



Legal Review

NATIVE AMERICAN RIGHTS FUND

NARF BRINGS HISTORICAL TRIBAL TRUST CLAIMS TO HISTORIC SETTLEMENTS

Introduction

Today, the United States government says that it holds almost 3,000 accounts valued collectively at over \$3.2 billion in trust for over 250 American Indian and Alaska Native tribes.¹ Some of these accounts date back to the 1800s. In the last decade, over 110 of these tribes have sued the United States for historical trust accounting and mismanagement claims. Over 40 of these tribes have been represented by NARF. Until 2012 only about half a dozen tribes had settled their historical breach of trust claims. In early 2012 the White House announced the unprecedented – settlements of the claims of over 40 tribes for over \$1 billion, including over 25 of NARF’s clients. Just what are these “tribal trust accounts,” why were tribes (and why are some tribes still) suing the government over them, and how did a single Administration manage to settle almost one half of the century old claims that it inherited?

Tribal Trust Accounts

The government’s holding of trust accounts for tribes dates back to an 1820 federal policy. At that time the United States entered into treaties with tribes as sovereign nations. The inter-sovereign treaties were primarily transactions of land from tribes to the United States in exchange for various forms of compensation including money, services, and protection. The United States decided that when it paid tribes for the land it purchased from them it would not do so directly. Instead, the United States would hold

the money in trust for tribes unless and until it distributed the money to the tribal beneficiaries.

This policy became law in 1837 when Congress required the government to deposit payments for tribal treaty lands in the Treasury. By 1840 the government was holding \$4.5 million of such “treaty funds” in trust for tribes. By the ▶



- ▶ NARF Brings Historical Tribal Trust Claims to Historic Settlements..... page 1
- ▶ CASE UPDATES..... page 11
 - Klamath Tribes Score New Victories in Klamath Basin Water Rights Adjudication
 - Tribal Supreme Court Project
- ▶ New Board Members page 14
- ▶ National Indian Law Library..... page 17
- ▶ CALLING TRIBES TO ACTION! page 18
- ▶ NARF page 19

¹The accounts that the government holds in trust for tribes are independent of the accounts that the government holds in trust for hundreds of thousands of individual Indians.

end of the nineteenth century, at which time hundreds of million acres of land had been purchased from tribes, the Department of the Interior, which was established in 1849, reported to Congress that over \$18 million was being held in trust “for the benefit of the Indian tribes.”

Tribal trust accounts include more than just treaty funds. The government today identifies two main types of tribal trust funds: “Judgment Awards” and “Proceeds of Labor” accounts. Judgment Awards are monetary awards to tribes typically from settlements of legal claims by tribes against the government. Proceeds of Labor accounts are based on income earned from land and natural resources (also known as “trust assets” – as opposed to “trust funds”) that are under trust management for tribes by the government. The Interior Department manages almost 56 million acres of trust land for tribes. Hundreds of thousands of leases on these lands allow for various uses – typically by private non-Indian parties – including farming, grazing and rights of way as well as the extraction of oil and gas, minerals and timber.

The vast majority of Judgment Awards come from the historic Indian Claims Commission (ICC). For over 150 years access by tribes to federal courts in the United States was limited. Tribes had to get special acts of Congress authorizing their claims against the government. In 1946 Congress created the ICC – a very unique forum. The ICC was authorized generally for a limited time period to hear and adjudicate a broad range of legal and equitable claims of tribes against the government that accrued before August 13, 1946. It had jurisdiction only to award money damages. Over 600 ICC claims were filed by tribes, most of which were for additional compensation for lands purchased from tribes by the United States through treaties and agreements. “Basically, the ICC was the United States’ recognition that on their land deals, tribes had been cheated – getting 10 cents an acre – or less,” explains John Echohawk, NARF’s Executive Director. “Few if any other nations have made such admissions and allowed their indigenous populations such recourse,” he adds. When the ICC began, the government was

holding about \$28 million in trust for tribes. The ICC, which terminated in 1982, ultimately awarded in 341 claims over \$1.2 billion to tribes as Judgment Awards to be held in trust by the government unless and until distributed.

The government’s management of tribal trust accounts, funds, and assets are governed by several statutory and regulatory schemes, many of which date back to the 1800s. By these statutes Congress has delegated authority for fiduciary duties regarding tribal trust accounts, funds and assets primarily to the Interior (which includes the Bureau of Indian Affairs (BIA)) and Treasury Departments.

Some early treaties provided that while it held funds in trust for specific tribes, the government was obligated to earn interest on the funds. Throughout the nineteenth and twentieth century, Congress passed general statutes that provided for increased fiduciary investment duties and beneficiary protections for all tribal trust funds. Today, the Interior Department generally has discretion to act “in the best interests of the Indians” and either deposit tribal trust funds in the Treasury or invest them outside of Treasury in a range of statutorily approved financial instruments. If deposited in the Treasury, since 1984 they must earn interest at rates determined by Treasury considering current market yields on comparable marketable obligations.

Many of the general statutes governing the government’s management of tribal trust assets date back to the late nineteenth century. Tribal trust asset management statutes generally are grouped by type – for example “surface use statutes” include farming, grazing, and rights of way and easements for roads and utilities. “Mineral resources statutes” include oil, gas, coal and uranium. “Forest resource statutes” include timber, nuts and berries and stumps and roots. Until recently tribes had very little input into trust asset management decisions made by the government. Since the 1970s, under the federal policy of tribal self-determination, Congress has recognized a greater role for tribes in the development of tribal land and natural resources with respect to many aspects of the underlying leases, contracts, and agree-



Pembina v. U.S. case clients and experts after a negotiation session in Washington, D.C. with NARF attorney Melody McCoy.

ments with third parties. For most tribal trust assets, however, the government is still charged with collecting the income from the asset management and depositing that income in Proceeds of Labor accounts for tribal beneficiaries. At that point the tribal trust asset income becomes tribal trust funds subject to the general investment statutes described above.

Tribal Trust Accountings

One area of the government’s management of tribal trust accounts that has received considerable attention is the area of accountings. In cases brought by tribes, court after court has held that as trustee, the government’s obligation to provide trust accountings to its beneficiaries is fundamental. A trust accounting typically contains a detailed description of each and every transaction – debits and credits or receipts and disbursements – conducted by the trustee from the inception of the trust to the present. Dates and amounts of transactions must be verified as authorized and accurate under the terms of the trust. “This is so essential,” says John Echohawk, “but to this day not one tribe ever has received a full and complete historical accounting of its trust accounts from the government – not one.” In the past three

decades in particular, this basic unfulfilled trust obligation – accountings – has led to massive efforts by government agencies and contractors, Congress and the courts to address a problem that remains unresolved.

In the early 1980s two key agency reports criticized the government’s accounting of tribal trust funds. The General Accounting Office (GAO) reported in September 1982 that there are “Major Improvements Needed in the Bureau of Indian Affairs’ Accounting System.”

The Bureau of Indian Affairs has lost accountability over hundreds of millions of dollars of grant, contract and trust funds because its automated accounting and finance system produces unreliable information. Also, system operating deficiencies, including inadequate controls over cash receipts and disbursements, prevent the Bureau from properly discharging its fiduciary responsibilities as trustee for Indian trust funds.

The Bureau is attempting to solve these serious, longstanding problems with \$15.5 million of new computer equipment, but this is not the answer. GAO believes that the Bureau’s accounting and finance system must be completely redesigned to correct



design deficiencies dating back to the system's 1968 implementation and, toward that end, makes both short and long term recommendations to the Secretary of the Interior. The agency agreed with our recommendations and promised corrective action.

One year later the Interior Department's own Office of Inspector General (OIG) reported specifically on the BIA's lack of "Accounting Controls Over Tribal Trust Funds."

This report discusses the Bureau's poor controls over accounting for tribal trust funds. It points out that: 1) the Bureau has five systems involved in trust fund accounting, which is four too many; 2) these systems are not reconciled and are not in balance with each other. Two systems recording fiscal year 1981 and 1982 cash transactions were out of balance by \$71 million; 3) the Bureau's balance of unexpended trust funds was \$75 million less than the Department of Treasury's balance at the end of fiscal year 1982; 4) the Bureau invests more trust funds than it actually has available; 5) the Bureau recently exposed several tribes' funds to an uninsured position because of bookkeeping errors and faces the possible loss of almost \$195,000 in principal and the certain loss of interest on these funds.

Our primary recommendation is that the

Bureau establish an organization separate from its finance and accounting operations whose sole responsibility is handling tribal trust funds. Contracting out this operation is a possibility and we understand the Bureau has begun a feasibility study covering this possibility along with other aspects of trust fund operations.

In its response to our draft report, the Bureau agreed in principle with our findings and recommendations. However, the response indicated future actions for implementation. The Bureau expects to complete its reconciliations of the various systems by February 1984 and to have the results of its contracted study of trust fund operations by March 1984. We therefore plan to review the Bureau efforts to resolve its trust fund problems after the completion of these actions and will leave the recommendations in the followup system until then.

The government's response to these reports was to contract with private accounting firms – Price Waterhouse and Arthur Andersen – for assistance with evaluating its management of tribal trust funds and auditing tribal trust accounts. Price Waterhouse's voluminous in depth study on "issues related to [investment] portfolio management and cash management ... [and] related accounting system and control issues" was completed in 1984. Arthur Andersen's review of a single year of aggregate

tribal trust account balances was issued in 1989. Arthur Andersen's report was "the first known financial audit by independent public accountants of the Tribal and Individual Indian Monies (IIM) Trust Funds managed by the Bureau." Arthur Andersen found errors, procedural weaknesses and material weaknesses in the Bureau's accounting systems and internal control procedures "so pervasive and fundamental as to render the accounting systems unreliable." Arthur Andersen was unable to confirm balances for each account held in trust for each tribe.

Of the 1980s' agency and contractor reports one recommendation in particular was apparently attractive to the government. In 1985 the BIA embarked on an official effort to contract out or "privatize" future collection of, accounting for and investment management of tribal trust accounts and funds, ostensibly to improve the collection and accounting of funds and their earnings for tribes. John Echohawk recalls, however, that "This effort met with substantial opposition from tribes, primarily because the government had not done historical trust accountings and tribes could not be sure of their account balances." He adds, "The Senate Select Committee on Indian Affairs heard the concerns of tribal leaders and held an Oversight Hearing in September 1986." Echohawk reflects, "It did seem as if the government was putting the cart before the horse – they were proposing that things could be better in the future but they hadn't fixed what they'd done or failed to do in the past."

At the request of tribes and supported by scores of mounting reports documenting government tribal trust account accounting and mismanagement failures (from 1982 to 1989 alone, the OIG issued thirty separate such reports) in 1987 Congress halted any outsourcing of future tribal trust fund accounting and management and mandated that the government perform and provide full historical tribal trust account accountings, audits and reconciliations. When congressional committees took up the matter again in late 1989 and 1990, they were dismayed that the BIA had not performed the accountings or reformed its management and was still proceeding to implement a "future



financial services contract" with an outside entity. Members of Congress and tribes were outraged that the "Bureau [was] simply passing off the unbalanced books to someone else," and that "The Bureau wasted more than 1 year and as much as \$1 million of the Federal taxpayers' money in an effort to turn over many of the Government's financial responsibilities to a third party." Congress' next move in 1990 was to provide that, with respect to tribal trust fund mismanagement claims, the general six year statute of limitations for legal claims against the government does not begin to run unless and until the government provided tribal beneficiaries with proper trust accountings.

Unable to move forward with future trust accounting and management contracts and apparently unable to comply internally with the congressional mandates for historical trust accountings, in 1991 the BIA proceeded to contract out the historical accountings. It awarded Arthur Andersen a \$12 million contract to reconcile all transactions in all tribal and individual Indian trust accounts from their inception.²

²Early on in the project, Arthur Andersen estimated that due to the level of effort and associated cost and the potential for missing documentation, reconciliation of the IIM accounts would cost about \$281 million. When the government declined to meet that cost and nothing more was done regarding IIM accounts, the *Cobell* case was filed as a class action on behalf of all IIM account holders seeking full and complete accountings of their trust accounts.



Arthur Andersen’s contract work ultimately consisted of researching only some transactions in some tribal trust accounts for a twenty year time period, fiscal years 1973 - 1992. Moreover, due to insufficient records even for this limited time period, Arthur Andersen could not conduct full accountings or reconciliations; instead it applied “alternative procedures” to review accounts and test transactions. Notwithstanding its reduced scope and procedures, the Arthur Andersen contract final cost was \$21 million.

In 1996 the BIA sent Arthur Andersen reports to 311 tribes. A flurry of meetings, consultations, and correspondence ensued where the government tried to get tribes to agree that the Arthur Andersen reports met the congressional mandate for “full and complete accountings” that was now codified in the American Indian Trust Management Reform Act enacted in 1994. Tribes did not so agree and neither did the GAO, the OIG, or the new “Office of the Special Trustee for American Indians” created by the 1994 Trust Reform Act. For several years the debate continued. In 2002, mindful of the 1990

legislation that “tolled” the six year limitations statute in the absence of proper trust accountings, several tribes began to file cases in court seeking full and complete trust accountings and declarations that the Arthur Andersen reports were not such accountings. Congress responded with yet another “legislative fix” providing that for purposes of applicable limitations statutes the date on which tribes received their Arthur Andersen reports was deemed to be December 31, 1999. In 2005 Congress deemed the Arthur Andersen report receipt date to be December 31, 2000. But in 2006 Congress declined to address the matter further.

John Echohawk surmises that “Congress had been trying for thirty years to get the government to provide tribes their trust accountings and it had not worked. There wasn’t much else left for tribes to do but go to court.”

Tribal Trust Cases

As mentioned, some tribes – including the Chippewa Cree Tribe of the Rocky Boy’s Reservation in Montana, represented by NARF – had filed trust accounting and mismanagement cases in 2002. There were also a few tribes, including the Pembina Chippewa Tribes, represented by NARF in a case filed in 1992, that had even older pending historical breach of trust cases. But by December 31, 2006 over 110 tribes had filed federal court cases for historical trust accountings or for damages for trust funds and asset mismanagement. The mismanagement claims typically included underinvestment of tribal trust funds, failure to get fair market value for leases, contracts and sales agreements for tribal trust assets, and under-collection of income from tribal trust assets.

“The last time this many tribes were suing the government over essentially the same issues was probably the ICC,” says Melody McCoy, the lead NARF attorney on all of NARF’s tribal trust cases. In justifying its annual budget requests to Congress, the Department of Justice reported that the scores of new cases filed by tribes against the government constituted a “filing frenzy” that along with the existing cases were consuming enormous amounts of the Department’s time and resources. Most of the



Ute Mountain Ute Tribe Chairman and NARF Board member Gary Hayes speaking at the Whitehouse press conference on the tribal trust funds case settlements.

cases were filed in the District Court for the District of Columbia and the Court of Federal Claims, both in Washington, DC. A few tribes filed their cases in federal district courts in Oklahoma.

Immediate efforts by the government to get tribes to agree to “stay” the court cases pending proffered settlement negotiations met with strong resistance from NARF’s clients and other tribes. “We were happy to talk settlement,” remembers McCoy, “but not at the expense of litigation. We finally had the government in court and we didn’t buy the government’s line that it couldn’t simultaneously litigate and negotiate these cases.” The government’s strategy was then to ask the court to stay the cases while the court remanded the tribes’ claims to the Interior Department to develop an “historical accounting plan.” The tribes opposed remand, reminding the court that nothing to date had stopped the government from doing the historical accountings, let alone a “plan” for doing the accountings. The court agreed with the tribes, but, notes McCoy, the remand motion “bought the government about a year of time.” “That’s what you get when you get the government in court,” she adds, “delay and more delay – anything to avoid having a court reach the merits of

the tribes’ claims, which are whether they have been provided with proper trust accountings, and whether there is any liability or remedy due including damages for failure to account or for other breaches of trust.”

The main tribal trust case that NARF filed, *Nez Perce Tribe, et al. v. Salazar, et al.* was filed as a class action by twelve tribes on behalf of all tribes that did not have their own pending cases for historical trust accountings. The government opposed class certification and the court agreed with the government. The court was of the view that to force tribes to be in the case as plaintiffs was antithetical to the tribes’ sovereignty. However, the court did allow a limited time period for other tribes to join NARF’s case voluntarily as plaintiffs. By the end of 2008 thirty-one more tribes had joined the original 12, all but 2 of which were represented by NARF.

Meanwhile, the government had moved to dismiss *Nez Perce v. Salazar* and the breach of trust cases of seven other tribes who had refused to stay their cases pending settlement negotiations. The government asserted that the court lacked jurisdiction over the tribes’ claims in these cases on various grounds. All tribes opposed dismissal. A few courts in Oklahoma ruled against the government and denied dismissal, but the federal district court in Washington, DC never has ruled on the motion to dismiss in *Nez Perce v Salazar* or in the cases of other tribes there that the government has sought to dismiss.

In the Court of Federal Claims, two cases by tribes not represented by NARF have gone to trial. After a ten day trial in 2006 over a tribe’s breach of trust claims filed in 1999 related to the government’s historical management of its oil and gas resources the court awarded the tribe over \$330 million. In late 2011 another tribe’s breach of trust claims filed in 2002 endured a three week trial and a decision in that case is expected later this year. “That is par for the course,” according to McCoy, “due to threshold issues of jurisdiction, discovery, evidence and



procedure that the government will pour its resources into defending, it can take ten years to get to trial on these claims – if you can even get there.” She adds, “And then there are appeals.”

Most importantly, notes John Echohawk, while tribal access to federal courts today is generally more available than it was in the past, “the Supreme Court presently is not favorable to tribal rights and in particular has set strict requirements for tribes suing the government for money damages for alleged breaches of trust.” McCoy agrees, “No matter what you might win at trial, it gets riskier and riskier the higher up your case goes. To this day there are no final court decisions with all appeals exhausted regarding the existence or scope of government liability for breaches of trust or the remedies or relief that may be judicially awarded to tribes. All we know for sure is that tribal trust cases are costly and time consuming.”

But as NARF and its clients continued to gear up for long bitter battles over tribal breach of trust claims in court, a new potential means of claims resolution emerged on the horizon.

Tribal Trust Settlements

In November 2008 Barack Obama was elected President of the United States and he took office in January 2009. His predecessor, George W. Bush, whose Administration had publicly estimated the government’s liability in the tribal trust cases to be over \$200 billion, had settled three of the cases, including one for \$88 million. But the Obama Administration nevertheless

inherited over 110 tribal trust cases, certainly more than any other Administration had faced in recent years.

During his presidential campaign, Obama had promised tribe leaders that he would seriously try to settle on fair terms the pending tribal trust and *Cobell* cases. In September 2009 about 100 of the 110 tribes litigating their trust claims collectively wrote President Obama requesting a formal meeting with him “to discuss the possibility of a negotiated settlement of our trust claims.” In December 2009 the parties to the *Cobell* case announced that they had reached an historic agreement on a negotiated settlement of the IIM account claims in that case.³ Within two weeks of that announcement, the tribes wrote President Obama again regarding their interest in “fair and reasonable” negotiated settlements of their claims. All of NARF’s tribal trust case clients signed off on the 2009 letters to President Obama.

Under John Echohawk’s leadership and with NARF’s coordination, many litigating tribes had spent much of 2009 preparing for their communications to President Obama. They organized a nationwide voluntary group that became known as the “Settlement Proposal to the Obama Administration” (SPOA) group. They invited each and every litigating tribe to join, and initially

³Following congressional legislation in 2010 that authorized, ratified and confirmed the *Cobell* settlement, in 2011 the district court granted final approval to the settlement. A federal court of appeals has recently affirmed that approval.

90% of those tribes did join. Over time some tribes left the group to pursue resolution of their trust claims on their own through litigation or negotiations, but most remained in the group. “In all my 25 years at NARF I’d never seen anything like it,” says McCoy, who served as the group’s coordinator and communication point person with the government. “I was skeptical at first, but I think John was right – we can work together and there is strength in unity and numbers.”

In February 2010 President Obama responded in writing to the SPOA group through his spokespersons in the Justice and Interior Departments. The President was prepared to meet with the tribes to discuss negotiated settlements of their claims and was prepared to devote the personnel and other resources at the federal political level to accomplish that goal. The Justice Department hosted the first in-person SPOA meeting in Washington, DC in April 2010. Both sides began working on agreed upon principles that would govern their negotiations. By autumn the tribes and government were discussing negotiated settlement data and methodology needs. While under court approved joint stipulations of confidentiality the SPOA negotiations are strictly confidential, the negotiations process actively continued through 2011. “We had many meetings with the government and amongst ourselves,” says John Echohawk, who participated in the discussions according to his availability. “Most of all we had hope,” he adds, “because the amount of high level political commitment was extraordinary.”

Through mid-2011 the Obama Administration had settled two tribal trust cases for about \$1 million each. In late 2011 the parties to the Osage Nation trust case, which was the one where after trial in 2006 the tribe was awarded over \$330 million, announced a negotiated settlement of the tribe’s claims for \$380 million. Osage was one of the SPOA tribes. The government began to make public announcements in December 2011 and January 2012 that more SPOA settlements were likely and imminent.



(l to r) Ute Mountain Ute Tribe Vice-Chairman Bradley Hight; tribal General Counsel Peter Ortego; NARF attorney Melody McCoy; NARF Executive Director John Echohawk; and Ute Mountain Ute Tribe Chairman Gary Hayes outside the Whitehouse.

On April 11, 2012 the White House announced after 22 months of negotiations the settlements of the historical breach of trust claims of 41 SPOA tribes (in addition to Osage) for over \$1.2 billion. This included 25 of NARF’s clients. Since that announcement two more of NARF’s clients have reached settlement agreements with the government. On May 16, 2012 the federal district court in Washington, DC approved all of the SPOA settlements filed in that court as of that date.

Of NARF’s 27 tribal trust cases that have settled, the settlement amounts range from \$25,000 to \$150,000,000. McCoy emphasizes that “while SPOA process had a lot of commonality, each tribe’s settlement was based on its own claims.” She adds, “That each tribe would enter into government to government negotiations with the United States was one of the original agreed upon SPOA principles.” The amounts paid by the government under the SPOA settlements will come from the Permanent Judgment Fund, not from taxpayer revenues or appropriated federal funds, which

was another of the SPOA principles. The settlements end the litigation of claims for historical accountings and trust funds and assets mismanagement that occur before the date of the settlements. The settlements also provide for specific future information sharing and dispute resolution procedures between the parties on the tribes' trust accounts, funds and assets.

The 27 settlements still leaves about 15 of NARF's tribal trust cases unsettled, but McCoy is confident that most if not all of these will reach settlement soon. "A good dozen of them are in active negotiations," she confirms, then adds, "I appreciate the congratulations on the ones that have settled, but when people tell me that it's a good time to take a vacation, I say, 'no, the rest of my clients would not like that.'" And when she looks at the thousands of hours of work she has put in on the settlements and on-going negotiations to date, McCoy reminds herself "it's probably better than litigating."

The Future

The trust cases brought and settled by NARF's clients involve historical claims of tribes, and the SPOA settlements are in many ways historic. But the government remains the trustee for tribal trust accounts, funds, and assets. Many, including tribes, Congress, and the Executive Branch are wondering what will happen next and how the historical cases and historic settlements will affect the future.

On May 17, 2012 the Senate Committee on Indian Affairs, www.indian.senate.gov held an Oversight Hearing on the Federal Trust Responsibility to Tribal Governments. It was the Committee's first hearing on trust matters in several years. NARF was asked to testify and did testify regarding the recent tribal trust case settlements. In response to questions about what Congress might do regarding tribal trust accounts, funds and assets in the future, McCoy



(l to r) NARF attorney Melody McCoy; Brooklyn Baptiste, Vice-Chairman, Nez Perce Tribe; NARF Executive Director John Echohawk; NARF Board member Stephen Lewis at a Senate Indian Affairs Committee hearing on the tribal trust funds case.

urged the Committee to "work directly with tribes – as the historical claims negotiated settlements show these things really are best worked out at the government to government level."

NARF also is involved in the work of the new Secretarial Commission on Indian Trust Administration and Reform (SCITAR), <http://www.doi.gov/cobell/commission/index.cfm> which was established by the legislation authorizing the *Cobell* settlement. The SCITAR is tasked with providing advice and recommendations to the Interior Secretary about future trust management for Native Americans. As part of its comprehensive evaluation of government trust management and administration the SCITAR is seeking the input of tribes and Indian organizations at a scheduled series of public meetings this year. NARF has been asked to present at a panel at the SCITAR meeting in Albuquerque, New Mexico on June 11 – 12, 2012 about, among other things, "lessons learned from settlement of the recent tribal breach of trust cases." 🌟

CASE UPDATES

Klamath Tribes Score New Victories in Klamath Basin Water Rights Adjudication

An important milestone in the Klamath Tribes’ effort to secure their treaty-reserved water rights was reached on April 16 with Administrative Law Judge Joe L. Allen ruling in favor of quantification of the Tribes’ water rights for two water sources, the Klamath River and Klamath Lake, in the amounts claimed by the Tribes and the United States, Bureau of Indian Affairs as trustee for the Tribes. The rulings were a resounding victory as they adopted, across-the-board, the water amounts sought by the Tribes, and confirmed, once again, that the Tribal water rights are the most senior in the Basin. The Proposed Orders add to six earlier victories achieved by the Tribes in December 2011 – for Tribal water rights in the Williamson, Sycan, Sprague, and Wood Rivers, the Klamath Marsh, and in 140 springs scattered throughout the former Klamath Reservation – and bring to a close this phase of the decades-long litigation of the Tribal rights.

Since time immemorial members of the Klamath Tribes hunted, fished, trapped, and gathered throughout their vast ancestral homeland located in and around the Klamath Basin. In their 1864 treaty with the United States, the Tribes reserved the right to continue their traditional harvest activities on the Klamath Reservation. And for the last 36 years, the Tribes have been involved in litigation to secure the water rights necessary to support fish, wildlife, and plants to allow the Tribes to exercise their treaty-reserved harvest rights.

As in the six earlier Proposed Orders, the April 16 Proposed Orders confirmed the amounts of water claimed by the Tribes and the United States are the amounts necessary to establish and maintain a healthy and productive habitat for treaty species that will enable the



Tribes to exercise their treaty-protected hunting, fishing, trapping, and gathering rights, and also ruled that the Tribal water rights can extend to off-reservation water sources where necessary to support the Tribes’ on-reservation harvest rights. Tribal Vice-Chairman, Don Gentry stated, “These rulings are definitely a victory for the fish and all the water dependent resources that are important to the Klamath Tribes.”

At the same time, the Klamath Tribes’ Negotiation Team has also been working hard on settlement negotiations regarding Klamath Basin water and related resource issues, resulting in the introduction of legislation last fall to enact the Klamath Basin Restoration Agreement (KBRA). “These rulings reconfirm the role that the KBRA can play in resolving Basin resource issues. The Tribes will continue to work with others in the Basin to determine the best path from here on,” said Jeff Mitchell who leads the Team. “With the results of the adjudication process becoming more clear, now is the time for Senator Wyden and Representative Walden to join Senator Merkley in supporting KBRA



legislation and press forward with Senate hearings,” added Mitchell.

“This is an important step in the Adjudication, although much work remains to be done as the cases move on from here to the Oregon Water Resources Department Adjudicator and then on to the state circuit court. Meanwhile, it is a time for the Tribes to feel good about their commitment to protecting Treaty water rights and other resources,” said Tribal Attorney, Bud Ullman.

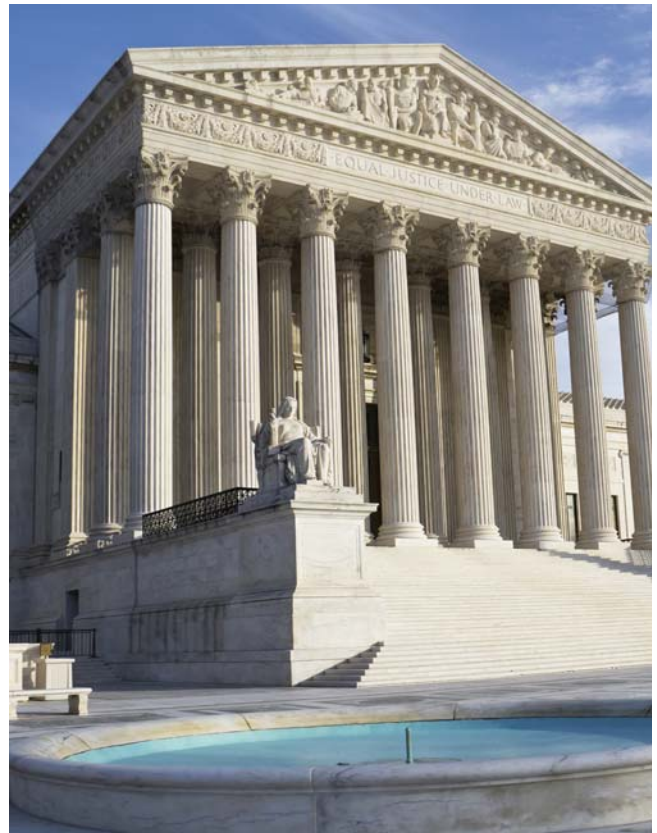
Along with Klamath Water Adjudication Project attorneys Bud Ullman and Sue Noe, the Native American Rights Fund has represented the Klamath Tribes throughout the Klamath

Basin Adjudication process. “NARF is honored to represent the Klamath Tribes and we are pleased for what these rulings mean to the Klamath Tribes and its citizens. This is a good time to recognize all those involved, notably NARF attorney David Gover and former NARF attorney Walter Echo-Hawk, as well as the support staff that is instrumental in these types of cases. We also appreciate our counterparts at the U.S. Department of Justice and Bureau of Indian Affairs for their tireless efforts over the years, but we are mindful that it’s not over,” said NARF Executive Director, John Echohawk. 🌟

Tribal Supreme Court Project

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund. The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review.

Currently, three petitions for a writ of certiorari have been granted in two Indian law or Indian law-related cases for the October Term 2011. In *Salazar v. Ramah Navajo Chapter*, on April 18, 2012, the Court heard oral argument in review of a decision by the U.S. Court of Appeals for the Tenth Circuit which held that the Bureau of Indian Affairs is liable for its failure to pay full contract support costs despite the “subject to availability of appropriations” provision under the Indian Self-Determination Act. In its petition, the United States framed the question as to



whether the government is required to pay all the contract support costs incurred by a tribal contractor under the Indian Self-Determination and Education Assistance Act where the Congress has imposed an express statutory cap

on the appropriations available to pay such costs and the Secretary cannot pay all such costs for all tribal contractors without exceeding the statutory cap. The Tenth Circuit holding is in direct conflict with the holding of the Federal Circuit in *Arctic Slope Native Ass'n v. Sebelius* in which a petition was filed by the tribal contractors and is being held by the Court with the question on whether the Federal Circuit erred in holding, in direct conflict with the Tenth Circuit, that a government contractor which has fully performed its end of the bargain has no remedy when a government agency over commits itself to other projects and, as a result, does not have enough money left in its annual appropriation to pay the contractor.

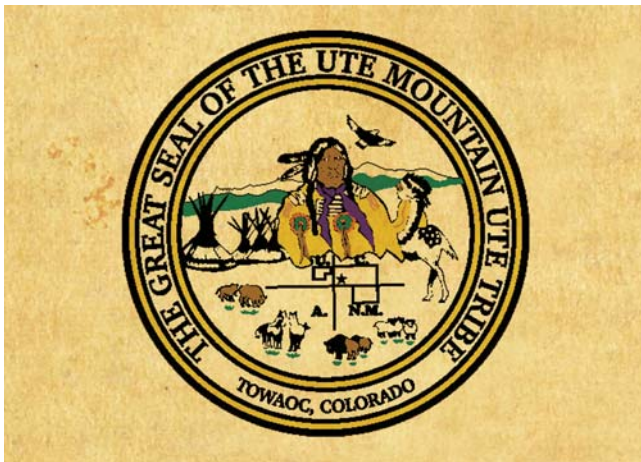
In the consolidated cases of *Salazar v. Patchak* and *Match-E-Be-Nash-She-Wish Band of Potawatomi Indians v. Patchak*, on April 24, 2012, the Court heard oral argument in review of a decision by the U.S. Court of Appeals for the District of Columbia that held: (1) Mr. Patchak, an individual non-Indian landowner, is within the “zone of interests” protected by the Indian Reorganization Act and thus has standing to bring a *Carciere* challenge to a land-in-trust acquisition; and (2) Mr. Patchak’s *Carciere* challenge is a claim brought pursuant to the Administrative Procedures Act (APA), not a case asserting a claim to title under the Quiet Title Act (QTA), and is therefore not barred by the Indian lands exception to the waiver of immunity under the QTA. The D.C. Circuit acknowledged that its holding on the QTA issue is in conflict with the Ninth, Tenth and Eleventh Circuits which have all held that the QTA bars all “suits ‘seeking to divest the United States of its title to land held for the benefit of an Indian tribe,’ whether or not the plaintiff asserts any claim to title in the land.” In its petition, the United States framed two questions presented: (1) Whether 5 U.S.C. § 702 [of the APA] waives the sovereign immunity of the United States from a suit challenging its title to lands that it holds in trust for an Indian tribe. (2) Whether a private individual who alleges injuries resulting from

the operation of a gaming facility on Indian trust land has prudential standing to challenge the decision of the Secretary of the Interior to take title to that land in trust, on the ground that the decision was not authorized by the Indian Reorganization Act.

In its petition, the Tribe framed two questions: (1) Whether the Quiet Title Act and its reservation of the United States’ sovereign immunity in suits involving “trust or restricted Indian lands” apply to all suits concerning land in which the United States “claims an interest,” 28 U.S.C. § 2409a(a), as the Seventh, Ninth, Tenth, and Eleventh Circuits have held, or whether they apply only when the plaintiff claims title to the land, as the D.C. Circuit held. (2) Whether prudential standing to sue under federal law can be based on either (i) the plaintiff’s ability to “police” an agency’s compliance with the law, as held by the D.C. Circuit but rejected by the Fifth, Sixth, Seventh, and Eighth Circuits, or (ii) interests protected by a different federal statute than the one on which suit is based, as held by the D.C. Circuit but rejected by the Federal Circuit.

In addition to its work before the U.S. Supreme Court, the Project continues to monitor Indian law cases pending before the lower federal courts and in the state courts. In certain cases, the Project may become involved in the lower court litigation—coordinating resources, developing litigation strategy and/or filing briefs in support of tribal interests. The Project also continues to provide updates of Indian law cases pending in the lower courts, updating the cases by subject-matter area: Post-*Carciere* Litigation; Criminal Jurisdiction (Federal and State); Civil Jurisdiction (Tribal and State); Diminishment/Disestablishment; Indian/Tribal Status; Sovereign Immunity; Taxation; Treaty Rights; Religious Freedoms; and Trust Relationship. Hopefully, these efforts will help us identify trends or currents within distinct areas of Indian law that can be effectively addressed prior to reaching the Supreme Court. ❁

NEW BOARD MEMBERS



Gary Hayes is an enrolled member of the Ute Mountain Ute Tribe and currently serves as the Chairman. The Ute Mountain Ute Tribe is located in Colorado, New Mexico and Utah, comprising over 600,000 acres, with its government seat in Towaoc, Colorado. The Tribe's membership is 2,085 and is governed by a Tribal Council consisting of seven elected officials. The Tribe's enterprises include a casino, hotel, two travel centers, a construction company, a farm and ranch and a pottery factory. All the tribal enterprises serve to support the tribal government and fulfill public purposes, but more importantly to provide the quality of life to its membership. The Tribe also has significant coal, gas and oil reserves, and has secured substantial water rights.

In December 2005, Gary retired from the United States Navy after serving 25 years. He served 11 years of sea time on board aircraft carriers, USS CONSTELLATION, USS KITTY HAWK, USS RANGER, USS INDEPENDENCE, Attach Fighter Squadron (VFA-151) embarked on board the USS ABRAHAM LINCOLN and served on Staff with Commander, Carrier Group One. His shore tours included Naval Supply Depot, Naval Station Subic Bay, Republic of Philippines, Comander, U.S. Pacific Command, Camp H.M. Smith, Hawaii, and Naval Air Station, Sigonella, Italy.

In January 2006, Gary returned back home and was elected into the Tribal Council for an eight month term. In October 2006, he was re-elected for a three year term and was elected as Tribal Chairman in October 2010. He was appointed by the Tribal Council to serve on the following committees and organizations: Law Enforcement, Economic Development, Health Care, Tribal/Interior Budget Council (TIBC), National Congress of American Indians (NCAI), DOJ Tribal Nations Leadership Council (TNLC), Albuquerque Area Health Board (AAIHB) and HHS Secretary Tribal Advisory Committee (STAC). Gary has received numerous personal awards and military decorations, and a degree from Hawaii Pacific University.



Moses Kalei Nahonoapi'ilani Haia III, is the Executive Director of the Native Hawaiian Legal Corporation (NHLC), a private, non-profit, public interest law firm. NHLC asserts, protects and defends Native Hawaiian rights to land, natural resources, and related entitlements. Moses is a 1994 graduate of the William S. Richardson School of Law, University of Hawaii. Prior to joining NHLC in 2001 as a staff attorney, Moses was in private practice where his work was focused on labor and employment law, civil litigation and Native Hawaiian rights. As a staff attorney with NHLC from 2001 through 2009,

Moses was involved in a number of native rights cases dealing with the protection and preservation of traditional and customary native Hawaiian subsistence, religious and cultural practices, and the state and county governments' trust duties related thereto. In 2007, he was recognized by a major Honolulu daily newspaper as one of "10 Who Made A Difference" for his work related to the protection and preservation of historic and cultural properties.

Moses has been a Board member of the Native Hawaiian Advisory Council and the Native Hawaiian Bar Association. He has published numerous articles on Native Hawaiian history, culture and water rights.



Julie Roberts-Hyslop was born and raised in Tanana Alaska, graduated from Tanana High School in 1973 as Valedictorian and attended Sheldon Jackson Jr. College in Sitka Alaska. Julie also attended University of Alaska Fairbanks.

She has been employed as a Heavy Duty mechanic for four years in Prudhoe Bay for Atlantic Richfield. She also worked for the Village Corporation for 10 years as a Land and Office Manager and was employed by the Tanana Tribal Council for 10 years as the Executive Director. She then worked as a truck driver for the Teamsters Union for 3 years and is currently employed as a Housekeeper for the Tanana Elders Residence and the Clinic.

Julie currently serves on the following boards:

President of the Native Village of Tanana and has been on the Tanana Chiefs Conference Board of Directors for the past 5 years. She has also served on the local school board for over 10 years; Head Start Committee; Tanana City Council; served on the Village Corporation Board Tozitna Limited; Served on the Alaska Federation Board ; Yukon River Panel , an international board that addresses Yukon River Salmon.



Stephen R. Lewis, Lt. Governor of the Gila River Indian Community in Arizona, graduated from Arizona State University with a Bachelors of Science degree and pursued graduate studies at John F. Kennedy School of Government at Harvard University. Mr. Lewis has long been an advocate for Native American issues nationally and locally.

Stephen has served the Community as a Gaming Commissioner for the Gila River Gaming Commission, as a member of the Board of Directors for the Gila River Telecommunications, Inc., and most recently, as member of the Board of Directors for the Gila River Healthcare Corporation. In the area of Indian education, he was selected to serve as a Board member for the National Indian Education Association (NIEA), and a delegate to the White House Conference on Indian Education. Stephen was also selected to the National Indian Gaming Commission's (NIGC) Task Force on Minimum Internal Controls for Indian Country,

served as a trainer for the National Indian Gaming Association (NIGA), and served as a teaching assistant for the National Judicial College's Tribal Commissioner Training.

In the area of mass media, he organized and staged the first ever showing of Native films and documentaries at the Sundance Film Festival in Park City, Utah and was an associate producer for the groundbreaking and critically acclaimed six-part documentary, "The Native Americans." Currently, Stephen serves on the Board of Directors for the Children's Action Alliance (CAA), a non-profit organization working to improve children's health, education and security through advocacy.



Peter M. Pino, Tribal Administrator and Treasurer for the Zia Pueblo of New Mexico since 1978, received a Bachelor of Arts from New Mexico Highlands University in 1970 and an M.B.A. from the University of New Mexico in 1975. Peter is tasked with the administration of all Tribal, State, and federal projects and programs. He coordinates community development projects from concept to completion; establishes management systems for the Pueblo; and is the Tribal Liaison between other Pueblos, State of New Mexico, federal agencies and commercial business firms. Peter also establishes and implements Pueblo investment policies and administers the Pueblo Tax Ordinance.

Peter has been a Tribal Council member since 1967 and is currently a Board member of the

Greater Sandoval County Chamber of Commerce. He has been a Board member of Futures for Children; Board of Commissioners for the New Mexico Game and Fish Department; Board member of the Mesa Verde Foundation; Board member of the Crow Canyon Archeological Center; Chairman and Board member of Education Funds, Inc.; and Vice-Chairman, Board of Commissioners, State of New Mexico Office of Indian Affairs.

The Board and staff of the Native American Rights Fund look forward to working with our new Board members and in learning from their expertise in Native American affairs. 🌟



National Indian Law Library

Justice Through Knowledge!

The National Indian Law Library needs your financial support

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

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

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

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



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

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

By donating, you stand with the National Indian Law Library in its effort to fight injustice through access to knowledge. You help ensure that the library continues to supply free access to Indian law resources and that it has the financial means necessary to pursue innovative and groundbreaking projects to serve you better. Please visit www.narf.org/nill/donate now for more information on how you can support this mission. 🌟

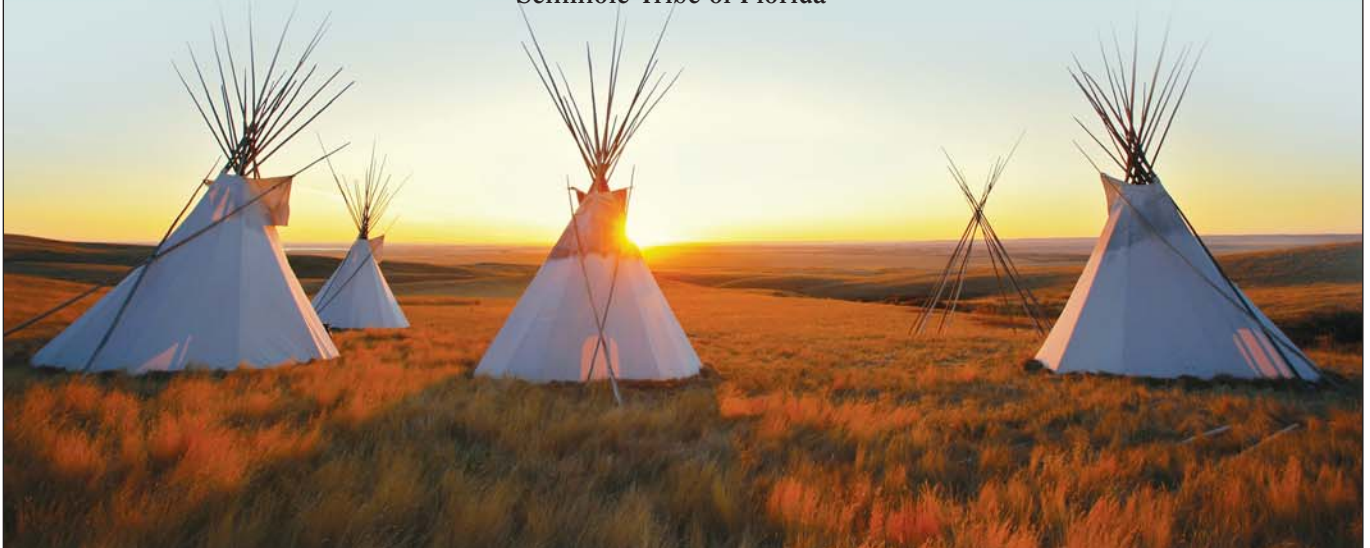
CALLING TRIBES TO ACTION!

It has been made abundantly clear that non-Indian philanthropy can no longer sustain NARF's work. Federal funds for specific projects have also been reduced. Our ability to provide legal advocacy in a wide variety of areas such as religious freedom, the Tribal Supreme Court Project, tribal recognition, human rights, trust responsibility, tribal water rights, Indian Child Welfare Act, and on Alaska tribal sovereignty issues has been compromised. NARF is now turning to the tribes to provide this crucial funding to continue our legal advocacy on behalf of Indian Country. It is an honor to list those Tribes and Native organizations who have chosen to share their good fortunes with the Native American Rights Fund and the thousands

of Indian clients we have served. The generosity of Tribes is crucial in NARF's struggle to ensure the future of all Native Americans.

The generosity of tribes is crucial in NARF's struggle to ensure the freedoms and rights of all Native Americans. Contributions from these tribes should be an example for every Native American Tribe and organization. We encourage other Tribes to become contributors and partners with NARF in fighting for justice for our people and in keeping the vision of our ancestors alive. We thank the following tribes and Native organizations for their generous support of NARF thus far for our 2012 fiscal year – October 1, 2011 to September 30, 2012:

- Arctic Slope Regional Corporation
- Bering Straits Native Corporation
- Bristol Bay Native Corporation
- Colorado River Indian Tribes
- Curyung Tribal Council
- Forest County Potawatomi Foundation
- Native Village of Eyak
- Native Village of Port Lions
- Old Harbor Tribal Council
- Pechanga Band of Luiseño Indians
- Poarch Band of Creek Indians
- Pueblo of Pojoaque
- Puyallup Tribe of Indians
- San Manuel Band of Mission Indians
- Seminole Tribe of Florida
- Seven Cedars Casino/Jamestown S'Klallam
- Shakopee Mdewakanton Sioux Community
- Confederated Tribes of Siletz Indians
- Suquamish Indian Tribe
- Tanana Chiefs Conference
- Tulalip Tribes
- Yoche Dehe Wintun Nation



THE NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund (NARF) is the oldest and largest nonprofit national Indian rights organization in the country devoting all its efforts to defending and promoting the legal rights of Indian people on issues essential to their tribal sovereignty, their natural resources and their human rights. NARF believes in empowering individuals and communities whose rights, economic self-sufficiency, and political participation have been systematically or systemically eroded or undermined.

Native Americans have been subjugated and dominated. Having been stripped of their land, resources and dignity, tribes today are controlled by a myriad of federal treaties, statutes, and case law. Yet it is within these laws that Native Americans place their hope and faith for justice and the protection of their way of life. With NARF's help, Native people can go on to provide leadership in their communities and serve as catalysts for just policies and practices towards Native peoples nationwide. From a historical standpoint Native Americans have, for numerous reasons, been targets of discriminatory practices.

For the past 42 years, NARF has represented over 250 Tribes in 31 states in such areas as tribal jurisdiction and recognition, land claims, hunting and fishing rights, the protection of Indian religious freedom, and many others. In addition to the great strides NARF has made in achieving justice on behalf of Native American people, perhaps NARF's greatest distinguishing attribute has been its ability to bring excellent, highly ethical legal representation to dispossessed tribes. NARF has been successful in representing Indian tribes and individuals in cases that have encompassed every area and issue in the field of Indian law. The accomplishments and growth of NARF over the years confirmed the great need for Indian legal representation on a national basis. This legal advocacy on behalf of Native Americans continues to play a vital role in the survival of tribes and their way of life. NARF strives to protect the most important rights of Indian people within the limit of available resources.

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

- Preservation of tribal existence
- Protection of tribal natural resources
- Promotion of Native American human rights
- Accountability of governments to Native Americans
- Development of Indian law and educating the public about Indian rights, laws, and issues

NARF Annual Report: This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request. Ray Ramirez Editor, ramirez@narf.org.

The NARF Legal Review is published biannually by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Ray Ramirez, Editor, ramirez@narf.org. There is no charge for subscriptions, however, contributions are appreciated.

Tax Status: The Native American Rights Fund is a nonprofit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the provisions of Section 501 C (3) of the Internal Revenue Code, and

Under the priority of the *preservation of tribal existence*, NARF works to construct the foundations that are necessary to empower tribes so that they can continue to live according to their Native traditions, to enforce their treaty rights, to insure their independence on reservations and to protect their sovereignty.

Throughout the process of European conquest and colonization of North America, Indian tribes experienced a steady diminishment of their land base to a mere 2.3 percent of its original size. Currently, there are approximately 55 million acres of Indian-controlled land in the continental United States and about 44 million acres of Native-owned land in Alaska. An adequate land base and control over natural resources are central components of economic self-sufficiency and self-determination, and as such, are vital to the very existence of tribes. Thus, much of NARF's work involves *the protection of tribal natural resources*.

Although basic human rights are considered a universal and inalienable entitlement, Native Americans face an ongoing threat of having their rights undermined by the United States government, states, and others who seek to limit these rights. Under the priority of the *promotion of human rights*, NARF strives to enforce and strengthen laws which are designed to protect the rights of Native Americans to practice their traditional religion, to use their own language, and to enjoy their culture. Contained within the unique trust relationship between the United States and Indian nations is the inherent duty for all levels of government to recognize and responsibly enforce the many laws and regulations applicable to Indian peoples. Because such laws impact virtually every aspect of tribal life, NARF maintains its involvement in the legal matters pertaining to *accountability of governments* to Native Americans.

The coordinated *development of Indian law and educating the public about Indian rights, laws, and issues* is essential for the continued protection of Indian rights. This primarily involves establishing favorable court precedents, distributing information and law materials, encouraging and fostering Indian legal education, and forming alliances with Indian law practitioners and other Indian organizations.

Requests for legal assistance should be addressed to the Litigation Management Committee at NARF's main office, 1506 Broadway, Boulder, Colorado 80302. NARF's clients are expected to pay whatever they can toward the costs of legal representation.

contributions to NARF are tax deductible. The Internal Revenue Service has ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

Main Office: Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302 (303-447-8760) (FAX 303-443-7776). <http://www.narf.org>

Washington, D.C. Office: Native American Rights Fund, 1514 P Street, NW (Rear) Suite D, Washington, D.C. 20005 (202-785-4166) (FAX 202-822-0068).

Alaska Office: Native American Rights Fund, 801 B Street, Suite 401, Anchorage, Alaska 99501 (907-276-0680) (FAX 907-276-2466).

Native American Rights Fund

1506 Broadway
Boulder, CO 80302

Non-Profit Org.
U.S. Postage
PAID
Boulder, Colorado
Permit No. 589



PRINTED ON RECYCLED PAPER



NATIVE AMERICAN RIGHTS FUND BOARD OF DIRECTORS

- Gerald Danforth, Chairman Wisconsin Oneida
- Natasha Singh, Vice-Chairman Native Village of Stevens
- Marshall McKay, Treasurer Yocha Dehe Wintun Nation
- Virginia Cross Muckleshoot Tribe
- Moses Haia..... Native Hawaiian
- Gary Hayes Ute Mountain Ute Tribe
- Julie Roberts-Hyslop Native Village of Tanana
- Ron His Horse Is Thunder Standing Rock Sioux
- Stephen Lewis Gila River Indian Community
- Mark Macarro Pechanga Band of Luiseño Indians
- Peter Pino Zia Pueblo
- Buford Rolin Poarch Band of Creek Indians
- Barbara Anne Smith Chickasaw Nation
- Executive Director: John E. Echohawk Pawnee

NARF LEGAL REVIEW • VOLUME 37, NO. 1 • WINTER/SPRING 2012