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Native American Rights Fund  
Annual Report 2001

# CONTENTS

## Native American Rights Fund - Annual Report 2001

Introduction .....	page 2
Chairman's Message .....	page 3
Executive Director's Report .....	page 4
The Board of Directors .....	page 6
The National Support Committee .....	page 7
The Preservation of Tribal Existence .....	page 8
The Protection of Tribal Natural Resources .....	page 12
Major Activities 2001 NARF Case Map .....	page 20
The Promotion of Human Rights .....	page 22
The Accountability of Governments .....	page 28
The Development of Indian Law .....	page 32
Treasurer's Report .....	page 34
Contributors .....	page 35
NARF Staff .....	page 39

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**Photographs:** Photograph of NARF's Board of Directors by Thorney Lieberman. NARF staff photograph by Torry Mendoza. Photographs on pages 18 and 40 by Bill Hess. Photographs on pages 2, 4, 5, 8-11, 13, 17, 25, 28, 31, 33, 38 by Ray Ramirez.

**Tax Status:** The Native American Rights Fund (NARF) 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. 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. NARF was founded in 1970 and incorporated in 1971 in Washington, D.C.

**National Indian Law Library**  
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# NATIVE AMERICAN RIGHTS FUND

## Introduction

The Native American Rights Fund (NARF) was founded in 1970 to address the need for legal assistance on the major issues facing Indian country. The critical Indian issues of survival of the tribes and Native American people are not new, but are the same issues of survival that have merely evolved over the centuries. As NARF heads into its thirty-second year of existence, it can be acknowledged that many of the gains achieved in Indian country over those years are directly attributable to the efforts and commitment of the present and past clients and members of NARF's Board and staff. However, no matter how many gains have been achieved, NARF is still addressing the same basic issues that caused NARF to be founded originally. Since the inception of this Nation, there has been a systematic attack on tribal rights that continues to this day. For every victory, a new challenge to tribal sovereignty arises from state and local governments, Congress, or the courts. The continuing lack of understanding, and in some cases lack of respect, for the sovereign attributes of Indian nations has made it necessary for NARF to continue fighting.

As the struggle continues, NARF strives to safeguard the legal and sovereign rights of tribes and Indian people within the limit of available resources. NARF's success is directly attributable to the many financial supporters that NARF has had throughout the years. Contributors like the Ford Foundation have been with NARF since the beginning. The Rockefeller Foundation, the General Service Foundation, the John D. and Catherine T. MacArthur Foundation, the Carnegie Corporation of New York, and the Skadden Fellowship Foundation have consistently contributed towards NARF's efforts. Federal funding from the Administration for Native Americans for NARF's governance, economic and social development efforts in Indian country has been almost continuous. Each year the number of tribes contributing to NARF has increased and their contributions have become vital to



our programs and services. NARF is also indebted to the thousands of individuals who have had faith in NARF and have given their financial and moral support to NARF's efforts on behalf of tribes and Indian people.

As established by NARF's first Board of Directors, the priorities that guide NARF in its mission to preserve and enforce the status of tribes as sovereign, self-governing bodies still 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

## Chairman's Message



The Native American Rights Fund has for the past thirty-one years fought diligently to preserve the past and to ensure the future on Native peoples throughout this North American continent. We have taken up the battles of our parents who were tribal

leaders in the early 1960's, and who recognized that governments of tribes needed to exist for the purposes of political sovereignty. What they really wanted was the perpetuation of their cultures. They further recognized the desire of Indian people to remain culturally strong and to continue to identify themselves as a unique race of people. One of NARF's major objectives is the preservation of tribal existence. Although we have made great strides in the courtroom, boardroom, and classroom, nothing can compare to the great strides that have been made in our homes.

I attribute the success of our Indian people to our Indian women who have showed us how to make the transition from the 20th to the 21st Century. When we talk about identity, it is our Indian women who remind us that our future is deeply rooted in our culture, our traditional and spiritual values. When we think that all hope is lost, it is our Indian women who tell us that we are not a weak people. Look at us, for the past 100 years we have been growing and developing. We have multiplied, prospered and we are just beginning to live, just beginning to taste life.

They further tell us that we have all the time in the world. Why hurry! We are clean because we have not violated anybody's rights. We have not oppressed anyone and we have not stolen the lands of other cultures. They tell us that a change is coming because they feel it. That other cultures feel it too and they want us to be ready, to be prepared.

Indian country's greatest orators come from our own homes, such as Katie John, LaDonna Harris, Ada Deer, Kathryn Harrison, Wilma Mankiller to name a few. And we have those women who have gone on to the spirit world, but whose contributions we still feel. Yes, I think Indian country is doing pretty good. Our Indian women have worked hard to bring harmony between the races. They have brought down barriers, destroyed hatred, and most importantly, showed us how to be what we are.

I think the greatest contribution is the tranquility of being Indian. My mother who just turned 94 during the Thanksgiving holidays, still says in her quiet whispered voice, "It's good to be Indian."

May God Bless You All

Wallace Coffey, *Chairman*  
*Native American Rights Fund*

# NATIVE AMERICAN RIGHTS FUND

## Executive Director's Message



The Native American Rights Fund's program of providing legal advice and assistance to Native Americans across the country on legal issues of national significance continued into its 31st year in fiscal year 2001. Substantial developments and important victories were achieved in several cases and activities during the year that I want to highlight.

In the area of Indian land and water rights claims, the Alabama-Coushatta Tribe of Texas and the United States neared a settlement agreement of about \$270 million in *Alabama-Coushatta Tribe of Texas v. United States* where the Court of Federal Claims has previously ruled that the United States should compensate the Tribe for the loss of use of 2.85 million acres of ancestral land in east Texas that was illegally taken without federal approval after Texas became a state in 1845. NARF has been co-counsel to the Tribe in this case since 1981.

Legislation was introduced in Congress to compensate the Northern Lakes Pottawatomi Nation of Canada in an amount of \$1.83 million for the failure of the United States to pay certain annuities under a series of treaties with the historic Pottawatomi Nation from 1795 to 1833. The Northern Lakes Pottawatomi had never been paid because their ancestors had fled from their ancestral lands in the upper Midwest to Canada in 1833 to avoid being relocated to other lands. They have been represented by NARF since 1993 in the Court of Federal Claims which approved the settlement.

Legislation was also introduced in Congress that would address a major problem in negotiating Indian water rights settlements - the lack of federal funding for settlements. Through the efforts of NARF, the Western Governors' Association, the Western States Water Council and the Western Regional Council, nine Senators introduced a bill that would amend the Budget Act and allow the Appropriations Committee to fund settlements



*NARF Executive Committee and staff meet with the Alabama-Coushatta Tribe of Texas.*

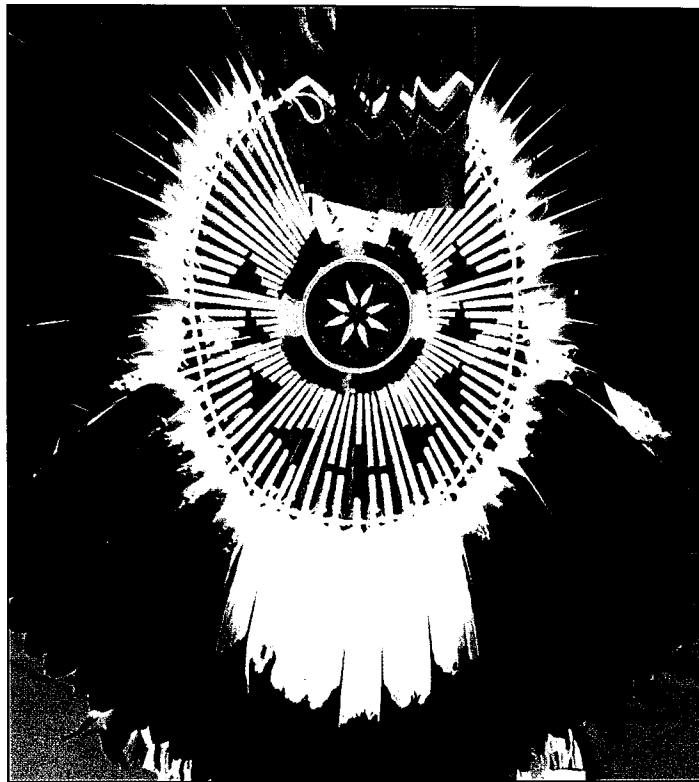
without having to count those appropriations against the Interior Department's budget caps.

In a major victory for Alaska Native subsistence fishing rights, the Ninth Circuit Court of Appeals held in the *Katie John* case that federal law requires the federal government to manage subsistence fisheries in navigable waters in Alaska where most of the Native subsistence fishing occurs. With strong pressure from Alaska tribes, the Governor of Alaska decided not to seek review of the decision in the U.S. Supreme Court and ended the State's opposition to Native subsistence fishing in navigable waters. NARF has been representing Alaska Native subsistence fishers in this case since 1990.

NARF assisted eleven tribes in negotiations to repatriate 187 Native American ancestral remains from the Colorado History Museum that could not be identified to any one specific tribe. The tribes agreed to repatriate the remains together under the control of the Ute Mountain Ute and Southern Ute Tribes and the remains were put to rest at a site selected by the Tribes in southwestern Colorado.

On the international front, NARF was instrumental in securing a more forward-looking policy on the rights of indigenous peoples from the United States. Representing the National Congress of American Indians and working with the Indian Law Resource Center, NARF helped to convince the United States for the first time to recognize a limited right of self-determination for indigenous peoples during negotiations on these issues in the United Nations and the Organization of American States which are continuing.

In a widely publicized case, NARF and private co-counsel won a significant victory in *Cobell v. Norton*, the class action on behalf of 300,000 individual Indian trust account holders. The Court of Appeals for the District of Columbia held that the federal government has a legally enforceable duty to properly manage and account for



these Indian trust assets and that the government is in breach of that duty. NARF has been involved in the case since 1996.

We thank all of our contributors and supporters who have helped to make these victories and developments for Native Americans possible. With your continuing assistance, justice through the legal system for Native Americans can happen.

John E. Echohawk, *Executive Director*

# NATIVE AMERICAN RIGHTS FUND

## Board of Directors

The Native American Rights Fund has a governing board composed of Native American leaders from across the country -- wise and distinguished people who are respected by Native Americans nationwide. Individual Board members are chosen based on their involvement and knowledge of Indian issues and affairs, as well as their tribal affiliation, to ensure a comprehensive geographical representation. The NARF Board of Directors, whose members serve a maximum of six years, provide NARF with leadership and credibility and the vision of its members is essential to NARF's effectiveness in representing its Native American clients.

### Board of Directors Photograph

Bottom to Top: **Wallace E. Coffey**, Chairman (Comanche - Oklahoma); **Mike P. Williams** (Yup'ik - Alaska); **E. Ho'oipo Pa** (Native Hawaiian - Hawaii); **Mary T. Wynne** (Rosebud Sioux - Washington); **Jaime Barrientoz** (Grande Traverse Band of Ottawa & Chippewa Indians - Michigan); **Karlene Hunter** (Oglala Lakota - South Dakota); **Rebecca Tsosie** (completed her six-year term on the Board - Pascua Yaqui, Arizona); **Roy Bernal**, Vice-Chairman (Taos Pueblo - New Mexico); and **Kenneth P. Johns** (Athabascan - Alaska).

Not Pictured: **Billy Cypress** (Miccosukee - Florida); **Nora Helton** (Fort Mojave - California); **Sue Shaffer** (Cow Creek Band of Umpqua - Oregon); and **Ernie Stevens, Jr.** (Wisconsin Oneida - Wisconsin).





## National Support Committee

The National Support Committee (NSC) assists NARF with its fund raising and public relations efforts nationwide. Some of the individuals on the Committee are prominent in the field of business, entertainment and the arts. Others are known advocates for the rights of the underserved. All of the 41 volunteers on the Committee are committed to upholding the rights of Native Americans.

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Owanah Anderson, *Choctaw*  
Edward Asner  
Katrina McCormick Barnes  
David Brubeck  
U.S. Senator Ben Nighthorse Campbell, *Northern Cheyenne*  
Ada Deer, *Menominee*  
Harvey A. Dennenberg  
Michael J. Driver  
Richard Dysart  
Lucille A. Echohawk, *Pawnee*  
Louise Erdrich, *Turtle Mountain Chippewa*  
James Garner  
Sy Gomborg  
Carol Hayward, *Fond Du Lac Chippewa*  
Richard Hayward, *Mashantucket Pequot*  
Alvin M. Josephy, Jr.  
Charles R. Klewin  
Nancy A. Klewin  
Wilma Mankiller, *Cherokee*  
Chris E. McNeil Jr., *Tlingit-Nisga'a*  
Billy Mills, *Oglala Sioux*  
N. Scott Momaday, *Kiowa*  
Amado Peña Jr., *Yaqui/Chicano*  
David Risling Jr., *Hoopa*  
Pernell Roberts  
Walter S. Rosenberry, III

Marc & Pam Rudick  
Leslie Marmon Silko, *Laguna Pueblo*  
Connie Stevens  
Anthony L. Strong, *Tlingit-Klukwan*  
Maria Tallchief, *Osage*  
Andrew Teller, *Isleta Pueblo*  
Verna Teller, *Isleta Pueblo*  
Studs Terkel  
Tenaya Torres, *Chiricahua Apache*  
Thomas Tureen  
Richard Trudell, *Santee Sioux*  
Aine Ungar  
Rt. Rev. William C. Wantland, *Seminole*  
Dennis Weaver  
W. Richard West Jr., *Cheyenne Arapaho*

# THE PRESERVATION OF TRIBAL EXISTENCE

Under the priority of the *preservation of tribal existence*, NARF's activity emphasizes enabling Tribes to continue to live according to their Native traditions; to enforce their treaty rights; to insure their independence on reservations; and to protect their sovereignty. Specifically, NARF's legal representation centers on federal recognition and restoration of tribal status, sovereignty and jurisdiction issues, and economic development. Thus, the focus of NARF's work involves issues relating to the preservation and enforcement of the status of tribes as sovereign, self-governing bodies. Tribal governments possess the power to regulate the internal affairs of their members as well as other activities within their reservations. Conflicts often arise with states, the federal government, and others over tribal sovereignty.

## **Tribal Sovereignty**


Tribal judicial systems are under ceaseless attack from those who do not wish to be held accountable for their conduct while on Indian reservations. Tribes look to the federal courts to uphold the right of tribes to provide a forum for the resolution of civil disputes which arise within their territories, even when those disputes involve non-Indians. Unfortunately, U.S. Supreme Court rulings on issues critical to the sovereign and cultural survival of Native Americans have eroded tribal sovereignty.

In June 2001, the U.S. Supreme Court issued another blow to tribal sovereignty in the *Nevada v. Hicks* case. In overturning a Ninth Circuit Court decision, the Court held that the Fallon-Paiute Shoshone tribal court lacks the authority to hear a civil rights lawsuit brought by a tribal member against Nevada state game officials. The Court ruled that state officers who are investigating tribal members on Indian reservations for alleged off-reservation crimes are not subject to suit in tribal court for their conduct in the course of their investigations. Further, the Court held that the state officers need not get the permission of the Tribe to enter the reservation to conduct their investigations. NARF has represented the Fallon Paiute-Shoshone Tribe in this case since 1994. The



case arose when a tribal member sued state game wardens in Tribal Court in their individual capacities for money damages. The game wardens had conducted two search and seizures of the tribal members' property before ceasing their investigation and bringing no charges against him. The Tribal Court of Appeals, The Federal District Court, and the United States Court of Appeals for the Ninth Circuit had all upheld tribal jurisdiction before the U.S. Supreme Court reversed.

Believing that Supreme Court Justices as well as federal and state court judges need to be more informed about tribal courts, the National American Indian Court Judges Association, assisted by the Native American Rights Fund, arranged for two Supreme Court Justices to visit tribal courts for the first time in July 2001. Justices Sandra Day O'Connor and Stephen Breyer toured tribal courts on the Spokane Reservation in Washington and the Navajo Reservation in Arizona and concluded their tour by meeting with the National American Indian Court Judges Association membership at the National Judicial College in Reno, Nevada. After observing tribal courts in action,



the Justices were impressed but also noted that there were some jurisdictional and funding problems that perhaps should be addressed by Congress. The Justices also listened to the tribes' concerns over the recent decisions rendered in the *Nevada v. Hicks* and the *Atkinson Trading Co. v. Shirley* cases which limited tribal jurisdiction over non-Indians within reservation boundaries.

In response to *Nevada v. Hicks* and other adverse U.S. Supreme Court decisions diminishing tribal sovereignty, tribes across the country met in September 2001 and formed the Tribal Sovereignty Protection Initiative. As part of the Initiative, NARF was asked to co-chair a committee charged with drafting a legislative proposal for Congressional consideration that would overturn the recent bad Supreme Court decisions. NARF was also asked to co-chair a committee to establish an entity that would monitor and oversee all tribal cases possibly heading for the Supreme Court in the future in order to increase the rate of success for tribes before the Court.

In *Oklahoma Tax Commission v. Goodeagle*, NARF has undertaken representation of several individual Indians in Oklahoma who are challenging the taxation of their income by the State of Oklahoma. In these cases, the tribal members work on their own tribe's trust land, but live on trust allotments within the jurisdiction of another tribe. While Oklahoma does recognize it lacks jurisdiction to tax the income of tribal members who live and work within their own tribe's trust land, it does assert jurisdiction to tax where the member either lives or works on trust land within the jurisdiction of another tribe. NARF has filed position statements on behalf of seven claimants before the Oklahoma Tax Commission.

#### **Federal Recognition of Tribal Status**

NARF currently represents seven Indian communities who have survived intact as identifiable Indian tribes but who are not federally recognized. These Indian tribes, for differing reasons, do not have a government-to-government relationship between themselves and the federal government. Traditionally, federal recognition was

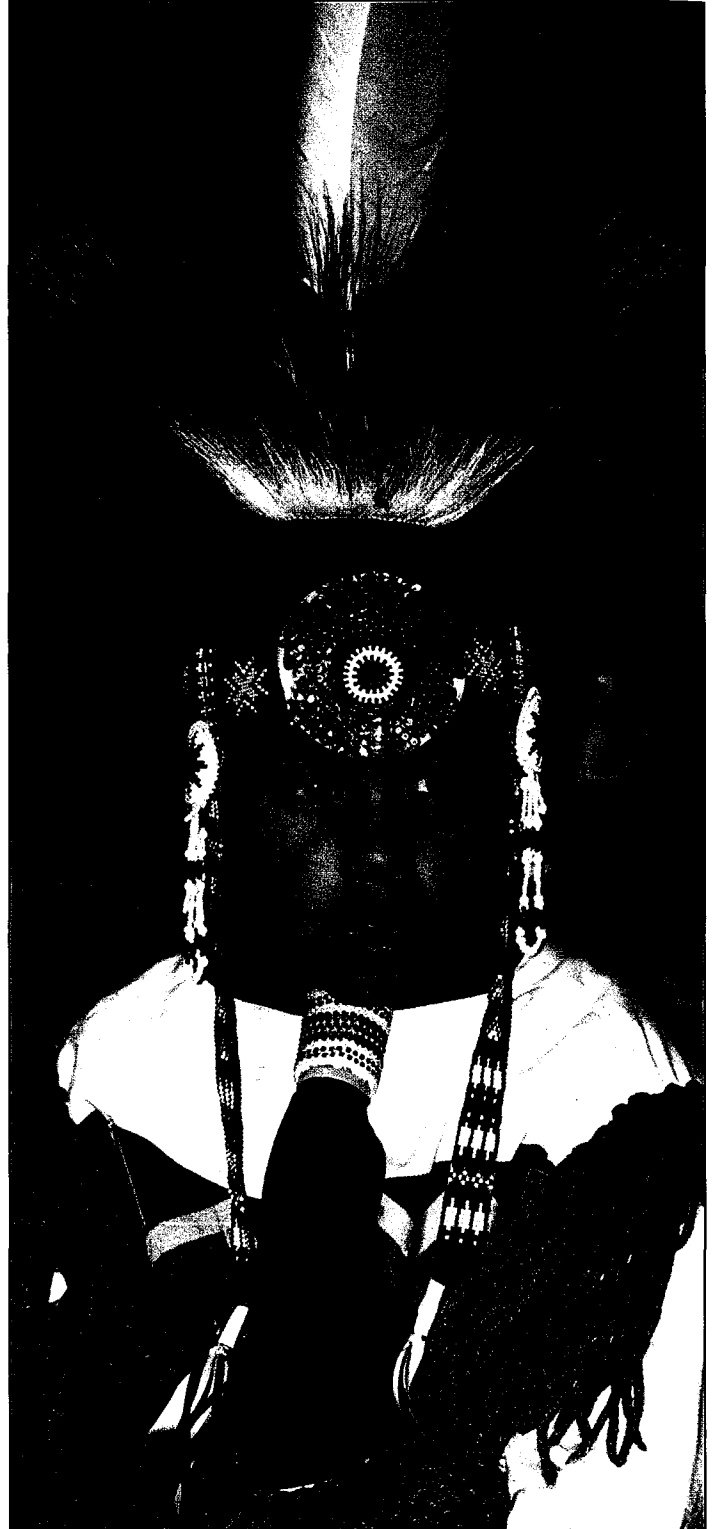


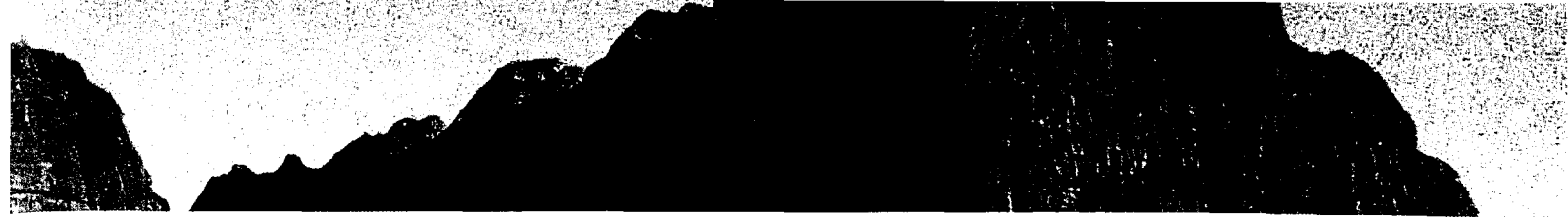
## The Preservation of Tribal Existence

accorded to a tribe through treaty, land set aside for a tribe, or by legislative means. The majority of these NARF clients are seeking an administrative determination by the Bureau of Indian Affairs (BIA) that they, in fact, have continued to exist as Indian tribes from the time of significant white contact to the present day and have continued to govern themselves and their members. NARF, therefore, prepares the necessary historical, legal, and anthropological documentation to support a petition for acknowledgment. For more than 100 years, these Indian communities have been foreclosed from the benefits of a formal federal relationship with the federal government. Through administrative acknowledgment, NARF is now trying to bridge that gap.

NARF has been representing the Shoonaq' Tribe ever since it was erroneously removed by the Interior Department bureaucrats from the list of Alaska Native Villages acknowledged to be federally recognized tribes by the Assistant Secretary in 1993. With about 1,000 members, Shoonaq' was the largest of the few remaining unrecognized tribes in Alaska. In December 2000 the Bureau of Indian Affairs issued a determination acknowledging the Shoonaq' Tribe of Kodiak, Alaska to be a federally recognized tribe. However, this determination was never published in the Federal Register before the change in Administration. With the new Administration coming in, the determination was put on hold and is currently being reviewed.

On behalf of the United Houma Nation of Louisiana, NARF responded to proposed findings against federal acknowledgment issued by the BIA under their acknowledgment regulations. The Tribe has their petition for federal recognition pending before the BIA's Branch of Acknowledgment and Research and is now waiting for a final decision on its petition. In the meantime, NARF assisted the Tribe in revising its constitution to strengthen its tribal government and to improve its chances for federal recognition. After four months of community

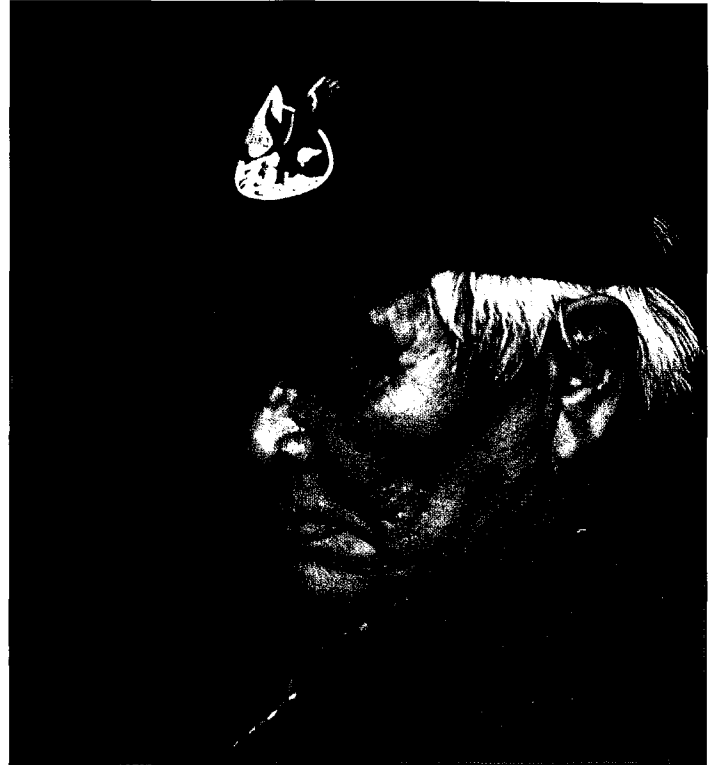




meetings, the Tribe's members voted on the amendments to the constitution and adopted the revisions in May 2001.

NARF completed and submitted a petition for federal recognition on behalf of the Little Shell Tribe of Chippewa Indians of Montana. The Tribe was placed on a one year active review status in 1997, however, the BIA continued granting itself six-month extensions. Although the due date for the findings of tribal status was in February 1998, the extensions continued through April 2000. Finally, after all the delays, the Assistant Secretary informed the Tribe in May 2000 that the Bureau would publish in the Federal Register "a proposed finding that acknowledges that the Little Shell Tribe of Chippewa Indians of Montana exists as an Indian tribe within the meaning of federal law." Publication did not take place until July 2000. In the meantime, NARF will continue to supplement the Tribe's record until January 2002.

In *Miami Nation of Indians v. Babbitt*, NARF is challenging the BIA's decision not to recognize the Miami Nation as an Indian tribe. The U.S. District Court for Indiana initially rejected the Miami's claim that they were recognized in an 1854 treaty and were never terminated by Congress, but the Court considered other Miami claims. In three separate opinions, the District Court granted the federal government summary judgment on all claims raised by the Tribe. The Tribe appealed the District Court's opinion seeking reversal of the opinion and having the case remanded to the agency with instructions to recognize the Miami Tribe, or at a minimum, to consider the Tribe under the regulations as reformulated in 1994. In June 2001, the Miami Tribe lost their appeal before the 7th Circuit Court of Appeals. The Court thereafter rejected the Tribe's petition for reconsideration. NARF and the Tribe are currently seeking U.S. Supreme Court review in the case.



NARF has filed a petition for federal recognition for the Mashpee Wampanoag Tribe of Massachusetts that is now under active consideration by the BIA. NARF has also completed and submitted a petition on behalf of the Shinnecock Indian Nation of New York and is responding to a BIA technical assistance letter explaining omissions or deficiencies in the petition. Work on a petition for the Pamunkey Tribe in Virginia continues.

# THE PROTECTION OF TRIBAL NATURAL RESOURCES

The land base and natural resources of Indian nations continue to be critical factors in the preservation of tribal existence. Through control over tribal lands and resources, Indian tribes can regain a degree of economic self-sufficiency necessary for Indian self-determination. There are approximately 55 million acres of Indian-controlled land in the continental United States which constitutes only 2.3 percent of their former territory. About 45 million acres are tribally owned and 10 million acres are individually owned. Additionally, there are about 44 million acres in Alaska which are owned by Natives after the 1971 Alaska Native Claims Settlement Act.

The federal government has in many instances failed to fulfill its trust duty to protect Indian tribes and their property rights. The Native American Rights Fund concentrates much of its legal representation on cases that will ensure a sufficient natural resource base for tribes.

## **Protection of Indian Lands**

The Alabama-Coushatta Tribe of Texas seeks compensation for the loss of use of millions of acres of fertile forest that they once occupied in southeast Texas. The Tribe has been represented by NARF since 1981 in their quest to prove that their ancestral land was illegally taken from them by settlers. In 1996, the United States Court of Federal Claims ruled in *Alabama-Coushatta Tribe of Texas v. United States* that the United States should compensate the Alabama-Coushatta Tribe for the loss of use of ancestral land illegally taken without federal approval between 1845 and 1954. In June 2000, the United States Court of Federal Claims ruled once again in favor of the Alabama-Coushatta Tribe of Eastern Texas in their breach-of-trust claim against the United States, holding the Government liable for the Tribe's loss of use of over 2.85 million acres of land between 1845 and 1954. The court also ruled that 5.5 million acres of aboriginal title has never been extinguished, so the Tribe also has a possessory land claim against the current occupants of 5.5 million acres. Negotiators for the United States and

the Tribe reached a tentative agreement on the amount of damages, \$270 million, in June 2001.

The Stockbridge-Munsee Tribe of Wisconsin, represented by NARF, has a land claim to 26,000 acres of ancestral lands in New York pending in a New York federal district court against the State of New York and various local governments based on the lack of federal approval required for Indian land transactions. Recent United States Supreme Court rulings have held, however, that the Eleventh Amendment bars tribal suits against states. In response, NARF has asked the United States to intervene as trustee to protect against the state's expected motion to dismiss based on sovereign immunity. Over two years ago, the Department of Interior requested the Department of Justice to intervene on behalf of the United States, but the matter is still under review. NARF is also pursuing a land claim for the Tribe as successor in interest to the former Brotherton Reservation in New Jersey.

NARF represents the Keewattinosagaing or Northern Lakes Pottawatomini Nation of Canada, a band of Pottawatomies descended from the historic Pottawatomini Nation, which from 1795 to 1833 signed a series of treaties with the United States. These treaties provided, among other things, the payment of certain annuities. The ancestors of the present-day Canadian Pottawatomini fled to Canada following the signing of the final treaty, the Treaty of Chicago in 1833, because they did not want to be moved west of the Mississippi. They were never paid their annuities. In 1993, NARF brought suit on behalf of the Tribe in the Court of Federal Claims, by way of Congressional reference, to seek redress of these failed payments. After five years of fact-finding, discovery and briefing of this case, the Tribe and the United States agreed in principle to the settlement of this case. Settlement terms were approved by the Court in December 2000 and settlement legislation was presented to Congress in July 2001 for compensation of \$1.83 million.



NARF continued representing the San Juan Southern Paiute Tribe in the consolidated cases of *Masayesva v. Zah v. James* and *Navajo Tribe v. U.S. v. San Juan Southern Paiute Tribe*, cases involving the Navajo and Hopi Tribes in a dispute over an area of land in northern Arizona claimed by all three tribes. An Arizona federal district court found that the San Juan Southern Paiutes had established exclusive use to 75 acres and had an interest, along with the Navajo Tribe, to another 48,000 acres of land. The court refused to partition San Juan Southern Paiute land. After negotiations, the San Juan Southern Paiute Tribal Council and the Navajo Tribal Council approved a settlement in 1999. In March 2000, in an historic ceremony, the San Juan Southern Paiute and the Navajo Nation formally signed the settlement treaty. The settlement provides for a small reservation in Utah and one in Arizona (approximately 5,400 acres) to be carved out of the Navajo Reservation for the Paiute Tribe. NARF and the Tribe are now working on Congressional approval of the settlement.

NARF is working with the Lower Brule Sioux Tribe against the State of South Dakota's challenge to the United States' decision to place approximately 91 acres of

land into trust for the Lower Brule Sioux Tribe under Section 465 of the Indian Reorganization Act. The State is alleging, among other things, that the Secretary lacks authority to place land into trust because Section 465 is an unconstitutional delegation of legislative authority. In an earlier proceeding regarding this same 91 acres of land, the 8th Circuit did hold that Section 465 was unconstitutional but the Supreme Court vacated that opinion and remanded to the Secretary for further reconsideration. The State is now challenging the Secretary's reconsidered, and again favorable decision to place the land in trust. The Tribe filed a motion to intervene in this case, but the federal district court denied the Tribe's motion. The Tribe is now considering its options.

The Summit Lake Paiute Tribe of Nevada requested a legal opinion on its ownership of and jurisdiction over legal rights to control fish and related habitat in Summit Lake. The Tribe's long-term goal is to use the legal opinion to help negotiate a memorandum of agreement among the Tribe, the federal government, and the State of Nevada whereby the Tribe would have primary authority to regulate the fish in all of the Lake. NARF completed the legal opinion and the Tribe is now considering its options.

## The Protection of Tribal Natural Resources

With NARF's assistance, the Klamath Tribes of Oregon delivered the completed proposed Economic Self-Sufficiency Plan (ESSP) to the Office of the Secretary of the Interior in November 2000. The ESSP was mandated by Congress in the Klamath Tribe's Restoration Act of 1986. Additional copies of the ESSP were delivered to the Governor of Oregon, the Secretary of Agriculture and selected congressional offices, including the Senate Committee on Indian Affairs. The purpose of the ESSP is to define the foundation for the ability of the Tribes to regain the economic autonomy that they enjoyed prior to federal termination of the trust relationship and the taking of the Tribes' lands in the 1960s and 1970s.

NARF represents the Native Village of Tuluksak in Alaska in their quest to have the land owned by the Village corporation transferred over in fee simple to the Village tribal council. The Department of Interior would then be petitioned to place the land into trust on behalf of the Village. The Department of the Interior is in the process of revising regulations governing the process of taking land into federal trust for Native Americans. NARF worked with the NCAI Tribal Leaders' Task Force on Land Recovery, on behalf of Tuluksak, to develop comments to the proposed regulations and has been waiting for the Secretary of the Interior to issue final regulations. The Department of the Interior has already stated that the final regulations will continue to preclude Alaska tribes from being able to petition the Secretary to place tribal lands in trust. NARF is preparing a lawsuit on behalf of Tuluksak which will be filed against the Secretary once the regulations are finalized.


NARF has played a key role in the implementation of federal environmental law and policy that recognizes tribal governments as the primary regulators and enforcers of the federal environmental laws on Indian lands. NARF continued to work with tribes, the National Tribal Environmental Council and other Indian organizations to maintain the progress that has been made with the Environmental Protection Agency and other federal

agencies. With a representative on the Green Group, a coalition of national environmental leaders, NARF continues to coordinate with and educate the environmental community on the role of tribal governments in environmental law and policy.

After assisting the Oglala Sioux Tribe of South Dakota with a Tribal Environmental Review Code, NARF assisted the Tribe in drafting a Safe Drinking Water Code, a Water Quality Management Code, and a Water Services Security Connection Ordinance. These Codes will allow the Tribe to gain control over the environmental integrity of an important aspect to water within the Tribe's jurisdiction and bring the Tribe into compliance with the requirements of federal environmental laws.

Parallel to the efforts of completing these tribal codes is the effort to assure that their implementation will be compatible with the requirements of federal law. In particular is the concern the Tribes will be able to implement their laws in compliance with federal environmental laws and EPA's regulations. Of particular concern is the ability of Tribes, working with EPA, to secure implementation of federal environmental laws without the unnecessary intrusion from states. This will require a change in the laws that allow EPA to compact with tribes to accomplish implementation of certain federal environmental laws – including the Clean Water Act. NARF has been working with the Oglala Sioux Tribe and representatives of other tribes from EPA's Region 8 (including North and South Dakota, Montana, Wyoming, Colorado, and Nebraska), along with the attorneys representing these Tribes, to secure the necessary authority for EPA and the Tribes to enter into the necessary agreements.

NARF represents the Gwich'in Steering Committee in their efforts to protect the Arctic National Wildlife Refuge (ANWR) from oil development. The Gwich'in, which means 'People of the Caribou', are the northernmost Indian nation living across northeast Alaska and north-



west Canada. There are about 7,000 Gwich'in people who live on or near the migratory route of the Porcupine Caribou Herd. For thousands of years, the Gwich'in have relied on the caribou for food, clothing, tools, and a source of respect and spiritual guidance. The calving grounds of the Porcupine River caribou herd inside ANWR is considered sacred. The Gwich'in call it "Vadzaih googii vi dehk'it gwanlii" (The Sacred Place Where Life Begins). The Gwich'in will not journey into these sacred grounds for hunting even in times of great need or food shortage. Oil development in ANWR would not only harm the caribou and threaten the future of the Gwich'in people, it would also threaten more than 180 species of birds, and numerous mammals including polar bears, musk ox, wolves, wolverine, moose, Arctic and red foxes, black bears, brown bears, and the white Dall sheep. NARF continues to work with a coalition of environmental groups and organizations to convince Congress to stop any attempts at oil drilling in ANWR.

### **Water Rights**

Establishing tribal rights to the use of water in the arid west continues to be a major NARF involvement. Under the precedent established by the United States Supreme Court in 1908 in the case of *Winters v. United States* and confirmed in 1963 in *Arizona v. California*, Indian tribes are entitled under federal law to sufficient water for present and future needs, with a priority date at least as early as the establishment of their reservations. These tribal reserved water rights are superior to all state-recognized water rights created after the tribal priority date, which in most cases will give tribes valuable senior water rights in the water-short West. Unfortunately, most tribes have not utilized their reserved water rights and most of these rights are unadjudicated or unquantified. As a result, tribal water claims constitute the major remaining water allocation issue in the West. The focus in each case is to define or quantify the exact amount of water to which each tribe is entitled. NARF pursues these claims on behalf of tribes through litigation or out-of-court settlement negotiations.

In 1999 the Rocky Boy's water rights settlement bill was signed into law by the President and became Public Law No. 106-163. The Act is the culmination of 17 years of work by the Chippewa Cree Tribe of the Rocky Boy's reservation seeking a fair settlement of the Tribe's water rights claims in Montana. NARF has represented the Tribe in the settlement of its water rights claims since 1987. The Act ratifies a water rights settlement compact between the Tribe and the State of Montana; allocates 10,000 acre feet of federal storage water for future Tribal drinking water needs; and, authorizes \$47 million for the Tribe. The Tribe received \$24 million in FY 2001 appropriations and \$23 million in FY 2002 appropriations. The final step in the settlement of the Tribe's water rights claims is securing a final decree from the Montana water court approving the quantification of the Tribe's water rights in the compact and dismissing the Tribe's water rights claims. The Tribe, State and United States are now preparing appropriate motions requesting that the state water court deny the objections and approve the Compact.

NARF continues its extensive involvement in the water settlement negotiations on behalf of the Klamath Tribes to adjudicate the Tribe's reserved water rights to support its 1864 treaty hunting and fishing rights. Water settlement negotiations have resumed, but due to delays beyond NARF's control much of the negotiations have been overtaken with litigation. The Tribes and the United States were successful in efforts to have the federal district court exercise its continuing jurisdiction retained in *United States v. Adair* to construe and clarify that judgment. This action was necessitated because of a deep dispute over that judgment between the U.S. and the Tribes versus the State of Oregon and private water users which has arisen in state court in the Klamath Basin Water Rights Adjudication (KBA). The KBA has become very active, with voluminous water rights claims and contests being referred to hearing panel officers to pave the way for adjudication hearings. Also, the United States Supreme Court rendered an adverse ruling on the



## The Protection of Tribal Natural Resources

Freedom of Information Act case, *Department of the Interior and BIA v. Klamath Water Users Protective Association*, holding that confidential communications between the Tribe and the U.S. in its capacity as trustee protecting trust assets and water rights must be disclosed to the public upon request under the Act. The case has adverse impacts on Indian country and the ability of the U.S. to carry out its fiduciary obligations if trust communication is hampered. For this reason, Congress may have to legislate to correct this problem.

NARF continues its representation of the Nez Perce Tribe of Idaho in its water rights claim to the Snake River Basin. The Tribe's major claim is for sufficient in-stream flows to maintain its treaty rights to fish for salmon and steelhead that migrate down the Snake River to the Columbia River and out to the ocean before returning to spawn. NARF is involved in on-going settlement negotiations that focus on the removal of four lower Snake River dams to obtain sufficient in-stream flows. In 1999 the state district court rejected the Nez Perce Tribe's in-stream flow claims to water in the Lower Snake, Clearwater, Salmon and Weiser rivers. After issuance of the decision, the Tribe learned that the judge and his brother and sister have claims to both surface irrigation and groundwater irrigation flows in these waters which present direct and actual conflicts of interest with the Tribe's claims. The Tribe filed motions to disqualify the judge and appealed the decision. The Idaho Supreme Court granted the Tribe's motion for appeal in July 2000. The Tribe's appeal is now pending. In the meantime, NARF attorneys have continued legal and technical assistance to the Tribe in active mediation efforts for the past two years.

NARF continues to assist the Tule River Tribe of California in securing its water rights. NARF has been drafting a settlement agreement to present to both the United States and downstream users along the South Fork of the Tule River. The Tribe's goal is to prepare a

proposal that will provide the Tribe with sufficient water to create a permanent homeland for its people with minimal impact on the other users. Thus far, the Tribe has identified the core elements of a settlement proposal and has developed a method for allocating water between the parties based on allocating the natural flow of the river – a concept to which all parties have thus far agreed. Such a method of agreement relies on accurate measurement of the river flows and thus, to measure such flows the Tribe has installed two gage stations. One at the midway point of the Reservation and a second gage station at the Reservation boundary. The Tribe has presented the downstream users with its overall plan for settlement and description of its proposal.

NARF also concentrated on addressing a major problem in water rights settlements – the lack of federal funding for settlements. The problem has been the budget caps imposed by Congress which has meant that new settlement funding had to come out of existing Interior Department programs. Working with state and private partners in the Ad Hoc Group on Indian Reserved Water Rights, the Western Governors' Association and the Western Regional Council, nine Senators were convinced to introduce a bill that would amend the Budget Act and allow the Appropriations Committee to fund settlements without having to count those appropriations against the budget caps. NARF anticipates that similar legislation will be introduced in the House of Representatives soon.

### Hunting and Fishing

The subsistence way of life is essential for the physical and cultural survival of Alaska Natives. Most of the two hundred small Native villages in Alaska are located on or near the shores of a river or a lake, or located on the coast of the North Pacific or Arctic Ocean. The proximity to water is no accident and reflects the dependence of Natives on the harvest of fish stocks for sustenance and the basis of their traditional way of life. In many Native villages fresh meat, fish and produce are unavailable



except through the subsistence harvest. Annually, subsistence harvest amounts to less than 10% of the total take of fish and game.

As important as Native hunting and fishing rights are to Alaska Natives' physical, economic, traditional, and cultural existence, the State of Alaska has been and continues to be reluctant to recognize the importance of the subsistence way of life. The State views subsistence as nothing more than a taking of a natural resource, and as something that all citizens of the state should be entitled

to engage in on an equal opportunity basis with little distinction between commercial sport and trophy hunting, and subsistence needs.

In what is known as the *Katie John* case, NARF brought suit on behalf of two Native Elders from the Native Villages of Mentasta and Dot Lake in federal court in 1990 alleging that the 1980 Alaska National Interest Lands Conservation Act (ANILCA) requires the federal government to manage subsistence fisheries in navigable waters of Alaska. Both the federal district court and the Ninth



## The Protection of Tribal Natural Resources


Circuit Court of Appeals in 1995 agreed and held that the definition of "public lands" in Title VIII of ANILCA includes navigable waters in which the United States has reserved water rights. Under the reserved water rights doctrine, when the United States withdraws land and reserves it for a federal purpose, it also reserves by implication water rights necessary to fulfill the purposes of the reservation.

In 2001, the State of Alaska was granted a rehearing by the full panel of Ninth Circuit judges following entry of final judgment in the Alaska federal district court. In May 2001 the Ninth Circuit Court of Appeals issued an opinion in favor of protecting Alaska Native subsistence rights.

The court held that "the [1995] judgment rendered by the prior panel and adopted by the district court should not be disturbed or altered by the *en banc* court." This decision was but the latest in a series upholding Katie John's fishing rights.

The State had 90 days to appeal this decision to the U.S. Supreme Court. However, after a face-to-face meeting with subsistence plaintiff Katie John, Governor Knowles announced in August 2001 that he would not appeal the *Katie John* decision. He acknowledged that the State of Alaska has not been protecting the basic right of rural Alaskans to provide for themselves and for their families. Several challenges have been made by members of the





State Legislature and private groups trying to force the Governor to reverse his decision and appeal the case, but have been denied by the courts.

*Katie John*, more than any other subsistence case that had been pending before state or federal courts in Alaska, exemplifies the contentious battle being waged between federal, tribal and state interests about jurisdiction over Native fishing rights. NARF has been at the forefront of this battle for 17 years now.

In *Native Village of Eyak v. Daley*, NARF asserts aboriginal hunting and fishing rights on behalf of Alaska Native tribes to the Outer Continental Shelf (OCS) in the Gulf of Alaska. The issue presented is whether the Tribes may possess non-exclusive aboriginal hunting and fishing rights to waters on the OCS. The lawsuit challenges the Department of Commerce's Individual Fishing Quota (IFQ) regulations for halibut and sable fish on the ground that they prohibit tribal members from fishing within their traditional fishing grounds without IFQ's. The Ninth Circuit Court of Appeals ruled that claims for aboriginal title, including exclusive hunting and fishing rights, on the Outer Continental Shelf were barred by the federal paramountcy doctrine. The Court, however, expressly reserved the question whether Native tribes might hold non-exclusive hunting and fishing rights. The Supreme Court denied the Villages' petition, thereby refusing to review the Ninth Circuit's decision rejecting the Villages' claims to exclusive hunting and fishing rights on the OCS. The question whether the Villages have nonexclusive aboriginal fishing rights is now back before the federal district court where a decision is expected next year.

The Kenaitze Indian Tribe is a federally recognized tribal government whose members are direct descendants of Tanaina (Dena'ina) Athabaskan Indians. The Tribe has occupied the Kenai Peninsula region for centuries and subsisted by harvesting and gathering the resources offered by the land and the sea with salmon as the primary

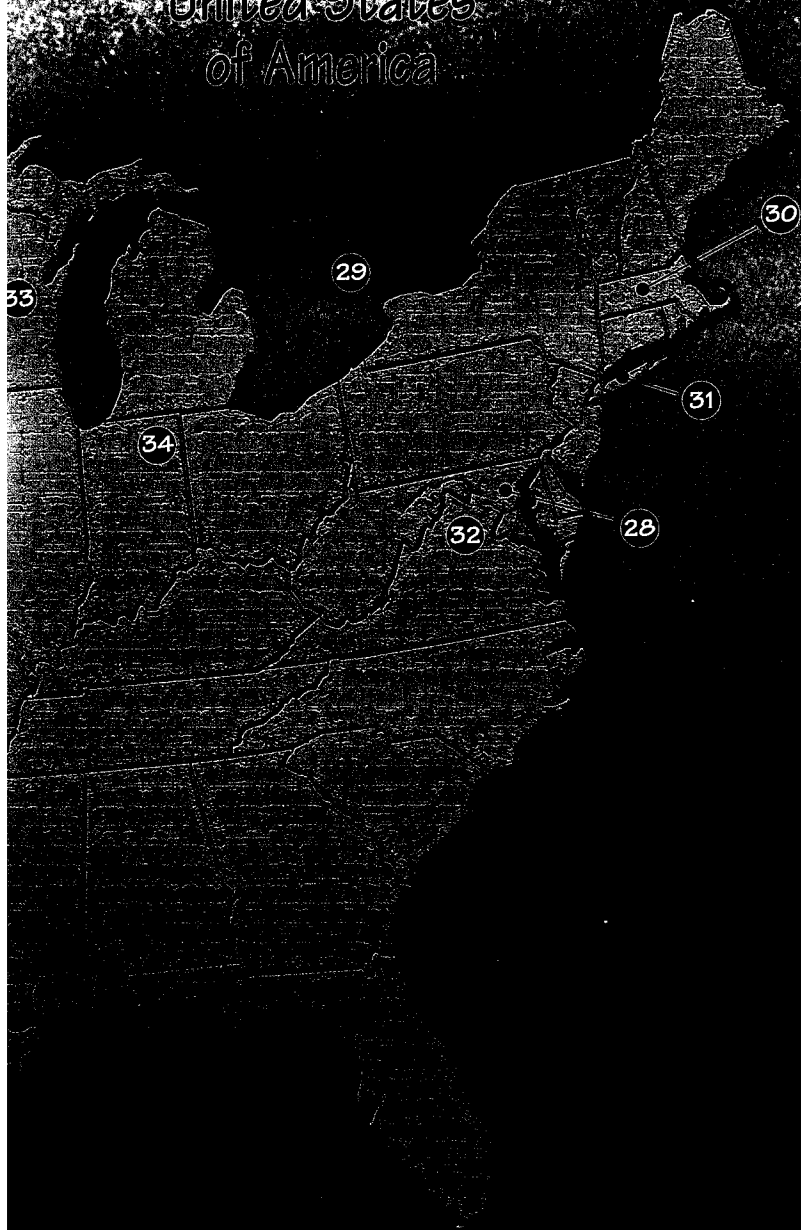
subsistence resource. Under the federal subsistence priority law, ANILCA, residents of rural areas are given a subsistence priority over sport and commercial hunters and fishermen. In 1991, the Federal Subsistence Board declared large portions of the Kenai Peninsula to be non-rural, including the entire Kenai area, which comprises the primary hunting and fishing grounds for members of the Kenaitze Indian Tribe. The Kenaitze Tribe with NARF's assistance drafted and submitted a proposal to the Regional Advisory Council and the Federal Subsistence Board seeking to have the Board reverse its 1991 "non-rural" determination. In May 2000, the Federal Subsistence Board reversed itself, holding that the Kenai Peninsula was indeed rural. However, the State and others requested the Board to reconsider this determination and in June 2001, the Board reversed itself again, holding that virtually all of the Kenai Peninsula was non-rural. The Tribe has decided to challenge this decision in court. A complaint will be filed by NARF on behalf of the Tribe.

The Native Village of Kluti Kaah requested that NARF look into potential litigation against the federal government and the State of Alaska to federalize the fishery in and surrounding the Chitina area. The fishery has been regulated under state law as a personal use fishery until recently when the Alaska Board of Fisheries reclassified the fishery as a subsistence fishery open to all Alaskans. The designation will have a great impact on the local users as more and more urban residents come to the Copper River to fish as "subsistence users." NARF has been assisting the Tribe petition the State Board of Fisheries to get it to reconsider the decision to make the personal use fishery in Chitina a subsistence fishery. The Board's action will have the effect of opening the fishery to urban residents creating greater competition for a limited number of available fish. NARF has also assisted the Tribe in preparing testimony before the Federal Board of Fisheries requesting that Board to do a customary and traditional use determination for the Chitina fishery that occurs in federal waters.

# MAJOR ACTIVITIES - 2001 NARE CASE MAP



# United States of America



1. Koyukuk Indian Tribe  
Subsistence (Alaska)
2. Owichin Steering Committee -  
Environmental/Subsistence  
(Alaska)
3. Alaska Intertribal  
Council/Native Village of Akiak  
Equal Protection (Alaska)
4. Native Village of Alekper -  
Language Initiative (Alaska)
5. NARF ANCHORAGE OFFICE
6. Native Village of Juklusk -  
Trust Lands (Alaska)
7. Mantasla & Dot Lake  
(Katie John) - Subsistence  
(Alaska)
8. Native Village of Nulik East -  
Subsistence (Alaska)
9. Native Village of Eyak -  
Subsistence & Aboriginal Title  
(Alaska)
10. Inupiat, Inupiat of Kotzebue  
Federal Recognition (Alaska)
11. Aloa Inupiat Band -  
Aboriginal Rights (Alaska)
12. Kluane Canyon  
Native Rights (Alaska)
13. Fort Kona Inupiat -  
Native Rights (Alaska)
14. Klamath Inupiat -  
Native Rights &  
Cultural Heritage (Alaska)
15. Klamath Inupiat -  
Native Rights &  
Cultural Heritage (Alaska)
16. Klamath Inupiat -  
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Cultural Heritage (Alaska)
20. Klamath Inupiat -  
Native Rights &  
Cultural Heritage (Alaska)
21. Klamath Inupiat -  
Native Rights &  
Cultural Heritage (Alaska)
22. Oklahoma Tax Commission  
v. Goodale - Taxation  
(Oklahoma)
23. Medicine Wheel National  
Historic Landmark -  
Sacred Site (Wyoming)
24. Fort Rock Tribes -  
Education (Montana)
25. Chippewa Cree Tribe -  
Water & Trust Claim  
(Montana)
26. Little Shell Tribe -  
Recognition & Trust Claim  
(Montana)
27. Turtle Mountain Reservation -  
Trust Claim (North Dakota)
28. NARF WASHINGTON, D.C.  
OFFICE
29. Northern Lakes Indian and  
Native Land Claim (Minnesota)
30. Madeline Island, St. Ignace  
Reservation (Michigan)
31. Shawnee Tribe  
Recognition (New York)
32. Pamunkey Tribe -  
Recognition (Virginia)
33. Chickasaw Nation -  
Trust Lands (Mississippi)
34. Chickasaw Nation -  
Trust Lands (Mississippi)
35. Chickasaw Nation -  
Trust Lands (Mississippi)
36. Chickasaw Nation -  
Trust Lands (Mississippi)
37. Chickasaw Nation -  
Trust Lands (Mississippi)
38. Chickasaw Nation -  
Trust Lands (Mississippi)
39. Chickasaw Nation -  
Trust Lands (Mississippi)
40. Chickasaw Nation -  
Trust Lands (Mississippi)
41. Chickasaw Nation -  
Trust Lands (Mississippi)

# THE PROMOTION OF HUMAN RIGHTS

In fiscal year 2001, NARF provided assistance in several matters involving religious freedom, cultural rights, education, child welfare and international law. NARF, on behalf of its clients, seeks to enforce and strengthen laws which are designed to protect the human rights of Native Americans in this area.

## **Religious Freedom**

Because religion is the foundation that holds Native communities and cultures together, religious freedom is a NARF priority issue. As a result, NARF has utilized its resources to protect First Amendment rights of Native American religious leaders, prisoners, and members of the Native American Church, and to assert tribal rights to repatriate burial remains. Since Native American religious freedom affects basic cultural survival of Indian tribes, NARF believes that American law and social policy must provide adequate legal protection.

In late 1994, Public Law 103-344, which exempts the religious use of peyote by Indians in bona fide traditional ceremonies from controlled substance laws of the federal and state governments, was passed. NARF represented the Native American Church of North America (NACNA) and played a key role in the passage of the legislation. It also prohibits discrimination against Indians for such religious use of peyote, including the denial of otherwise applicable benefits under public assistance programs. The bill closes the door to governmental prohibition of sacramental use of peyote by Indians and effectively reverses a 1990 United States Supreme Court decision in *Smith v. Oregon* that denied First Amendment protection to the Native American Church.

NARF is representing the Native American Church in the case *O Centro Espírita Beneficente União Do Vegetal (UDV-USA) v. Ashcroft*. The UDV is a Christian religious organization duly formed under the laws of Brazil, with its headquarters in Brasilia, Brazil. The UDV-USA is the United States branch of the UDV whose principal offices are in New Mexico. The UDV claims that the federal

government is violating its constitutional right of equal protection by permitting Native American Church members to possess and use peyote for religious purposes while denying them the religious possession and use of ayahuasca by UDV members. Ayahuasca is a hallucinogenic tea decoction made from the stems or bark of the vine banisteriopsis (also known as "mariri") together with the leaves of psychotria viridis (also known as "chacruna"). Ayahuasca has been used for centuries in healing rituals in Columbia, Ecuador, Brazil, and Peru.

The government bases its protection of the religious use of peyote on the trust relationship between the United States and Indians and the political relationship between the United States and tribes. Numerous courts over the past 20 years have recognized and upheld this special relationship as a basis for the unique treatment of the Native American Church. NARF and the Church are assisting the United States Department of Justice in defending current federal law which protects the religious use of peyote by Indian Church members.

NARF represents the NACNA in negotiations with the Department of Defense (DOD), which has initiated a process to promulgate regulations governing the religious use of peyote in the military. The Pentagon issued interim rules in 1997 that recognize and control the sacramental use of peyote by Native Americans in the military who are members of federally recognized tribes. It is estimated that there are approximately 9,600 Native Americans in the U.S. military but only a few hundred are members of the Native American Church. For Native American Church members, peyote is viewed as a natural gift from the Creator and the Church believes in strong family values, personal responsibility and abstinence from drugs and alcohol at all times. In 1998, the Department of Defense issued amendments to the interim rules and NARF submitted comments on behalf of the Native American Church of North America for the promulgation of a final rule which would prohibit the ingestion of the sacrament within 24 hours of duty,

ban the possession of the sacrament except the amulet known as the "Peyote heif", on bases, military vehicles, aircraft and vessels, and require affected service members to notify their commanders after returning to base if they have used the sacrament. The final rule has not yet been released.

NARF was a leading proponent of the Native American Graves Protection and Repatriation Act (NAGPRA) which was signed into law in 1990. The Act requires federal agencies and private museums that receive federal funding to inventory their collections of Native American human remains and funerary objects, notify the tribe of origin, and return the ancestral remains and funerary objects upon request to the tribe. It makes clear that Indian tribes have ownership of human remains and cultural items which are excavated or discovered on federal or tribal land and that they alone have the right to determine disposition of Indian human remains and cultural remains discovered in these areas. The Act prohibits the trafficking of Native American human remains and cultural items where the items are obtained in violation of the Act and requires federal agencies and private museums that receive federal funds to create a summary of sacred objects in their possession. If a tribe can prove a right of possession to these objects then they must be returned upon request of the tribe.

In continued guidance to tribes asserting NAGPRA claims, NARF participated with the Colorado Commission on Indian Affairs (CCIA) and the Colorado Historical Society (CHS) in assisting the Ute Mountain Ute Tribe of Colorado, the Northern Ute Tribe of Utah, the Cheyenne and Arapaho Tribes of Oklahoma, the Comanche Tribe of Oklahoma, the Fort Sill Apache Tribe of Oklahoma, the Kiowa Tribe of Oklahoma, the Northern Cheyenne Tribe of Montana, the Pawnee Nation of Oklahoma, the Oglala Sioux of South Dakota, the Rosebud Sioux of South Dakota, and the Mandan, Hidasta and Arikara Tribes of North Dakota with the return of Native American ancestral remains that were stored for up to a century in

boxes at the Colorado History Museum. NARF participated in a symposium involving the Tribes, the CCIA and the CHS in negotiating for the eventual return of 187 of the remains to the Tribes even though many could not be identified to any one specific tribe.

Since the remains could not be identified for any specific tribe, the tribes agreed to repatriate the remains together under the control of the Colorado Ute Mountain Ute Tribe and the Southern Ute Tribe in July 2001. The remains were put to rest somewhere in the southwestern corner of Colorado, the exact site to remain a secret to prevent any further disturbance. NARF is also assisting the CCIA in developing changes to Colorado law protecting unmarked human burials.

The Native American Rights Fund represented the National Congress of American Indians (NCAI) as an amicus in the case of *Bonnichsen v. United States*, sometimes referred to as the "Kennewick Man case." The case arose from the discovery of 9000 year old human remains along the Columbia River. Several northwest Tribes collectively filed a claim for possession of the remains with the Department of Interior (DOI) under the Native American Graves Protection and Repatriation Act. The Tribes wish to rebury the remains in accordance with tribal religious traditions.

Several scientists, *i.e.*, anthropologists, archeologists, museumologists, petitioned DOI for permission to conduct extensive studies of the remains before reburial by the Tribes. DOI denied the scientists' petition and granted the Tribes' petition. At that point, the scientists sought review and reversal of DOI's decision in the federal district court of Oregon. The court heard arguments and issued an opinion requiring DOI to reconsider its decision in light of analysis of a number of questions posed in the Court's opinion. DOI reconsidered and adhered to its original decision. The scientists again filed suit in Oregon court seeking review and reversal of DOI's decision. Briefs were filed and oral argument was held in June 2001.



## The Promotion of Human Rights

The Medicine Wheel National Historic Landmark, located within the Bighorn National Forest in north-central Wyoming, is a valuable cultural and religious resource for several Native American tribes who have inhabited the area for at least 7,500 years. Many tribes consider the site sacred, as has been documented in various ethnohistoric studies. In 1988 it became apparent that the site was in need of a better management plan to ensure visitor safety and the integrity of the Medicine Wheel. Therefore, in 1996 the United States Forest Service and several consulting parties signed a Historic Preservation Plan (HPP) which established a management plan for this site. The purpose of the HPP was "to establish a process for integrating the preservation and traditional use of historic properties with the multiple use mission of the Forest Service, in a manner that gives priority to the protection of the historic properties involved by continuing traditional cultural use consistent with the National Historic Preservation Act." The HPP additionally provided for on-site interpreters, visitor management, limited motorized access, and the protection of traditional cultural use of the site.

In *Wyoming Sawmills v. United States* and Medicine Wheel Coalition, a private timber company in Wyoming has challenged the legality of the United States Forest Service's Management Plan for the Sacred Medicine Wheel. NARF filed an *amicus curiae* brief on behalf of the National Congress of American Indians urging the United States District Court for the District of Wyoming to uphold the Plan on statutory and constitutional grounds and is now awaiting a decision.

### Cultural Rights

In November 1998, an "English Only" initiative was passed in the State of Alaska. The initiative was written in very broad terms and will have a major impact upon Alaska Natives. Unlike other official English measures that are primarily symbolic, this measure prohibits the use of any language except English in all governmental

functions and actions. The measure applies to "the legislative and executive branches of the State of Alaska and all political subdivisions, including all departments, agencies, divisions and instrumentalities of the State, the University of Alaska, all public authorities and corporations, all local governments and departments, agencies, divisions, and instrumentalities of local governments, and all government officers and employees."

NARF filed suit on behalf of twenty-seven Native individuals and organizations that have asked NARF to represent them. In March 1999, the Alaska Superior Court granted a preliminary injunction that enjoined the State of Alaska from the operation and enforcement of Alaska's Official English Initiative. Alaskans for a Common Language moved to intervene and requested an expedited appeal before the State Supreme Court and were granted intervention in August 2000. They then requested and were granted an extension to file their argument. NARF was given until March 2001 to file their reply to the movants brief. All of the briefing has been completed and oral argument on the summary judgment motions took place in October 2001. NARF is now waiting for a decision.

NARF is also helping the Rosebud Sioux Tribe of South Dakota develop a Cultural Resources Management Code by which the Tribe can regulate its cultural and intellectual property on its reservation. The Tribe is particularly interested in regulating the harvest and use of sage, its Sun Dances, and various arts and crafts.

In 1978, the United States Congress enacted the Indian Child Welfare Act (ICWA). The Act states as its purpose: "The Congress hereby declares that it is the policy of this Nation to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or

adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family programs."

The Act established substantive, procedural and jurisdictional protections for tribes and Indian families in cases of adoption, pre-adoptive placement, foster care placement, and termination of parental rights proceedings involving Indian children. Because these protections are challenged or may conflict with state law, policy or practice, there have been several hundred state and federal court decisions interpreting the Act. Congress has also attempted to amend the Act to resolve concerns related to the enforcement of the Act. NARF continued to monitor Congressional legislation and participated in several national conferences and meetings related to Indian child welfare to address tribal concerns.

### **Education**

In the past and even today, most federal and state education programs circumvent tribal governments and maintain federal and state government control over the intent, goals, approaches, funding, staffing and curriculum for Indian education. For 31 years, the Native American Rights Fund has focused its educational efforts on increasing Indian self-determination and transferring control back to the tribes.

NARF has implemented an Indian Education Legal Support Project with its central theme of "tribalizing education." The goal is to give tribes more control over their most precious resource, their children, and help them to improve Indian education and tribal societies. Rather than focusing on traditional civil rights work such as racial discrimination claims, NARF's efforts are devoted to confirming the unique sovereign rights of Indian tribes based on principles of Indian law. To date these rights and principles have not been addressed adequately in the context of education.



*NARF attorney Melody McCoy at NIEA Conference*

Under the Project, NARF strives to strengthen tribal rights in education. This means helping tribes gain control of the formal education of their members, regardless of the government that provides the education -- federal, state, or tribal. As NARF continues to develop and successfully promote cutting-edge legal theories about tribal control of education, work continues in developing tribal education laws, such as education codes, policies, and plans; developing tribal-state agreements and compacts as necessary to implement tribal laws; reforming federal and state education laws and policies; and litigation to enforce tribal rights in education.

NARF continued to represent the Rosebud Sioux Tribe on implementing and refining its Education Code that was adopted in 1991. NARF continues to help the Tribe work with the U.S. Department of Education's Office of Indian Education regarding the Department's policies and programs on the availability of public school district records on students who are tribal members. With these records, the Tribe can improve its Tribal Student Tracking System, and its State of the Reservation Education Report. The Tribe has noted several areas where the Department's policies and programs could be improved to help facilitate the Tribe's tracking and reporting systems.



## The Promotion of Human Rights

The Department is reviewing the Tribe's proposed changes. The Tribe is also working with the state to improve student record retrieval and in cooperative agreements on teacher training. NARF and the Tribe sponsored, along with the Fort Peck Tribes, the Jicarilla Apache Tribe, The National Indian Education Association (NIEA), the National Congress of American Indians, and the National Indian School Boards Association, a National Tribal Education Departments Forum in October 2001 in Billings, Montana. The forum was held in conjunction with NIEA's Annual Convention.

The Fort Peck Tribes have continued to work toward full implementation of the Tribal Education Code through cooperative agreements with the five public school districts within reservation boundaries, and through the establishment of a tribal student tracking system. Due to the need to collect signed parental permission forms prior to inputting attendance and academic data, a reservation-wide tribal student tracking system is not yet operational. NARF continues to assist the Tribes in dealing with concerns raised by certain public school officials regarding the release of student records to the Tribal Education Department. These records are currently utilized by the Tribal Education Department in administering a successful incentive award program and will ultimately be used in carrying out additional programs authorized by the Tribal Education Code. Without this information, the Tribes will be unable to address the educational needs of their members. To ensure future cooperation by the state public school districts, NARF and the Tribes are seeking the support of the U.S. Department of Education, along with other tribal education departments, in this matter.

NARF assisted the Jicarilla Apache Department of Education (JADE) in negotiating a memorandum of understanding between the Tribe and the Dulce public school district setting out a process for JADE's data gathering from the district. This data is needed to formulate a State of the Reservation Education Report (SRE Report)

which sets forth facts concerning the present status of Indian education on the Reservation. Once the requisite data is gathered from the School District, as well as from tribal programs by JADE, the data will be compiled in the SRE Report. Then JADE will analyze the data and in consultation with the School District, will formulate preliminary findings, conclusions, and recommendations for Tribal action. The findings and recommendations will form the foundation for the Tribe's education code.

### International Law

Through a relentless campaign by a coalition of tribes and Indian rights organizations including the National Congress of American Indians (NCAI), NARF and the Indian Law Resource Center, the United States announced that it was adopting a more forward-looking policy on rights for "Indigenous Peoples" in January 2001. While the United States has promoted a measure of self-determination for Indian tribes domestically since the 1970s, the government had steadfastly refused to recognize any right of self-determination for tribes or other indigenous peoples within the international arena. For decades, tribes have urged the United States to abandon its anachronistic and discredited international policy on self-determination.

The new policy, while far from perfect, is a step in the right direction and will set the necessary foundation to begin a more constructive dialogue with the United States and other states on the Rights of Indigenous Peoples during negotiations surrounding the Declarations on the Rights of Indigenous Peoples in the United Nations (U.N.) and the Organization of American States (OAS). The new policy does three things that indicates considerable movement by the United States: (1) it acknowledges a right to "self-determination" (albeit only an 'internal' right); (2) it accepts that certain rights of "indigenous peoples" are "group rights"; and (3) it accepts the use of the term "Peoples." The use of the term Peoples has important legal significance, since two widely accepted international

covenants both expressly provide that "All Peoples have the right to self-determination . . .".

The new policy also impacts the United States' official position on the collective nature of the rights of indigenous peoples. Prior to this change in policy, one of the major stumbling blocks in the discussions at both the U.N. and the OAS regarding the respective Declarations has been that the United States had taken the position that it would only recognize rights belonging to individuals. But, of course, Indian tribes by definition have always had rights that are exercised by the group. The new United States policy acknowledges this reality.

In further action in the arena of indigenous rights, NARF represented NCAI in the World Conference Against Racism held in Durban, South Africa in September 2001. NARF/NCAI attendance at preparatory meetings in Geneva, Philadelphia, Oakland, Puerto Rico, Santiago, Chile and Quito, Ecuador have been important in pushing the indigenous agenda. Most of the indigenous issues were voted on by the states at the last preparatory committee meeting, right before Durban. The final document approved by the states uses the term indigenous peoples, but with a footnote (insisted on by the U.S.) that indicates that the meaning of that term is being negotiated in other fora. The plan of action urges negotiation and approval of the draft Declaration on the Rights of Indigenous Peoples as soon as possible.

NARF and NCAI participated in a U.N. session of the Working Group On Indigenous Populations in January, 2001 and drafting sessions on the OAS Proposed Declaration on the Rights of Indigenous Peoples in April 2001. It is hoped that the change in the U.S. position at the OAS will be continued at the U.N. and that the logjam at the U.N. will open up. NARF and NCAI have applied for consultative status in the U.N. and expects to hear on its application by January, 2002.



*Alan Jenkins, Ford Foundation; JoAnn Chase, NCAI; Keith Harper and Kim Gottschalk, NARF attorneys at World Conference on Racism in South Africa.*



*Professor Myrna Cunningham, Nicaragua; Keith Harper, NARF attorney; Matthew Coon Come, Canada; Rigoberta Menchu, Nicaragua at the World Conference on Racism in South Africa.*

# THE ACCOUNTABILITY OF GOVERNMENTS

NARF works to hold all levels of government accountable for the proper enforcement of the many laws and regulations which govern the lives of Indian people. NARF continues to be involved in several cases which focus primarily on the accountability of the federal and state governments to Indians.

NARF represents all present and past individual Indian trust beneficiaries (approximately 300,000) in a class action suit against the United States in 1996 for mismanagement of the individual Indian money (IIM) trust accounts. Commonly referred to as the "IIM Case," this litigation is intended to force the United States as trustee to: (1) perform a complete, accurate and reliable accounting

of all trust assets held to the benefit of individual Indian trust beneficiaries; (2) properly restate the trust fund accounts in conformity with that accounting; and (3) create an accounting and trust management system that is reliable and will safely and soundly manage the trust funds of individual Indians in the future.

In February 2001, the federal Court of Appeals for the District of Columbia upheld the December 1999 District Court decision holding the United States in breach of trust and requiring the government to provide an accounting to the IIM beneficiaries. These two decisions constitute two of the most important opinions ever issued on the trust responsibilities of the government to Native





Americans. In May 2001, the government decided against appealing the Court of Appeals unanimous decision to the Supreme Court.

In April 2001, U.S. District Court Judge Royce C. Lamberth appointed a court monitor, Joseph S. Kieffer III, to independently assess the United States' failing effort to reform the Indian trust management system. In July 2001, Mr. Kieffer issued the first of four reports. This First Report found that despite Judge Lamberth's 1999 order to account, the federal government failed to perform a full and fair accounting of trust funds. He also found that Interior Secretary Gale Norton and her predecessor, Bruce Babbitt, were orchestrating an elaborate charade to trick the Court into believing that they were taking action, when they were not. Mr. Kieffer's Second and Third Report filed in August and September 2001 respectively, found that the government lied at trial regarding the progress of trust reform and the likelihood that their trust reform plan would result in success. In addition, the Reports demonstrated that although federal officials were under an obligation to report truthfully on trust reform after the 1999 decision in Quarterly Reports to the Court, they failed to do so. Instead, time and time again they falsely told the Court that the reform effort was generally going as planned. They never revealed that both the Bureau of Indian Affairs (BIA) Trust Asset and Accounting Management System (TAAMS) data cleanup effort and the installation of the TAAMS system, the purported centerpiece of trust reform, was running into serious problems. Finally, in early October 2001, Mr. Kieffer issued a fourth report, this one finding essentially that Secretary Norton had knowingly verified an "inaccurate and incomplete" Quarterly Report to the Court. In October 2001, based on the four Kieffer reports and other material, plaintiffs amended their motion to reopen Trial One and have the Court grant additional relief, specifically, the appointment of receiver to take over trust management reform. In response, Secretary Norton has proposed a plan to reorganize management of individual Indian and tribal trust assets within the

Department of Interior by creation of a new agency within Interior, a plan which has been and continues to be overwhelmingly rejected by tribes throughout Indian Country since they were never consulted about it as required by law.

In December 2001 contempt proceedings against Secretary of the Interior Gale Norton and Assistant Secretary for Indian Affairs Neal McCaleb began. Norton and McCaleb were ordered by the Court to show why they were not in contempt of court for: 1) failing to comply with the Court's order to do an historical accounting; 2) committing fraud on the Court by concealing the true actions of the Department regarding the historical accounting; 3) committing fraud on the Court for failing to disclose the true status of the TAAMS project; and, 4) committing fraud on the Court by filing false and misleading status reports regarding BIA data clean-up.

A fifth charge of contempt was added regarding computer security. This charge came to light following a report issued by the Special Master describing lack of computer security for individual Indian trust data, calling the lack of security "deplorable and inexcusable." In addition, as a result of this report, Judge Lamberth issued a temporary restraining order on December 5, 2001, instructing that the federal defendants shall immediately disconnect from the Internet all information technology systems that house or provide access to individual Indian trust data, and shall immediately disconnect from the Internet all computers within the custody and control of the Department of the Interior, its employees and contractors that have access to individual Indian trust data. On December 17, 2001, Judge Lamberth issued an order allowing the Interior to issue checks to IIM beneficiaries. Despite this order, however, defendants have still not issued the checks.

In a Court of Federal Claims action, NARF represents the Turtle Mountain Band of Chippewa in North Dakota, the Chippewa-Cree of the Rocky Boys Reservation in Montana and the Little Shell Tribe of Chippewa in Montana against



## The Accountability of Governments

the Bureau of Indian Affairs for mismanagement of the Pembina Judgment Fund. The Tribes allege misaccounting, misinvestment, and mismanagement by the federal government of their \$50 million tribal trust fund. The Fund was established in 1980 to distribute Indian Claims Commission awards to these tribes for lands and other rights taken by the United States. After a partial distribution to the tribes in 1988, the undistributed portion was held in trust by the Bureau of Indian Affairs. NARF and the Tribes have been exploring the possibility of a negotiated settlement of the Tribes' claims since 1997. In August 2000, the tribes submitted the first of three parts of their settlement proposal. The government is now reviewing that proposal. The first settlement negotiations meeting was held in May 2001.

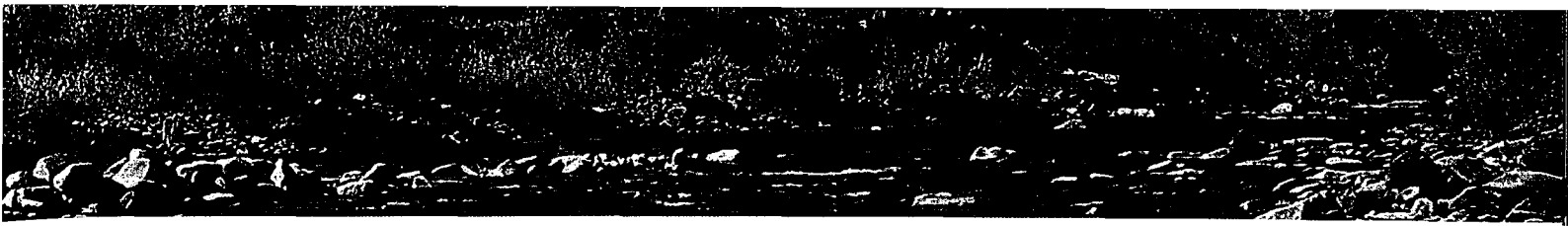
The Native American Rights Fund, on behalf of the Alaska Inter-Tribal Council, ten Native villages and seven Native individuals, filed a civil lawsuit in October 1999, in the Superior Court for the State of Alaska, seeking declaratory and injunctive relief against the State of Alaska for failure to provide minimally adequate police protection to off-road Native villages and for discriminating against them in the provision of State law enforcement services. In *Alaska Inter-Tribal Council v. Alaska* the complaint alleges that the actions of the State in unlawfully prohibiting Native villages from keeping the peace in their traditional ways, which rendered them defenseless to lawbreakers, while failing to provide them even minimally-adequate police protection under the State law enforcement system, violated the Villages' rights to Due Process of law and basic law enforcement protection guaranteed by the Fourteenth Amendment to the United States Constitution and Article I of the Alaska Constitution.

The complaint also alleges that the State's discriminatory treatment of Native villages in the provision of police protection is based on race and therefore violates the Villages' rights to Equal Protection of the law under the Fourteenth Amendment to the United States

Constitution and Article I of the Alaska Constitution. The complaint sets forth in sad detail the history of discrimination against Native Villages in the provision of law enforcement by both the Territorial and State governments. The State has moved for a summary judgment dismissing the Villages' case. NARF has filed opposition briefs and the trial is scheduled on the merits commencing in April 2002.

NARF is involved in Native Hawaiian legal issues primarily in support of the Native Hawaiian Legal Corporation, which NARF helped to organize in the early 1970s to address these issues. The Native Hawaiian cases are somewhat different than other NARF cases but there are historical similarities. The United States overthrew the sovereign Native Hawaiian government in 1893, pandering to business and military interests who sought control of the islands for strategic purposes. But prior to European contact in 1778, the Islands had a very complex and elaborate Native Hawaiian civilization. Over the years, Native Hawaiians have been making substantial progress in re-asserting Native Hawaiian rights.

*Rice v. Cayetano* involved a challenge by a non-Native to the voting restriction in the state constitution allowing only Native Hawaiians to vote for trustees of the Office of Hawaiian Affairs (OHA). The OHA administers income received from certain trust lands for the benefit of Native Hawaiians. Rice argued that the restriction violates the Fourteenth and Fifteenth Amendments to the U.S. Constitution. The Ninth Circuit Court of Appeals upheld the voting restriction, but the United States Supreme Court reviewed that decision. One of Rice's arguments is that since there are no tribes in Hawai'i, the voting restriction is purely race-based and subject to strict scrutiny. The Supreme Court case of *Morton v. Mancari* held that legislation as to Indian tribes is based on the political relationship between tribes and the United States and need only be rationally related to Congress' unique obligation toward Indian tribes. The question was whether the same standard applies to legislation passed



for the benefit of Native Hawaiians. NARF filed an *amicus curiae* brief in support of Native Hawaiians on behalf of the National Congress of American Indians in the Supreme Court. However, in February 2000 the Supreme Court ruled against the Native Hawaiians declaring that the state restriction on voting for OHA trustees to Hawaiians was based on race and, therefore, violated the 15th Amendment which prohibits denying anyone the right to vote based on race. Since this decision, NARF has been monitoring numerous challenges by non-Native Hawaiians to programs and legislation that have been enacted to benefit to Native Hawaiians.

In *Pele Defense Fund v. Campbell*, NARF and co-counsel Native Hawaiian Legal Corporation await a favorable ruling promised by a Hawai'i state court in 1996 that would allow for traditional Native Hawaiian access rights to rainforest lands traditionally exercised by Native Hawaiians on those lands before they were exchanged in

1983 by the State of Hawai'i for other lands in order to accommodate a geothermal developer. The decision is expected to be appealed to the Hawai'i Supreme Court. The case was previously before the Hawai'i Supreme Court in 1992 when it upheld the land exchange but remanded the case for trial on the traditional access rights issue. That ruling was precedent for a landmark 1995 ruling by the Court in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* which alerted government agencies of their responsibility under the Hawai'i State Constitution to consider Native Hawaiian rights in all permitting rather than forcing traditional access practitioners to resort to litigation in order to continue such customary usage. NARF continues to wait for the court ruling which has now been pending for six years.

# THE DEVELOPMENT OF INDIAN LAW

The systematic development of Indian law is essential for the continued protection of Indian rights. This process involves distributing Indian law materials to, and communicating with, those groups and individuals working on behalf of Indian people. NARF has two ongoing projects which are aimed at achieving this goal.

## **The National Indian Law Library**

The National Indian Law Library (NILL) is a national public law library devoted to American Indian law which serves both the Native American Rights Fund (NARF) and the public. The mission of NILL is to develop and make accessible a unique and valuable collection of Indian law resources and to assist people with their research needs. Special emphasis is placed on helping individuals and organizations working on behalf of Native Americans who have the greatest potential to positively influence their lives. NILL fills the needs of the often-forgotten areas of the nation known as Indian country. NILL handles close to 1,500 information requests per year and serves a wide variety of public patrons including attorneys, tribal governments, tribal organizations, researchers, students, prisoners, the media, and the general public.

For the past twenty-nine years, NILL has been collecting a wealth of materials relating to federal Indian law and tribal law that include such tribal self-governance materials as constitutions, codes and ordinances; legal pleadings from major Native American law cases; law review articles; handbooks; conference materials; and other information. Now the general public can access bibliographic descriptions of these materials from the electronic library catalog on the NILL website. This searchable catalog provides free access to current descriptions of more than 10,000 holdings in the library collection. Once relevant documents are located, patrons can review materials at the Boulder, Colorado library; request copies to be mailed, faxed or E-mailed for a nominal fee; or borrow materials through interlibrary loan. In addition, the library web pages provide research links, full-text copies of tribal codes and constitutions,

and current awareness services such as the U.S. Supreme Court update. Access these resources by directing your Internet browser to the Native American Rights Fund (NARF) website at [www.narf.org](http://www.narf.org), and click on the National Indian Law Library link.

## **Indian Law Support Center**

Since 1972 the Indian Law Support Center (ILSC) of the Native American Rights Fund had received funding from the Legal Services Corporation to serve as a national support center on Indian law and policy for the national Indian legal services community and the 32 basic field programs serving Native American clients. Literally hundreds of requests for assistance in all areas of Indian law were answered annually. Because of the unique and complex nature of Indian law and the geographic remoteness of Indian legal services programs, complicated by the difficulty of attracting and maintaining experienced staff, ILSC performed a vital and cost-effective support function to Indian programs and other legal services providers across the country.

Due to the loss of Legal Services Corporation funding in 1995, ILSC has been unable to carry on at traditional levels its program of working with Indian legal services lawyers nationwide through advice, research, recent Indian legal information, litigation and training. However, ILSC has been able to continue some assistance to Indian Legal Services programs throughout the year. ILSC continued to send out regular mailouts to Indian Legal Services programs, handling requests for assistance, and working with Indian Law Support Directors to secure a more stable funding base from the Congress. In December 2000 Congress enacted the Indian Tribal Justice and Legal Assistance Act of 2000 which President Clinton signed into law. The Act authorizes the Department of Justice to provide supplemental funding to Indian Legal Services programs for their representation of Indian people and tribes which fall below federal poverty guidelines. ILSC continues to work with the Indian Legal Services programs to secure



appropriations for the Act. ILSC also sponsored a two-day training conference on Tribal Courts in July 2001 in Berkeley, California.

#### **Other Activities**

In addition to its major projects, NARF continued its participation in numerous conferences and meetings of Indian and non-Indian organizations in order to share its knowledge and expertise in Indian law. During the past fiscal year, NARF attorneys and staff served in formal or informal speaking and leadership capacities at numerous Indian and Indian-related conferences and meetings such as the National Congress of American Indians Executive

Council, Midyear and Annual Conventions and the Federal Bar Association's Indian Law Conference. NARF remains firmly committed to continuing its effort to share the legal expertise which NARF possesses with these groups and individuals working in support of Indian rights and to foster the recognition of Indian rights in mainstream society.

# NATIVE AMERICAN RIGHTS FUND

## 2001 Treasurer's Report

Based on our *audited* financial statements for the fiscal year ending September 30, 2001, the Native American Rights Fund reports total unrestricted revenues of \$7,901,516 against total expenditures of \$7,409,815. Due to presentation requirements of the audited financial statements in terms of recognizing the *timing* of certain revenues, they do not reflect the fact that, based on NARF's internal reporting, operating expenses and other cash outlays actually exceeded revenue by \$37,309, allowing for a modest decrease to NARF's reserve fund. This decrease is largely attributed to unrealized losses on investments.

Expenditures increased by \$547,603 due, in the most part, to an increase in consultant costs for fiscal year 2001's case-related activity. Total management and fund raising costs constituted 24.58% of total revenues in fiscal year 2001. Support and Revenue comparisons between fiscal year 2001 and fiscal year 2000 are shown below.

## Support and Revenue Comparison

	2001		2000	
	\$	%	\$	%
Contributions	\$ 5,361,622	67.9%	\$ 2,927,937	41.3%
Federal Grants	1,906,824	24.1%	1,532,444	21.6%
Foundation Grants	1,837,437	23.2%	1,173,411	16.5%
Legal Fees	92,207	1.2%	137,440	1.9%
Other	46,737	0.6%	38,361	0.5%
Return on Investments	<1,343,311>	<17.0%>	1,288,862	18.2%
<b>TOTALS</b>	<b>\$ 7,901,516</b>	<b>100%</b>	<b>\$ 7,098,455</b>	<b>100%</b>

*Note: This summary of financial information has been extracted from NARF's audited financial statements on which the accounting firm of JDS Professional Group expressed an unqualified opinion. Complete audited financials are available, upon request, through our Boulder office or at [www.narf.org](http://www.narf.org).*

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