



# NATIONAL CONGRESS OF AMERICAN INDIANS

January 22, 2007

Office of the Clerk  
U.S. Court of Appeals for the Ninth Circuit  
95 Seventh Street  
San Francisco, CA 94103-1526

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RE: *Gros Ventre Tribe v. United States*, No. 04-36167

Pursuant to Circuit Advisory Committee Note to Rule 29-1, Rules of the U.S. Circuit Court of Appeals for the Ninth Circuit, comes now Amicus National Congress of American Indians to file this letter in support of the Gros Ventre Tribe, the Assiniboine Tribe and the Fort Belknap Indian Community Council and to join in the legal arguments set forth in their Combined Petition for Rehearing and Petition for Rehearing En Banc (“Petition for Rehearing”).

Established in 1944, the National Congress of American Indians (“NCAI”) is the oldest and largest American Indian organization, representing more than 250 Indian tribes and Alaska Native villages and is dedicated to protecting the rights and improving the welfare of American Indians. The member tribes of NCAI represent a cross-section of Indian tribes from around the country. Great variations exist among them, including with respect to their land and economic bases, populations and histories. All, however, seek to protect their rights secured under treaties, agreements, statutes and other laws, and to preserve the unique government-to-government trust relationship they have with the United States.

*Gros Ventre Tribe v. United States*, No. 04-36167, involves questions of exceptional importance to NCAI, its member tribes and the 440 plus Indian tribes located within the jurisdiction of the U.S. Circuit Court of Appeals for the Ninth Circuit. Specifically, this case offers an opportunity for an en banc panel of this Court to: (1) clarify the canons of construction and the appropriate standard of law the lower courts should be applying to a breach by the United States of its specific fiduciary duties to Indian tribes secured under treaties, agreements, statutes, or other law; (2) carefully reconsider the standard being applied by the lower courts to claims by Indian tribes seeking equitable relief (versus money damages) for a breach by the United States of its general trust obligations; and (3) resolve an intra-circuit conflict in relation to

the question of whether the Administrative Procedure Act's ("APA") waiver of sovereign immunity under § 702 is limited by the other provisions of the APA, including § 704's "final agency action" requirement.

In particular, the Court should carefully reconsider the specific fiduciary duty which arises under the treaties, agreements, statutes and other law in this case. Contrary to the findings of the three-judge panel, the duty the Tribes seek to impose upon the United States is not a duty "to regulate third parties or non-tribal resources for the benefit of the Tribe," or a duty "to manage non-tribal property for the benefit of the tribes." *Gros Ventre Tribe v. United States*, No. 04-36167, slip op. at 18471 and 18485. Rather, the duty the Tribes seek to impose upon the United States is the duty to protect the Tribes' federally reserved Indian water rights, recognized and affirmed by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908), which ensured that the Tribes were provided full beneficial use of all waters flowing to and entering the Fort Belknap Indian Reservation as provided by the 1888 "Grinnell" Agreement. *See* Petition for Rehearing at 7-8. In this case the United States has permitted an upstream mine located on federal land to poison the waters of the reservation with cyanide, to the great detriment of the flora and fauna on the reservation and the health of tribal members. This inquiry should include consideration of whether the three-judge panel properly applied the canons of treaty construction which direct courts to fully consider the history of treaty negotiations and to "interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *see also* Petition for Rehearing at 9-13. If allowed to stand, the three-judge panel decision brings into question the United States' obligations to Indian tribes under hundreds of similar treaties, and therefore constitutes a question of exceptional importance warranting en banc consideration.

The Court should also take this opportunity to clarify the nature and scope of the United States' general trust obligation to Indian tribes when no specific fiduciary duty is present and to reconsider the standard of law being applied by the lower courts to determine whether the federal government has fulfilled its general trust obligation under the treaties, statutes, agreements or other laws. In this case, the three-judge panel relied on *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9<sup>th</sup> Cir. 1998), to hold that the federal trust obligation is satisfied by a federal agency by its mere compliance with general regulations and statutes. This standard renders the general trust obligation of the United States to the 440 Indian tribes within the jurisdiction of this Court a nullity. *See* Petition for Rehearing at 13-18.

Given the questions of exceptional importance in this case, NCAI also believes that the Court would benefit from additional briefing on the merits of these issues. *See* Petition for Rehearing at 5, n2. Therefore, Amicus NCAI respectfully request that the Court grant the petition and rehear this case en banc in order to clarify the law governing the United States' trust obligations to all Indian tribes.

Respectfully,

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## CERTIFICATE OF SERVICE

I hereby certify that on January \_\_, 2007, I served two true and correct copies of this Letter in Support of Plaintiffs-Appellants' Combined Petition for Rehearing and Petition for Rehearing En Banc, via Federal Express, overnight delivery, to:

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