakota voter ID law.

Also, the unique burdens faced by Native ▶

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Americans in North Dakota—including a severe housing shortage—also mean that tribal members are much more likely to have recently moved or be homeless or precariously housed. As a result, determining members’ residential addresses and providing them with up-to-date documentation can require the investment of time and resources.

The state legislature knew this was the case. They knew that their voting ID law would disproportionately affect Native voters, but they still passed the law. In response, in January 2016, eight Native Americans, represented by NARF, Tom Dickson, and Rich de Bodo filed suit to block the discriminatory law.

Judge Daniel L. Hovland of the US District Court for the District of North Dakota held that the law likely violated the US Constitution because it disproportionately kept Native Americans from voting. He required the state provide a fail-safe mechanism in the 2016 general election for those without IDs. Hovland wrote, “...it is clear that a safety net is needed for those voters who simply

cannot obtain a qualifying voter ID with reasonable effort.”

In light of this defeat, the state legislature amended their voter ID law in early 2017, but the new law failed to include meaningful protections for voters’ rights. The new law continued to put North Dakota beyond the norms of voter ID laws and violated the constitutional rights of the state’s citizens. Just like North Dakota’s previous law, this law made it harder for some citizens—specifically Native American citizens—to exercise their right to vote.

On October 30, 2018, NARF along with the Campaign Legal Center, Robins Kaplan LLP, and Cohen Milstein Sellers and Toll PLLC filed a separate lawsuit on behalf of the Spirit Lake Nation and six individual plaintiffs to ensure that eligible Native American voters residing on reservations in North Dakota would be able to cast a ballot in the 2018 midterm elections and in all future elections. The Standing Rock Sioux Tribe, with approximately 5,868 residents of voting-age that could be affected by the law, joined the Spirit Lake case in early 2019.

Despite a nationwide outcry during the 2018 election cycle, North Dakota's discriminatory voter ID law remained on the books. During the 2018 election, the Spirit Lake Nation and the Standing Rock Sioux tribe expended substantial resources to ensure that their tribal members would have the identification necessary to vote, including shouldering the task of identifying and providing residential street addresses for their members.

Fixing the System

Finally, in early 2020 and with a trial date looming, the North Dakota Secretary of State agreed to settle the two lawsuits. At an in-person mediation at the North Dakota capitol, the Secretary agreed to take steps to ensure that eligible Native American voters are not disenfranchised due to the restrictive voter ID law.

In addition to recognizing tribal IDs and supplemental documentation issued to tribal citizens, the Secretary agreed to enter into a binding consent decree, enforced by a federal court order. That decree will ensure that Native American voters who do not have or do not know their residential street address are able to vote. The Secretary of State agreed to work with the Department of Transportation and tribal governments to distribute free, non-driver, photo IDs on every reservation statewide within 30 days of future statewide elections.

Importantly, in the 2020 election, Native American voters will have the option to mark their residence on a map, a process that is commonly used by voters in other states. The burden will then shift to the state to verify the residential street addresses for these voters, to provide that information to the voter and the tribe, and to ensure those voters' ballots are counted.

Finally, the court-ordered consent decree will include details about what the state must do to educate the public and train poll workers on the new procedures, as well as measures to ensure the state is complying with its obligations under the agreement.



These actions will help ensure that Native American voters living in North Dakota will have their voices heard. Also, the steps that North Dakota is taking today can serve as an example for the rest of the country going forward as we all work to ensure that all eligible voters have equal access to the polls and our democracy. Voting should never be contingent on criteria like home ownership, access to government services, or income. 🌸

CASE UPDATES

Montana Tribes and Native Orgs File Suit to Protect Voters

This March, the Native American Rights Fund, American Civil Liberties Union, and ACLU of Montana challenged a Montana law that severely restricts Native Americans' access to the ballot.

The lawsuit was brought on behalf of the Assiniboine & Sioux Tribes of Fort Peck, Blackfeet Nation, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Crow Tribe, and Fort Belknap Indian Community as well as Western Native Voice and Montana Native Vote (Native American-led organizations focused on getting out the vote and increasing civic participation in Native American communities). They are challenging the so-called Montana Ballot Interference Prevention ACT (BIPA).

Voting has never been easy for Native Americans living on rural reservations, which are often geographically isolated, with limited access to postal service and transportation.

"BIPA ignores the everyday realities that face Native American communities. It is not reasonable to expect voters to drive an hour to drop off their ballot, so collecting ballots in reservation communities just makes sense. Criminalizing this behavior is unfair to Native American voters and does nothing to solve the real problem of mail not being picked up and delivered to Native homes," said NARF Staff Attorney Jacqueline De León.

In a state where the majority of individuals vote by mail, rural tribal communities work with get-out-the-vote organizers who collect and transport ballots to election offices that would otherwise be inaccessible. These ballot collection efforts are often the only way Native Americans can access the vote. BIPA would effectively end this practice, disenfranchising Native American voters en masse. For example:

- BIPA imposes severe restrictions on who can collect ballots and how many ballots can be collected. Get-out-the-vote organizers would previously



Photo of MT capitol. Photo credit: gillfoto / CC BY-SA

collect up to 100 ballots each, but are now restricted to just six ballots per collector.

- Under BIPA, bringing ballots to the post office for relatives or neighbors could result in a \$500 fine per ballot.
- Compliance with BIPA is complicated by unclear definitions about who exactly can collect a ballot. Organizers may or may not fit into its provisions, depending on which interpretation law enforcement officials adopt.
- BIPA's provisions are incompatible with Native family structures and relationships. BIPA defines a "family member" as "an individual who is related to the voter by blood, marriage, adoption, or legal guardianship." But that definition does not reflect family relationships in tribal communities, where family includes members of the extended community.

Western Native Voice and Montana Native Vote work to promote civic participation in the Native American community. On average, they collect over 85 ballots per organizer, which has been critical to ensuring people on reservations can exercise their fundamental right to vote. Under BIPA, however, Western Native Voice and Montana Native Vote would be able to assist a mere fraction of the voters it assisted in 2018.

“A main tenet of our organization’s principles is to encourage civic engagement,” said Marci McLean, executive director of Western Native Voice. “We developed a robust get-out-the-vote program and coupled it with an official ballot collection program. We have organizers on every reservation in the state, and in urban areas. For Native voters living on a reservation, this law directly harms our ability to participate in our democracy.”

The complaint charges BIPA with violating the

voting and due process rights of individuals living on reservations, as well as the free speech and association rights of Western Native Voice and Montana Native Vote as they engage in ballot collection on reservations.

The lawsuit, *Western Native Voice v. Stapleton*, was filed in the Montana 13th Judicial District Court in Yellowstone County. Complaint available at https://www.narf.org/nill/documents/20200312complaint_wnv_v_stapleton.pdf

Little Shell Tribe of Chippewa Indians Obtains Federal Recognition

Congratulations to our long-time client, the Little Shell Tribe of Chippewa Indians of Montana who, after more than a hundred years of battling the federal government for recognition, were finally legislatively recognized by Congress.

The Little Shell Tribe has waged a two-front war to obtain recognition—one front in Congress and one in the administrative process. For decades, NARF has represented the Tribe in the administrative process and gathered crucial information used in the Congressional effort, which was led by Josh Clause (Clause Law P.L.L.C.). The two efforts complemented each other, and we are thrilled that we were able to support the Tribe’s ultimate success.

In 1978, the Department of the Interior established regulations governing the federal recognition of Indian tribes. The Little Shell Tribe sent a letter in 1978 indicating an intent to proceed under the regulations. The process required extensive historical, genealogical, and anthropological evidence of a tribe’s continuous existence as a governing body over time. Little Shell submitted over 60,000 pages of documentation in support of its recognition. NARF represented the tribe throughout these years’ of effort. Thousands of attorney hours were invested in fulfilling the regulations and experts were hired to collect and confirm the required anthropological evidence.



With the collected evidence in-hand, the Tribe received a favorable preliminary finding in support of its federal recognition. However, subsequently, that finding was reversed—even though no adverse evidence had been presented. To accommodate a convoluted and broken administrative process, extensive revisions were made to the recognition regulations. The Tribe has been working to resubmit under the new regulations.

Thankfully, given the recent Congressional action, that effort is no longer necessary. NARF congratulates the Tribe on its success and thanks them for the opportunity to serve them for these many decades.

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 and the Native American Rights Fund. The Project was formed in 2001 in response to a series of US 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 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 (<https://sct.narf.org>).

The oral argument in *McGirt v. Oklahoma* (18-9526), which was scheduled for April 21, 2020, has been postponed due to the COVID-19 pandemic. It will be argued telephonically on May 11, 2020. Both Muscogee (Creek) Nation and the United States were granted argument time, just as they were in *Sharp v. Murphy*.

PETITIONS FOR A WRIT OF CERTIORARI GRANTED

The Court has granted review in two Indian law cases that have not been decided by the Court:

MCGIRT V. OKLAHOMA (18-9526)

Petitioner: Jimcy McGirt

Petition Granted: December 13, 2019

Subject Matter: Reservation Disestablishment

Lower Court Decision: The Oklahoma Court of Criminal Appeals affirmed a lower court's denial of Mr. McGirt's post-conviction relief petition.

Recent Activity: Respondent's brief filed

Upcoming Activity: Oral argument scheduled for April 21, 2020, was postponed due to the COVID-19 pandemic. The Court announced argument will take place telephonically on May 11, 2020.



Petitioner Jimcy McGirt, a citizen of Seminole Nation and Muscogee (Creek) Nation, was convicted of several felony sex crimes in Oklahoma state court. He sought post-conviction relief in state court, asserting that the crimes occurred within the boundaries of the Muscogee (Creek) Reservation and, therefore, the State had no jurisdiction over him for the offenses. The state district court denied his petition, and the Oklahoma Court of Criminal Appeals affirmed.

SHARP V. MURPHY (17-1107)

Petitioner: State of Oklahoma

Petition Granted: May 21, 2018

Subject Matter: Reservation Disestablishment

Lower Court Decision: On a petition challenging his detention by the State of Oklahoma as improper, the Tenth Circuit Court of Appeals held that the Muscogee (Creek) Nation reservation was not disestablished and, consequently, that the State of Oklahoma lacked jurisdiction to prosecute and convict Mr. Murphy, an Indian, for a crime that occurred in Indian country.

Recent Activity: Argument held November 27, 2018. Re-argument was ordered in June 2019.

Upcoming Activity: Re-argument (no date set)

Patrick Murphy, a citizen of the Muscogee (Creek) Nation, was convicted of murder in Oklahoma



State court. After exhausting his appeals, he filed a habeas corpus petition in federal district court asserting that, because the crime occurred within the Muscogee (Creek) Nation's reservation boundaries and because he is Indian, the state court had no jurisdiction. The federal district court denied his petition and the Tenth Circuit reversed. The Tenth Circuit used the three-factor Solem reservation disestablishment analysis and found that Congress did not disestablish the reservation, and that statutes and allotment agreements showed that "Congress recognized the existence of the Creek Nation's borders." Likewise, the court held that the historical evidence indicated neither a Congressional intent to disestablish the reservation, nor a contemporaneous understanding by Congress that it had disestablished the reservation. Accordingly, the court concluded that Mr. Murphy's state conviction and death sentence were invalid

because the crime occurred in Indian Country and the accused was Indian.

The Supreme Court heard oral argument on November 27, 2018, and, on December 4, 2018, it ordered supplemental briefing by the parties, the Solicitor General, and the Muscogee (Creek) Nation addressing two questions: (1) whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status, and (2) whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U.S.C. §1151(a). On June 27, 2019, the Court announced that the case would be scheduled for re-argument in the October Term 2019, but no date has been set.



CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

As always, NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to the NCAI Fund, attn: Kurt Sodee, 1516 P Street, NW, Washington, DC 20005. Please contact us if you

have any questions or if we can be of assistance: Derrick Beetso, NCAI General Counsel, 202-630-0318, dbeetso@ncai.org; or Joel West Williams, NARF Senior Staff Attorney, 202-785-4166, williams@narf.org. 🇺🇸



National Indian Law Library (NILL)

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Each week, the National Indian Law Library (NILL) provides free updates on Indian law through the Indian Law Bulletins. More than seven thousand patrons receive the free weekly updates by email, while others access them through the NILL website or NARF's Facebook page. The Indian Law Bulletins are the only regularly published updates on Indian law covering tribal courts, federal and state courts, federal agencies, US legislation, law review articles, and news.

Most of the materials that are covered in the bulletins are available online. If the item you would like to see is not available online, you can contact the library (www.narf.org/nill/asknill.html) to request a copy of the item as well as additional information on your topic.

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select only the most timely and relevant information to include in the Indian Law Bulletins. You can feel confident that the information you receive includes what you need to know to stay up-to-date. This current awareness service is provided free of charge.

Newest Bulletin Covers Tribal Court Opinions

Since 2017, the Indian Law Bulletins have included select coverage of tribal courts. Free access to tribal court opinions research has been a challenge to Indian law researchers, but subscribers to the Indian Law Bulletins can learn about selected opinions published by tribal courts, some of which are found only on the NILL website.

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CALL 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. 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, voting rights, tribal water rights, Indian Child Welfare Act, and tribal sovereignty issues, NARF looks to the tribes to provide the 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.

We encourage other tribes and organizations 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 in the 2020 fiscal year (October 1, 2019 to March 31, 2020):

Affiliated Tribes of Northwest Indians
 Agua Caliente Band of Cahuilla Indians
 Ak-Chin Indian Community
 AmerindRisk
 Chickasaw Nation
 Mooretown Rancheria
 Muckleshoot Tribe

Redding Rancheria
 Rosebud Sioux Tribe
 San Manuel Band of Mission Indians
 Seminole Tribe of Florida
 United Tribes of Bristol Bay
 Yocha Dehe Wintun Nation



THE NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund (NARF) is the oldest and largest nonprofit legal organization defending and promoting the legal rights of Indian people on issues essential to their tribal sovereignty, natural resources, and human rights.

Since 1970, we have provided legal advice and representation to Native American tribes and organizations on issues of major importance. Our early work was instrumental in establishing the field of Indian law. NARF—when very few would—steadfastly took stands for Indian religious freedom and sacred places, subsistence hunting and fishing rights, as well as basic human and civil rights. We continue to take on complex, time-consuming cases that others avoid, such as government accountability, climate change, and the education of our children. We have assisted more than 300 tribal nations with critical issues that go to the heart of who we are as sovereign nations.

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

- Preserve tribal existence
- Protect tribal natural resources
- Promote Native American human rights
- Hold governments accountable to Native Americans
- Develop Indian law and educate the public about Indian rights, laws, and issues

Under the priority to **preserve tribal existence**, NARF works to construct the foundations that empower tribes to live according to their traditions, enforce their treaty rights, insure their independence on reservations, and protect their sovereignty.

An adequate land base and control over natural resources are central components of economic self-sufficiency and self-determination, and are vital to the very existence of tribes. Thus, much of NARF's work involves **protecting tribal natural resources**.

Although basic human rights are considered a universal and inalienable entitlement, Native Americans face the 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 **promoting human rights**, NARF strives to enforce and strengthen laws that protect the rights of Native Americans to practice their traditional religion, use their languages, and 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 laws and regulations applicable to Indian peoples. Because such laws impact virtually every aspect of tribal life, NARF is committed to **holding governments accountable** to Native Americans.

Developing 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 NARF's main office at 1506 Broadway, Boulder, CO 80302. NARF's clients are expected to pay what they can toward the costs of legal representation. 🌟

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.

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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.

www.narf.org

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