

*Honoring Nations Presents*



**Constitutions  
& Fundamental  
Governmental  
Reform**

**Lessons in Excellence in the  
Governance of American Indian Nations**



*HONORING NATIONS PRESENTS*

**Excellence in Fundamental Governmental Reform**

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# Osage Nation Governmental Reform Initiative, 2008

## Osage Nation

*At the turn of the 20th century, the U.S. government abolished the 1881 Osage Nation Constitution and imposed rules for land ownership and citizenship. Many Osage citizens were disenfranchised and the Tribal Council was granted only limited powers, leading to years of weak government, corruption, and turmoil. Over 100 years later, the Osage Government Reform Initiative began the task of designing a new government that would better represent and serve all Osages. As a result of the Initiative, the Osage Nation adopted a new constitution in June 2006. Written by the Osage people, it has brought back into the tribal community the thousands of citizens who had once been excluded.*

### **A Powerless Government**

Located in northeast Oklahoma, the Osage people live on the only reservation in the state. In the late 1800s, Osage leaders purchased their territory in fee title and the people enacted the 1881 Osage Constitution. This created a tripartite government, complete with checks and balances. By 1894, large quantities of oil had been discovered on the Osage lands. In the ensuing scramble to control these valuable resources, the U.S. government abolished the tribe's constitution and federal officials assumed the right to determine who was and was not an Osage citizen.

In 1906, the federal Osage Allotment Act divided the reservation lands into 2,229 individual lots known as "headrights." The US government recognized the headrights holders, or shareholders, as the only official Osage citizens. The imposed rules stated that only these 2,229 individuals had the right to vote, participate in tribal business, and receive mineral royalties. Citizenship rights could only be inherited when the shareholder died, and could be passed down to non-Osages. This gave rise to the shocking Osage Massacres in the 1920s, when non-Osage criminals murdered several Osage to gain their valuable headrights. By the end of the 20th century, around 4,000 Osage could vote in Tribal Council elections, even though approximately 17,000 people held federal Certificates of Indian Blood proving that they were of Osage decent.

Poorly adapted to the needs of the community, the Tribal Council was limited to signing lease agreements, passing nonbinding resolutions, and filling Council vacancies – all subject to approval by the federal government. The Tribal Council was elected only by the headright holders, who sometimes even had multiple votes. Over two-thirds of the Osage people were excluded. There was also no independent judiciary. Without an effective and representative government, the Osage struggled. The political situation led to instability, divided families, cultural loss, mismanagement, and frequent lawsuits. Complicating matters, although the Osage government was not meeting the Nation's needs, legal barriers and vested interests made it almost impossible to change the system. Throughout the 20th century, repeated attempts at reform failed.

### **Designing a New Constitution**

The 31st Osage Tribal Council that came into office in 2002 was determined to end a century of conflict and division by reforming the Nation's deeply flawed government. To do this, leaders pressured the U.S. federal government to pass Public Law 108-431, which affirmed the inherent right of the Nation to decide its own membership and its own form of government.

With federal legislation in place, the legal obstacles to governmental reform were removed. The Tribal Council created an independent Osage Reform Commission to lead the search for a new way to govern the Nation. The Commission was composed of 10 appointees, carefully chosen to



represent the entire Osage community. Each was a shareholder, yet none were closely related by blood or marriage to any member of the Tribal Council.

The Reform Commission had two clear goals: “to listen to the Osage people and form a government that would be a product of the Osage people themselves.” The Commission held town hall meetings in all Osage communities in Oklahoma, as well as in cities with large numbers of Osage people in California and Texas. Every individual with an Osage Certificate of Indian Blood was mailed a survey and was encouraged to vote on a series of key questions in a referendum. This was the first time all Osage aged 18 and over had been able to vote on the Nation’s interests since 1900. At the Osage “Sovereignty and Independence Day” celebration held to kick off the reform process, one Osage citizen reflected on the community’s excitement: “We are becoming involved in a Nation. That is what we are now, we are a Nation.”

The reform initiative culminated in a new Osage National Constitution, ratified by an overwhelming two-thirds majority of the vote in a constitutional referendum of all Osages. Echoing the Osage-designed 1881 Constitution, the new government has separate executive, legislative, and judicial branches. By Osage design, the traditional Osage clan system is insulated from electoral politics, and vice versa. The new citizenship rules allow all Osage people descended from the 1906 membership rolls to become full citizens of the Nation. On June 5, 2006, governmental authority transferred from the Osage Tribal Council to the Osage Nation Constitutional Government, and a Chief, Assistant Chief, and 12-member Congress were elected by all Osages who chose to vote.

### **Building a Nation**

One of the great tragedies of American Indian history in the U.S. is the willful destruction of indigenous governments. To try to “civilize” Indian tribes, the federal government imposed rules without regard for the political systems that had evolved over thousands of years to fit each distinct Native nation. As a result, many tribes still struggle to function with governments that do not match their cultural values of who should be in charge and how their government should run. These weak administrations are not up to the task of building healthy, self-sufficient, and successful Native nations.

When the 1881 Osage Constitution was abolished, the Osage Nation was denied two fundamental rights: the right to determine its citizenship and the right to determine its governing structure. The current Principal Chief notes that the new 2006 system was “an intuitive, community-based resistance to the federal domination.” But changing the existing government was not an easy task. Many Osage citizens benefited from the existing system, and there was vocal opposition from some to making any changes. Tribal leaders, themselves, had to show the courage to expand voting rights and possibly dilute their power base.

The Osage were able to move this difficult initiative forward by making sure the reform had a broad base of community support. The leaders had a vision of a government designed by the citizens rather than legal and academic experts. Choosing shareholders as reform Commissioners allowed current voting Osage to steer the process and gave it credibility. The Reform Commission, in turn, did everything it could to engage all the people. At every step of drafting the constitution, all Osage were invited to give their ideas and opinions. The process was difficult and setbacks occurred along the way. In fact, the Reform Commission almost disbanded when the first town hall meetings strained its internal trust and cohesion. Through the entire process of reform, however, the Commissioners sustained a deep and shared commitment: No matter how difficult the process, the new government would be a government of and for all Osages. In the end, the overwhelming



vote in favor of the new Constitution proved them right.

Since the Osage Reform Initiative, more than 11,000 previously disenfranchised Osages have enrolled and acquired full rights of citizenship in the Nation. A newly naturalized Osage citizen expresses what this restored political power means: “Voting, for me, will be an honor because now I have a voice in how things are conducted in the tribe... I think this is a real step forward.” Instead of answering to federal officials, Osage politicians and officials now answer to Osages. In fact, the new system encourages citizens to have their voices heard and to influence policy decisions by allowing for all Osages to participate in Congressional committee meetings.

Although it has only been in existence a few short years, the new Osage Nation government has already shown that a representative and effective political system makes a big difference in the lives of its citizens. The Nation has gone from employing 300 to 1800 people, its revenues have tripled, and almost all debt has been paid down. The government has passed laws to encourage economic development and promote Osage control over the Nation’s territory. The Osage Congress has also begun work on setting the Nation’s priorities for the next twenty-five years. This strategic plan will be shaped by the Osage people using what was learned during the Reform Initiative. Now that the Osage have an Osage-designed and legitimate government, the Nation once again has the tools it needs to harness the vision and energy of its citizens. The result does not mean the absence of debate, struggle and conflict. But the result means that the Osage will address the challenges of the future from a foundation built by Osage.

### **Bringing the Lessons Home**

Throwing off more than a century of rules imposed by outsiders, the Osage people have taken control of defining who is an Osage citizen and put in place a governing structure that makes sense to the Osage community. By exhibiting integrity and courage in pursuit of a new Osage system of self-government, and going to great lengths to consult and make sure the new government would reflect what the people wanted and would respect, the Reform Initiative has brought sovereignty to the Osage people. The Reform Initiative has built a strong foundation grounded in continued citizen participation. Today, the Osage Nation embraces all of its citizens and places in their hands a government that is a product of their own efforts, ideas, and dreams.

### **Lessons in Nation Building:**

- Inclusive, community-driven processes that build trust and ownership are critical for successful constitutional reform.
- The right to self-design the system of government is the most basic right of nationhood. A nation’s right to determine who its citizens are is a central power of self-governance.
- Throughout the constitutional reform process, an independent and autonomous reform commission is best positioned to identify and implement the governance aspirations of the nation.



## Northwest Intertribal Court System, 2003

**Confederated Tribes of the Chehalis Reservation, Jamestown S'Klallam Tribe, Muckleshoot Tribe, Port Gamble S'Klallam Tribe, Sauk-Suiattle Tribe, Shoalwater Bay Tribe, Skokomish Tribe, Stillaguamish Tribe, Tulalip Tribes**

*Courts are cornerstones of sovereign governments: they define and uphold the laws through which nations govern themselves. Too often, however, the absence or weakness of tribal courts means tribal citizens must rely on state courts that are ill-equipped to serve their needs. In 1979, a consortium of small tribes whose limited resources precluded the establishment of independent tribal courts formed the Northwest Intertribal Court System (NICS). NICS has demonstrated its commitment to protecting and advancing tribal sovereignty for over two decades by providing its member tribes with adjudication services and helping them to establish their own courts that promote fair, equitable, and uniform justice.*

Salmon fishing in the coastal rivers of western Washington was so critical to the cultures and economies of local Indian tribes that these tribes carefully preserved their rights to fish in the treaties they signed with the federal government in 1854 and 1855. These rights were worn away over the next century as non-Native fishers with increasingly sophisticated equipment began to dominate the tribes' traditional fishing grounds. In the 1960s, Indian activism drew attention to this crisis, and, in 1974, Judge George Boldt issued his decision in *US v. Washington* recognizing the right of western Washington tribes to 50 percent of the State's anadromous fish. The Boldt decision, as it is commonly known, was broadly celebrated by the tribes for reestablishing a long-ignored right, but the decision presented the tribes with an immediate institutional challenge: the ability to adjudicate tribal enforcement of the fishing regulations necessary to turn their treaty rights into a sustained and well-managed harvest of salmon. Quite a few of the Washington tribes felt unprepared to meet the challenge.

The reality was that many western Washington tribes simply did not have the resources to maintain their own court systems. Some of these tribes are extremely small, consisting of a couple hundred citizens. Many of them could not provide the necessary funding or professional staff to operate independent tribal courts. And, yet, because the tribes lacked robust dispute resolution mechanisms, tribal citizens were regularly forced into state courts for the resolution of critical tribal disputes, Boldt-related and not. There, they encountered state laws that were ill-equipped to address the unique customs, cultures, and economic realities of their lives. Moreover, a continuing reliance on state, rather than tribal, arbitration was eroding the tribes' ability to implement and adjudicate important tribal policies. In sum, weak tribal court systems were an obstacle to essential self-governing power.

In 1979, a consortium of thirteen western Washington tribes created the Northwest Intertribal Court System (NICS), an organization that supports tribes in establishing tribal courts. NICS is an innovative, non-profit organization that relies on federal and tribal funding, (72 percent and 28 percent, respectively) and is overseen by a governing board comprised of representatives from each of its seven member tribes. In addition to its member tribes, NICS also serves two affiliate tribes and a handful of tribes that contract NICS' services. Although NICS was established in response to the Boldt decision, it now supports tribal courts in their handling of a full array of civil and criminal matters, including major crimes, misdemeanors, civil suits, infractions, and a host of legal issues related to hunting and fishing offenses, child dependencies, guardianships, adoptions, gambling, zoning and land use, environmental protection, and tribal employment.

NICS is divided into several units that meet these tribal needs. One group of such units serves to provide operational support to their members. For example, the Judicial Unit hires full-time, part-time,



and contract judges to preside over tribal courts (currently three staff judges and two contract judges). The NICS Appellate Unit, established in 1987, recruits and trains a roster of appellate judges (currently thirty) who are impaneled on three-member appellate benches that hear roughly thirty cases a year. The Appellate Unit also publishes a compilation of its decisions in the biennial Appellate Reporter. The NICS Prosecutorial Unit consists of prosecutors, paralegals, and assistants who work closely with tribal law enforcement leaders. These services facilitate tribal courts' effective adjudication of tribal law.

Another group of NICS' units provides assistance in the development of tribal law and codes. Its Code Development Unit consists of a code developer, a full-time legal assistant, a law clerk, and several contract code writers. This unit works closely with tribal committees to draft codes and regulations for each member tribe that reflect the unique culture, values, and traditions of the people to whom the law will apply. Without customized codes, courts could not adjudicate tribal policies justly. The Technology Unit has supported the code-developing mandate of NICS since 2001 by converting tribal codes and court forms into electronic documents that are easily accessible to member tribes' judges, prosecutors, attorneys, and staff. This electronic information also helps member tribes' courts work as efficiently as their state and federal counterparts.

Since 1979, NICS member tribes have experienced great success in reclaiming jurisdiction over civil and criminal matters affecting their communities. The Prosecutorial Unit is currently handling 1,910 cases that might otherwise be in state courts. Through NICS support, the Tulalip Tribes have undertaken a retrocession of PL 280 criminal jurisdiction from Washington. Since retrocession, the number of criminal complaints filed in Tulalip's tribal court has risen dramatically from 56 in 2001 to 262 in 2002. Without the support of NICS, this major reassertion of tribal sovereignty would not have been possible: the Tribes would simply not have had the capacity to take up this new caseload. Other member tribes are experiencing similar empowerment. In the past year, the caseload for some tribes has increased 100 percent as they have assumed responsibility for increasingly numerous and complex legal issues.

As NICS member tribes assert and expand their jurisdictional authority, they strengthen their status as self-governing sovereigns. The essence of sovereignty is the right to establish, implement, and interpret the laws by which a community is governed. Although states share some civic goals with tribes, non-Indian and Indian values, norms, and cultures differ in substantial ways. Inherently, the policies of the states and the tribes must differ, too. NICS member tribes know from experience that establishing, implementing, and interpreting laws in ways that reflect the unique cultural values of their communities inspires increased compliance among tribal citizens and greater chances of success in implementation.

Legitimate concerns have been expressed over the whether a tribe particularly a small tribe can pool its talents and resources with others without forfeiting a measure of control. NICS' member tribes' experiences, however, suggests that creating a shared system for their courts as an important, and bold, exercise of their sovereignty. They contend that their decision to pool resources is, in itself, a sovereign choice and, further, that pooling of resources allows them to sustain courts that they would not otherwise have. The administration of justice has a steep learning curve and requires substantial investments in recording precedents, codes, and processes. NICS member tribes share the knowledge, funds, and, most importantly, the human capital necessary to administer justice effectively and efficiently.

Critically, NICS never loses sight of the tribes' specific circumstances. Deference to tribal norms is an important element of NICS organizational culture. Its staff members describe themselves as guests of member courts. This attitude is a natural outgrowth of the NICS organization: NICS governing board is made up of tribal representatives who establish its policy and select its administrators and judges; NICS staff salaries are paid by a combination of federal tribal priority allocations, pass through self-



governance funds, Administration for Native Americans grants, and enhanced services contracts. Individual tribal governments retain, with the full support of NICS staff, the power to make critical decisions about their jurisdiction. The member tribes choose which of the program services they will accept, which judges can be impaneled on their appellate courts, and what issues their codes will address. All of these features of member tribes' participation reinforce NICS's deference to individual tribal cultures.

To be certain, neutrality and competence are critical features of the NICS arrangement. The challenge of developing, organizing, and funding effective and fair tribal courts is well known in Indian Country, yet the NICS member tribes have recognized the critical importance of neutral dispute resolution for the health of Indian nations and built an arrangement that provides it. A tribal court similar to the ones supported by NICS, whose basis of authority derives from tribal values and laws, allows tribes to adjudicate disputes within a system of justice created on their own terms. A tribal court can legitimately adjudicate constitutional crises and thereby strengthen the legitimacy of tribal institutions of government. A competent criminal court can help maintain law and order and provide the basis for retrocession of tribal criminal jurisdiction. Though NICS is very clear that they only staff the court and are not the court per se, the existence of the NICS organization helps buffer the court proceedings from political pressure. The judge is contracted and paid by the NICS, and the tribes each have an opportunity to accept or reject judges on the rosters annually. In sum, NICS tribal courts, like effective tribal courts elsewhere, strengthen tribal sovereignty and advance their citizens' well-being.

Finally, the tribes' experience within the Northwest Intertribal Court System demonstrates that effective tribal courts may emerge out of the consortium form. Several of NICS past member tribes the Lummi, Suquamish, Nisqually, and Squaxin Island tribes now have entirely autonomous tribal courts. This independence is consistent with the NICS mission of assisting tribes in the exercise of their sovereignty. So, too, however, is the continuing cooperative pooling of resources that empowers its current member tribes. Choosing to establish a tribal court autonomous or shared is a vital step toward enhanced tribal sovereignty.

### **Lessons in Nation Building:**

- Creating a court-services consortium can be an act of tribal sovereignty. The courts can remain tribal organizations operating under a tribe's own laws, codes, cultural prerogatives, and procedures. It is not necessary for the consortium to supply the court per se, but simply support a tribal court with contracted staff.
- Pooling tribal resources (including judges, prosecutors, code-writing staff, and so on) to create a court-services consortium can benefit from economies of scale and thereby overcome the cost obstacles to creating a critical institution necessary for tribal success: an independent court.
- A consortium can be established in a way that allows its member tribes to decrease their reliance on the consortium as they gradually develop their own courts. This fluid process helps ensure that the consortium remains responsive to the needs of its member tribes.



## **Elders Cultural Advisory Council, 2000**

### **San Carlos Apache Tribe**

*Formed by Tribal resolution in 1993, the San Carlos Elders Cultural Advisory Council advises the Tribal Council on matters of culture, conducts consultations with off-reservation entities regarding cultural matters and administers the cultural preservation activities of the Tribe. As a source of traditional wisdom, the Elders Council plays an active role in the Tribe's governance by providing insight on diverse issues, including resource management, leadership responsibilities, environmental issues, cultural practices and repatriation.*

Traditional Apache culture is based on an intimate spiritual connection with and knowledge of the natural world. The elders believe that such connection and knowledge are necessary to respect one's self, other humans and all living things. Having spent most of their lives outdoors and being taught by the wisdom of their elders, they embrace and encourage self-reliance and discourage dependence on others. For today's elders, to be Apache is to be able to think for one's self, to know the rich history of their peoples, to speak the Native tongue, to participate in ceremonies, and to act responsibly and respectfully towards other humans and the natural world.

The fast-paced world of automobiles, fast food, video games and television has taken its toll on traditional Apache culture. Of course, all cultures change over time. But from the viewpoint of the San Carlos Apache elders, the changes in their community have been particularly worrisome. The youth no longer eat the traditional foods that once kept Apache fit and strong, and obesity runs rampant among the more than 10,000 Indians who call the San Carlos Reservation home. Traditional knowledge about plants and animals is being lost as the young spend much of their time indoors watching television or playing video games. Dependence on federal government goods and services has become an acceptable way to live. Interest in the ancient traditions and ceremonies is slowly being replaced by interest in activities and values associated with the dominant non-Indian culture. In short, despite a long and rich history of tribal strength and pride, the elders are upset about what the Apache people are becoming.

Furthermore, the elders at San Carlos are concerned about questions of governance. As the keepers of traditional knowledge and history, the elders remember – or have been told about – a time when leaders emerged because of their abilities, wisdom, achievements and public-minded character. They recall a time when important decisions were made with “one community mind” and in the best long-term interest of the nation – when political corruption simply was not tolerated. Indeed, the well-documented recent political history of the San Carlos Apache is nothing the elders can be proud of. Throughout the 1990s, San Carlos suffered from debilitating political instability, which has manifested in protests, takeovers, and demonstrations. Financial mismanagement has led to large governmental deficits, and the government is recognized more for its turmoil than for its ability to provide essential governmental services. Governmental ineffectiveness has left the reservation with a weak economy and poor social conditions that are akin to those found in many third-world countries.

In the midst of such cultural, political and economic difficulties lies a kernel of hope and inspiration – the San Carlos Elders Cultural Advisory Council (ECAC). Formed in November 1993 by Tribal Council resolution, the all-volunteer ECAC was established to advise the Tribal Council on cultural matters, to carry out consultations with off-reservation entities on culturally related matters, and to execute various projects related to cultural preservation. It is comprised of elders



from the reservation's four districts and meets every two to four months.

While much of the Council's initial work was concentrated on ethnobotany (and, particularly, on recording the names, uses and appropriate treatment of culturally important plant life), today it engages in a much broader range of activities. The ECAC regularly gives its traditional views to the Tribal Council and other decision makers on a wide variety of matters. The ECAC has provided guidance on tribal environmental policies, including Mexican spotted owl surveys and reservation-based mining; on cultural policies such as the inappropriate use of depictions of the Gaan (Mountain Spirits); and on guidelines for non-tribal researchers. It carries out cultural consultations with off-reservation entities, especially federal and state agencies that administer lands in traditional Apache areas, and advises the Bureau of Indian Affairs on the location of graves and sacred sites that should not be disturbed by tree harvesting. The ECAC also helps administer and oversee cultural preservation activities. For example, it is involved in activities related to the Native American Graves Protection and Repatriation Act (NAGPRA) and the Western Apache Place Names Project, and it helps collect traditional information on the natural world to be used in reservation school curriculum.

In engaging in these many comment and consultation processes, the ECAC has achieved important successes. When the elders felt that tribal citizens were being disrespectful and wasteful in how they cut and disposed of shade material used for camps in the Sunrise Dances, they published an instructive article in the Apache Moccasin on the proper collection, use and disposal procedures. The elders have also provided traditional guidance on penal approaches, on the appropriate way for the Tribe to develop a funeral home, and on the appropriateness of a motorcross race sponsored by the Tribe's casino. Much of this advice has been followed. When the Tonto National Forest imposed permit fees for tribal citizens gathering acorns in traditional hunting areas, the ECAC worked with the Tribal Council to get a tribal resolution passed, confronted the U.S. Forest Service and succeeded in changing the policy.

Moreover, the ECAC has been remarkably successful in its NAGPRA and cultural preservation work. The ECAC took the initiative to form a Western Apache coalition, comprised of the five Western Apache tribes, in order to deal with NAGPRA-related issues in a coordinated fashion. Not only has this coalition strengthened the tribes' claims – to date, over 70 objects have been repatriated to San Carlos alone – but it has helped tribes throughout Indian Country by establishing precedents in justifications of claims. The coalition was also instrumental in convincing the U.S. National Forest Service to give the San Francisco Peaks (a mountain held sacred to the Apaches) special protection and helped to place Mt. Graham, another sacred mountain, on the National Register of Historic Places.

In all of its activities, the ECAC consults its membership – who range in age from mid-40s to late-90s – and, as necessary, other elders respected for their wisdom and knowledge of Apache language, culture and outdoor living skills. While the ECAC operates strictly by consensus, the administrative functions are conducted by a coordinator and a facilitator who jointly organize the meetings, visit home-bound elders or medicine people, and transcribe conversations into letters, memoranda and articles. To ensure its long-term sustainability, the ECAC retains younger elders within its membership, who are mentored by older members. Both to smooth this administrative process and to create a record of its decisions, the ECAC oftentimes expresses its views or provides guidance in the form of letters, which are sent to department heads or the elected tribal leadership.

Compelled by their belief that the traditional Apache way of life is the most responsible, beautiful



and proper way for Apaches to live, the ECAC has also become an important, and much needed, check on government. The ECAC is deeply committed to making the tribal government more responsible and accountable by giving the traditional perspective an institutionalized and formal voice that the politicians cannot avoid. Although their views are not always welcome, the ECAC members feel strongly that leaders need the guidance of their elders to properly and wisely carry out their tremendous responsibilities to the people and to the land.

Several examples demonstrate the ECAC's interventions in support of improved governance. When the Tribal Council decided to renew a contract with a company that was buying springwater from a sacred spring on the reservation without community consent, the ECAC vigorously reprimanded the Tribal Council. In 1999, when the Tribe's financial mismanagement became especially bad, the ECAC met and wrote a letter to the Tribal Council reminding them of the proper ways leaders ought to behave. At the same time, the elders agreed that ECAC would set an example of self-reliance by foregoing tribal monies in favor of operating as a self-sustaining volunteer entity. Commenting on Apache leadership, the elders believe:

The values of self-reliance, respect and deep connection to nature are central to traditional Apache life, and are underlying themes in all ECAC activities, consultations and messages. These qualities, along with a great traditional knowledge help make a whole, successful person. A person with these qualities will be a good leader. The ECAC tries to bring these qualities and traditional knowledge to their own leaders in order for them to more effectively care for the people and their land.

The ECAC stands out on a number of dimensions. As an all-volunteer group, the program operates with minimal funding, it is replicable any place a dedicated elder could be recruited as coordinator, and it is a significant contribution at a reservation that suffers from dire political problems. Around Indian Country, elders are consulted for NAGPRA repatriations, for guidance in tribal policy, for assistance in cultural revitalization, and for wisdom in family life. In many instances, however, these efforts are ad hoc and yield only a small portion of the benefit that arises from paying consistent attention to elders' vision and values. The ECAC at San Carlos, in contrast, is a refreshing and instructive example of how elders can play a critical role in advancing the social, economic, political and spiritual health of an Indian nation. The knowledge they possess is essential to the long-term health of the Apache people and the environment, and the perspectives they bring to questions of governance are invaluable. The ECAC serves as a conscience for the San Carlos Apache Tribe by tapping, discussing and then articulating its members' understanding of Apache values. The Elders Cultural Advisory Council is a keeper and carrier of traditional Apache wisdom whose actions and advice will benefit the Tribe for generations to come.

### **Lessons in Nation Building:**

- As keepers of traditional wisdom, elders can and should play an active role in tribal governmental affairs, including cultural matters, leadership responsibilities and language preservation.
- One way to utilize the knowledge of elders is to formally recognize a council of elders that is empowered to make recommendations, provide guidance and advise tribal decision makers.
- In some cases, elders groups from different reservations or Indian nations should work together in order to maximize effectiveness when dealing with other governments (both tribal and non-tribal).



## Choctaw Tribal Court System, 2005

### Mississippi Band of Choctaw Indians

*The Mississippi Band of Choctaw Indians has created a vibrant economy, and one of the underpinnings of its success is its court system. Organized independently of elected leadership, the court provides an arena for the fair, reliable resolution of disputes. Intent on not becoming just another adversarial court of law, the Choctaw Tribal Court strives to incorporate traditional Choctaw values into its law and practices, to help both victims and offenders, and to pay particular attention to tribal youth. In so doing, the Mississippi Choctaw have developed a comprehensive judicial system that responds to the needs of all its citizens.*

The Mississippi Band of Choctaw's economic track record is widely viewed as the standard of excellence against which other Native nations measure their success. Over the last thirty years, the Band has deliberately engaged in business development through partnerships, tribal enterprise, and entrepreneurship that has transformed the community. In 1994, the already-thriving economy was given a further boost when the Band government entered the gaming market; today the Mississippi Choctaw own two casino-resorts in addition to their many other joint ventures and enterprises.

With this dramatic increase in economic activity, growing pains were inevitable. In particular, increased interactions between the tribal government, on- and off-reservation businesses, consumers, the Band's several thousand employees, and its 10,000 citizens heightened the demand for robust and capable tribal institutions for dispute resolution. The Mississippi Band of Choctaw has long had a tribal court, but by 1997 it became apparent that changes were needed if the court system was to be able to efficiently and effectively manage its ever-growing caseload (including disputes which ranged from minor traffic infractions to complex commercial litigation). Strain on the system threatened to compromise the integrity of the Band's judicial system and its commitment to Choctaw principles of justice. As a result, tribal leaders decided that the tribal court system needed to grow but to do so in a way that was consistent with self-determination.

Critically, these changes were initiated from a position of strength. Shortly after the Mississippi Band of Choctaw organized under a constitution in 1974, the tribal council passed a statute establishing the court, creating balanced oversight by both constitutional branches of government (the executive and legislative branches). Specifically, tribal judges must meet the qualifications laid out in the Choctaw Tribal Code. The Band's Chief has authority to nominate candidates for the bench, but the Tribal Council Committee on Judicial Affairs and Law Enforcement approves them, and the entire council must confirm a candidate with a two-thirds vote. Both tribal judges and court personnel are further bound by statutory Rules of Ethics and Conduct. Together, these provisions help ensure the tribal court's independence and make it possible for the court to serve the justice and related economic and social development needs of the nation.

Building on this base, opportunities were identified for improvement across all components of the court system. The goal was to become a full-service court system capable of handling a wide variety of cases effectively, to deepen the system's grounding in Choctaw practices and



law, and to grow the pool of prospective court personnel, so that the supply of Choctaw court services could keep pace with rising demand. Specifically, they created a four-branch court system (civil, criminal, peacemaker, and youth divisions), initiated a video history project focusing on Choctaw law, and began a summer internship program.

Prior to the 1997 court reform, the Mississippi Band of Choctaw Tribal Court had three divisions, youth (handling juvenile offender and child welfare issues), civil, and criminal. The heavy caseload, particularly of misdemeanor, youth, and family-related disputes, slowed the process of justice. By creating a new division and adding diversion programs, the Peacemaker Court, can streamline operations, better match court personnel and programs from other departments (like Behavioral Health and Victims Services) to case types, and apply Choctaw law in a culturally relevant way for the parties appearing before the court. The Peacemaker Court is available to parties who agree to handle their dispute through a traditional process in accordance with the traditional Choctaw values of cohesion, cooperation, and peace as opposed to the more Western and adversarial process available in the tribe's civil and criminal courts. Teen Court makes it possible for many of the less complicated juvenile offenses and disputes that would normally be heard in formal Youth Court to be heard by a panel of the defendant's peers, further spreading the caseload and training youth in the practice of Choctaw law.

The Teen Court is a particularly notable aspect of the Choctaw court system, as it not only facilitates smoother Youth Court operations but also results in peer-to-peer community building. For this upcoming generation of tribal citizens (and especially for prior offenders who complete their sentences and join the Teen Court), interactions with peers through court service generates a set of common experiences and a shared sense of accomplishment. In the words of court personnel, having teens that might not otherwise interact come together to decide on appropriate sentencing helps break down walls between youth with different backgrounds, goals, and experiences, heading off divisions that might otherwise persist through adulthood. Youth community building also occurs through mentoring. As new youth join the Teen Court, the more senior members mentor them, stressing the idea that Teen Court proceedings can genuinely affect the lives of the youth offenders (who are also their peers).

Other measures initiated by the Choctaw court system include the Indigenous Law Library and the Summer Internship Program. The library project compiles video-taped interviews with the nation's elders, generating and archiving records of traditional values. The tapes are referenced by the Court and content is applied for judicial direction. In 2003 the internship program provided the opportunity for citizens who are currently enrolled in law school to shadow clerks. In 2004, intern work expanded to all departments, including the judicial branch. The internship program included Teen Court participants in 2005.

Evidence that this multi-part court system is working comes from many quarters. Critically, Choctaw citizens are pleased with their better-functioning court, stressing that the structure leads to the timely adjudication of cases. While it does not speak directly to the rapidity at which cases pass through the system, data on the number of cases heard suggest that Mississippi Band of Choctaw Tribal Court is operating at a very high level: from September 2003 to October 2004, the court (with a staff of 25) heard over 9,400 cases (4,077 criminal cases, 2,831 civil cases, 2,201 juvenile cases, 306 peacemaker resolutions, and 14 Supreme



Court cases). The decisions of non-tribal courts provide impressive additional evidence. In 2002 the United States Court of Appeals ruled in favor of tribal jurisdiction in the case *Choctaw Tribe v. Bank One*. More recently, the local county court system referred a proceeding to the Band's Peacemaker Court. Both decisions implicitly acknowledge the Choctaw Tribal Court's capacity and quality. But perhaps most striking is the evidence provided by ongoing economic development. As shown in research conducted by the Harvard Project on American Indian Economic Development and others, a fair, effective, and independent dispute resolution system is critical to economic growth: Mississippi Choctaw's continued economic boom would not be possible without a well-functioning tribal court.

Choctaw Self-Determination is the motto on tribal government employees' business cards and the guiding principle behind all the tribal government initiatives. The nation puts the motto into practice by making decisions, funding activities, and governing its territory on Choctaw terms. Likewise, the reorganization of tribal court system in 1997 reflects this overall philosophy, as changes equipped the court to deal with any disputes arising under tribal jurisdiction. Today, and as a result of those changes, the Mississippi Choctaw judicial system is able to meet the complex needs of the nation. Through its structure and rulings, the court is able provide assurance to business interests, tribal citizens and families, and neighboring communities that the Band and its judicial institutions are fair and equitable to all. And, it is a fundamental, everyday mechanism by which the nation demonstrates its ability and authority to advance tribal self-determination and development. The Tribal Court System of the Mississippi Band of Choctaw Indians stands as a testament to the necessary power that consistent, competent, and culturally appropriate justice systems provide to support and promote a Native nation's community and economy.

### **Lessons in Nation Building:**

- The Mississippi Choctaw Tribal Court System embodies the Band's desire to adjudicate disputes in self-determined and culturally appropriate ways. Such justice systems complement tribal norms and values and reinforce a Native nation's overall efforts to deliver effective governance.
- Progressive tribal justice systems are able to adapt to the evolving demands of their communities while still protecting and promoting tribal values and customs. This competence and flexibility is especially important as Native nation governments increase the scope of self-determination and self-government.
- As Native nation economies continue to grow and expand, disputes arising from increased economic interaction will inevitably occur. The Mississippi Choctaw experience reinforces the finding that providing unbiased and effective dispute resolution helps secure development within tribal jurisdictions.



## **Akimel O’odham/Pee-Posh Youth Council, 2002**

### **Gila River Indian Community**

*Chartered under the laws of the Gila River Indian Community, the Akimel O’odham/Pee-Posh Youth Council gives youth a formal voice in tribal governance and prepares the next generation of leadership. Comprised of twenty young leaders between the ages of fourteen and twenty-one, who are elected by their peers to serve two-year terms, the Youth Council advises the Tribal Government on a diverse range of issues including youth delinquency, substance abuse, and teen pregnancy. In addition, the Youth Council engages tribal youth in a variety of initiatives that enhance understanding of and participation in tribal public service.*

Of the nearly 16,985 tribal citizens in the Gila River Indian Community, half are under the age of eighteen. Like Indian youth elsewhere, Gila River youth are challenged by a host of problems. Gang violence, drug and alcohol abuse, and teen pregnancy are particularly acute on the 372,000-acre reservation, which borders the cities of Tempe, Phoenix, Mesa, and Chandler. Until the late 1980s, however, Gila River youth had little or no say in crafting policy responses to these and other matters affecting their population. In fact, many youth were disillusioned with or simply didn’t understand their tribal government. This was the result, in part, of the government’s own attitude about youth and their role in the Community. As one leader acknowledged, “the tribal government has always focused on the elders, but youth and their issues were historically overlooked.”

Frustrated by their lack of power and influence in Community affairs, several Gila River youth organized the Akimel O’odham/Pee-Posh Youth Council (Youth Council) in 1987. Formed as a small, grassroots organization, the Youth Council sought to establish a voice for youth within the tribal government and to increase the level of communication and respect between adults and youth. Organizers quickly discovered, however, that the successful pursuit of these goals would require the tribal government’s involvement. Consequently, they began soliciting the support of tribal leaders, educators, and government officials. It was an effort that paid off quickly: In October 1988, the Youth Council was officially chartered under the laws of the Gila River Indian Community. The youth were granted a formal voice in tribal government.

Today, the Youth Council consists of twenty representatives between the ages of fourteen and twenty-one. Two youth represent each of the Community’s seven districts and six youth represent the Gila River Indian Community at large. To become a member of the Youth Council, interested individuals must complete a rigorous and competitive nomination, application, and election process. Youth Council members serve two-year terms, which are staggered to help ensure continuity in leadership and membership. To enhance their effectiveness as representatives of the Gila River Indian Community, Youth Council members undergo substantial leadership training in public speaking, writing, teambuilding, self-esteem development, parliamentary procedures, and conflict resolution. Youth Council members also abide by a strict, self-defined and self-administered code of ethics that is intended to hold members to standards commensurate with the leadership positions that they occupy.

As elected representatives who serve the interest of their peers, Youth Council members possess significant public service responsibilities. They communicate regularly with other



youths to identify and understand the myriad of issues, concerns, and challenges that children, teens, and young adults encounter. They formulate policy stances and debate them with their fellow Youth Council members at regularly scheduled meetings, and they present their ideas and policy solutions to the Community's elected leadership and other tribal government officials. In addition to these responsibilities, Youth Council members are expected to organize and participate in Community activities and events. For instance, the Youth Council provides technical assistance to other youth organizations on the reservation, and its members regularly volunteer at school and social events. Moreover, members of the Youth Council participate in local, state, regional, and national conferences and seminars as presenters, moderators, and panelists on issues pertaining to youth and youth/adult relationships. Although these responsibilities are extremely time-consuming, Youth Council members embrace them with a profound sense of duty and appreciation.

Perhaps not surprisingly, the Youth Council has a long list of accomplishments spanning its fourteen years of existence. The sheer number of participants and beneficiaries is impressive. Since the Council's creation, more than three hundred youths have served on the Youth Council itself, while more than eight thousand youth and Community members have been involved in its program activities. The Youth Council has coordinated fifteen leadership conferences, conducted a series of youth leadership development seminars, represented youth in dozens of conferences, and provided substantive input on a wide range of issues to tribal decision makers.

A number of examples highlight the depth and breadth of the Youth Council's achievements. In 1993, the Youth Council spearheaded Kids Voting, a program that prepares youth for an active civic life by allowing them to "vote" on tribal election days. Remarkably, tribal leaders credit a 7 percent increase in adult voter turnout to the program, which, by design, locates the mock polls next to the real polls and, thus, encourages greater adult voting. In 1996, the Youth Council also spearheaded the development of the first Boys and Girls Club serving a Native American community in Arizona, a particularly important achievement given the high rates of delinquency on the reservation and among American Indians in Arizona generally. In 1998, the Youth Council was awarded a grant from the Close Up Foundation to develop a program that annually brings together hundreds of Native youth to explore citizens' rights in and responsibilities for tribal government. In 2001, the Youth Council's continuing advocacy for a teen court met with success when the Judicial Branch of the Gila River Indian Community received a grant from the US Department of Justice to establish a teen court aimed at reducing, controlling, and preventing crime among Gila River Indian youth.

Importantly, the Akimel O'odham/Pee-Posh Youth Council is producing and grooming leaders. A testament to the quality training they receive, Youth Council members have been elected to serve on numerous national boards and commissions including, among others, the National Congress of American Indians Youth Commission, the US Department of Transportation's National Organizations for Youth Safety, and the Millennium Young People's Congress. Members have testified before Committees in the US Senate and US House of Representatives, met with policymakers to lobby on issues of importance, and attended White House functions. The fact that approximately 90 percent of former Youth Council members return to the Community to work and live after receiving their education is a powerful



reminder of how important it is to involve youth in civic life. Former Youth Council members have assumed leadership positions with the Gila River Indian Community Tribal Council, Gila River Boys and Girls Clubs, Gila River Health Care Corporation, and Gila River Gaming Enterprises. In preparing youth for future roles as participants, leaders, and citizens of tribal government, the Youth Council has identified an effective way to bring about positive, permanent change within the Gila River Indian Community.

The accomplishments of the Akimel O’odham/Pee-Posh Youth Council have earned them widespread admiration and respect on and off-reservation. Three factors appear to be powerful indicators of the Youth Council’s success. The first is the Community’s recognition that youth can and should play a critical role in tribal governance. By encouraging and fostering youth participation in tribal government, the Youth Council has made use of a valuable and previously untapped resource. For many, the Youth Council provides compelling proof that youth can be articulate and persuasive spokespeople by informing tribal, state, and national leaders about issues affecting them, by providing guidance and feedback in policy formation, and finally, by encouraging community members to learn how they can hold elected leaders and governments accountable. The future of Indian nations to be self-governing depends upon knowledgeable, motivated, and skilled youth to assume leadership positions.

A second factor that bolsters the Youth Council’s effectiveness is the seriousness with which its members and the tribal government take the Youth Council’s responsibilities. In fact, the tribal government treats the Youth Council like any other tribal government program or department. Last year, for example, the Gila River Indian Community Tribal Council directed the Youth Council to justify its budget in great detail. While members of the Youth Council were frustrated that they had to spend so much time defending activities that they felt should be beyond question or reproach, they also knew that they were being held accountable as a legitimate governing institution. Similarly, members of the Youth Council take their roles and responsibilities as Community leaders seriously. Members commit to a code of ethics that strictly forbids substance use, gang participation, and inappropriate behavior (including inappropriate dress). Although violations are rare, members who break these standards are sanctioned swiftly and sternly by their peers. The code of ethics also is reinforced by a shared demand for excellence: by setting the bar high for their own participation, the Youth Council proves to its members and others that they can live exemplary lives. Adults in the Community have taken notice. The Akimel O’odham/Pee-Posh Youth Council’s code of ethics already is being replicated within the Gila River Indian Community tribal government.

A third factor that undergirds the Youth Council’s success is its commitment to investing in itself. These investments take many forms. For one, the Youth Council’s robust, well-documented, and periodically updated by-laws show that it pays attention to its own governance. Among these by-laws are staggered election terms (only a few positions come up for election each year), an organizational attribute that many tribal governments throughout Indian Country do not enjoy. Training in culturally appropriate forms of governance is another investment the Youth Council makes. While elements of this “cultural match” are obvious—the Youth Council president calls meetings to order with a gavel made of cactus, as did historical Akimel O’odham and Pee-Posh leaders—other elements run deeper. The Youth Council’s structure itself is significant: the Council’s representation by district reflects the fact



that district allegiances are noticeably strong in the Community. These innovations are hallmarks of good governance.

The youthfulness of Native America is one of its most striking facts. The median age of the American Indian population is twenty-two and the youth population is growing faster than any other segment of Indian society. Investments in youth development are essential. Appropriately, tribal efforts towards youth development frequently focus on at-risk youth. Such efforts, however, should not eclipse the need for tribes to invest in youth who exhibit leadership potential. Indian nations cannot afford to lose the interest of their youth, especially if they are to be successful in sustaining self-determination. Although the Akimel O'odham/Pee-Posh Youth Council was formed, in large part, to offer youth a voice in addressing at-risk youth issues, the program is geared toward empowering and training future leaders. As tribes consider how to build the next generation of leaders, the Akimel O'odham/Pee-Posh Youth Council offers an excellent model of a youth development program that recognizes and facilitates the significant role youth may play in nation building.

**Lessons in Nation Building:**

- Statements about the importance of tribal youth should be backed by concrete investments in their development. For example, tribal leaders can facilitate the establishment of youth councils; fund, host, and participate in youth activities and events; and encourage youth to participate in national organizations. These and other investments inspire youth to make a positive difference in the community and build up the pool of future leaders.
- With appropriate training and organizational support, youth can make meaningful contributions to tribal governance. They can offer input into the issues affecting their peers, provide guidance and feedback in policy formation, and serve as effective spokespeople for the tribe.
- Like tribal governments, tribal youth councils require good organization. By-laws, staggered terms, a code of ethics, election rules, and clear processes for decision making are institutional ingredients for success.



# Old Law & New Law Together, 1999

## Navajo Nation

For hundreds of years, the Navajo lived under a traditional justice system composed of both Navajo common law and consensus-oriented judicial procedures.

The aim of the justice system was simple: to restore harmony. But beginning in 1892, with the forced introduction of the Bureau of Indian Affairs' Courts of Indian Offenses, this harmony began to rupture. The break was made complete with the Navajo Nation's wholesale adoption of a western court system in 1959. Over the next 25 years, the Nation wrestled with the alienating and disempowering effects of laws and procedures inconsistent with their culture and history. Tribal members who were used to resolving their own disputes were made dependent on modern institutions, including western-style police and judiciaries. Self-reliance and community participation withered.

By the early 1980s, members of the Judicial Branch recognized that, in order for the court system to regain its legitimacy and effectiveness, it needed reform. In 1981, the Chief Justice of the Navajo Supreme Court began reintegrating traditional Navajo law into the Nation's court system, a policy which received official support with the Navajo Tribal Council's passage of the Judicial Reform Act four years later. In 1982, the Judicial Branch created the Navajo Peacemaking Division, a forum for community-led, consensus-based dispute resolution. The goal of the Peacemaking Division is not to replace the previously established court system but to provide an alternative to it for certain types of disputes. Resolution techniques are drawn from the Navajo philosophy of K'e, which values responsibility, respect, and harmony in relationships. Instead of a single judge adjudicating guilt or innocence and imposing a sentence, Navajo peacemaking is characterized by a participatory process in which the affected parties work with a community leader to resolve their own problems.

Today, Navajo common and statutory laws are the "laws of preferences" in the Nation's Supreme Court, seven district courts, and five family courts, and 250 Peacemakers in the Nation's 110 districts successfully help to resolve a wide variety of individual, business and property disputes. This unique integration of Navajo and Western law occurs on a daily basis. For instance, bar membership rules require formal training in Navajo common law as a condition to practicing in Navajo Nation courts. The courts actively use this common law to decide cases, although legal opinions are published in English. In many instances, disputants can choose to resolve their differences in either a Western-style or traditional forum.

The strength of the Judicial Branch's mixed legal system is buttressed by its independence from other branches of government. On many reservations, the tribal council and executive leaders control the judiciary through discretionary hiring and firing practices and reversals of judicial decisions. The Navajo Nation has taken numerous steps to avoid these pitfalls. For example, the hiring process balances legislative and executive branch influence, as the Navajo Tribal Council's Judiciary Committee creates a list of prospective judges, an appointee of the Tribal President selects nominees, and the full Council confirms appointments. More importantly, the Judicial Branch has full and binding judicial review over actions of the



Nation's legislative and executive branches--including the power to overturn legislation, prevent indiscriminate terminations, and enforce the separation of powers between all three branches of government.

The Judicial Branch's success has had a positive impact on tribal and non-tribal courts across the country. Judges from the Navajo Nation meet regularly with their counterparts in surrounding state courts, which now refer cases to both divisions of the Navajo court system. Indian and non-Indian courts refer to opinions published by the Navajo Nation courts and rely on the Navajo Peacemaker Division as a model for alternative dispute resolution. And, since 1992, the Navajo Nation Supreme Court has held over a dozen sessions in off-reservation venues, a practice that enables law students, legal scholars, and the public to witness and gain a better understanding of the Navajo's unique system of justice.

The Navajo Nation Judicial Branch's innovative legal system is independent, fair, responsive, and consistent with the Nation's culture and traditions. Perhaps the Branch's most important contribution to governance, however, is its ongoing exercise of de facto sovereignty. By establishing and enforcing Navajo laws in Navajo ways, the court system-which handles over 9,000 cases per year-exemplifies the Navajo Nation's commitment to self-government and self-determination.

**Lessons in Nation Building:**

- The rule of law in a Native nation can and should be the rule of its *own* law.
- Investing in its own system of laws and dispute resolution can strengthen a Native nation's dealings with neighboring jurisdictions.
- Strong Indigenous legal systems bring stability and legitimacy to all branches of a Native nation's governing structure.



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