

*Annual Report 2011*  
**NATIVE AMERICAN RIGHTS FUND**



**IN MEMORIAM**  
**DAVID HARDING GETCHES**  
**AUGUST 17, 1942 – JULY 5, 2011**

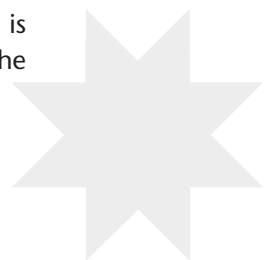
“We have an unknown distance yet to run, an unknown river to explore.”  
John Wesley Powell

The Board of Directors and the staff members of the Native American Rights Fund wish to dedicate this 2011 Annual Report to the memory of David H. Getches, founding Executive Director of the Native American Rights Fund.

Getches was born in Abington, Pennsylvania, received his bachelor’s degree from Occidental College and his J.D. from the University of Southern California Law School. He began his legal career in 1967 with the law firm of Luce, Forward, Hamilton and Scripps in San Diego, California. By 1968, he was co-directing attorney for California Indian Legal Services Escondido office. In 1970, he became the founding Executive Director for the Native American Rights Fund in Berkeley, California and later relocated to Boulder, Colorado in 1971. He served as Executive Director until 1973 when he turned the position over to John Echohawk and became Deputy Director for one year. He served as staff attorney until 1976 when he went into private practice. In 1978, he joined the University of Colorado Law School faculty and taught Indian law, environmental law, water law, and public land law. In 2003, he became the Dean of the Law School.

As a staunch advocate for American Indian rights, David Getches left an indelible imprint on modern Indian law. While at NARF, David Getches litigated major cases on behalf of Native American clients that included water rights, land claims, environmental issues, education, and civil rights. He served as lead counsel in the 1974 U.S. District Court decision in *U.S. v. Washington*, a landmark Northwest Indian fishing rights case – known as the Boldt decision – which still stands as the leading case on the enforcement of tribal treaty rights. This litigation involved the extent of off-reservation treaty fishing rights of 14 tribes in Washington. Getches advanced the bold and creative legal theory that the treaty’s promise of the right to take fish at “usual and accustomed places” and “in common with” territorial citizens entitled Indians to share equally and take up to half of the harvestable fish. His advocacy was not appreciated by all, as he was verbally taunted each day that he walked up the courthouse steps. Despite difficult odds and public sentiment, he prevailed on his theory and vindicated Indian treaty rights in the now famous Boldt decision.

David Getches’ visionary life has inspired each and every one of us. We commit to continue his legacy and devotion to our people, our nations, our causes and our environment. In this way, we honor his life, his family and the many people that he taught. We will always remember David’s spirit with abiding affection and respect. This NARF Annual Report is dedicated to the life of David Getches, founding Executive Director of the Native American Rights Fund.





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**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.

# Introduction



The Native American Rights Fund (NARF) is the national Indian legal defense fund whose primary work centers on the preservation and protection of Indian rights and resources. NARF began its work in 1970 with a planning grant from the Ford Foundation and through the years has grown into a reputable and well-respected advocate of Indian interests.

Since its beginnings, NARF has worked in conjunction with many people to seek judicial and negotiated solutions to long-standing Indian grievances, uncertainties and problems. NARF's partners have included tribal leaders, tribal attorneys, government attorneys and legal services attorneys.

Native advocates were almost invincible during the 1970's and into the 1980's, especially in the U.S. Supreme Court. Beginning in the mid-1980's, Supreme Court decisions started shifting against tribal interests. This negative shift continues today as the majority

of the Justices on the Supreme Court seem intent on limiting tribal sovereignty.

After the modern day tribal sovereignty movement, the field of Indian law is no longer considered an esoteric subject about ancient history. Due in part to NARF's existence – its tremendous successes in the courts as well as continued representation over the years in thousands of cases – the rights of America's Indians are now judiciously and routinely being advocated before the courts, administrative hearings, state legislatures and Congress. Officials and bureaucrats who either chose to ignore or had no information on the specific rights of America's Indians in the past are today held accountable for decisions relating to Native Americans, partly because of the rights defined and upheld in NARF's courtroom and legislative victories.

The initial goal for NARF's Indian law practitioners was to represent Native Americans in cases of major significance to a great number of Indian people. For the first time, Indian people were assured that a sustained, highly-trained Indian advocacy group was available to them to clarify treaty and constitutional rights guaranteed them – regardless of their ability to pay. NARF has been involved in some capacity in practically all of the precedent-setting cases in past forty-one years.

The Native American Rights Fund has been at the forefront in advocating for many of the major acts affecting Native Americans including the American Indian Religious Freedom Act, the American Indian Policy Review Commission, the Native American Graves Protection and Repatriation Act, the Maine Indian Land Claims Settlement Act, the Religious Freedom Restoration

*John Echobawk and  
David Getches in 1972.*



Act and many others. NARF has also been instrumental in assisting vital new Indian organizations including the American Indian Higher Education Consortium, the Tribal Education Departments National Assembly, the Council on Energy Resource Tribes, the National Tribal Environmental Council and the Native Hawaiian Legal Corporation.

As an Indian-controlled organization, NARF's leadership has provided as many opportunities as possible to develop young Indian law graduates and students in the area of Indian law. An average of eight law interns and/or clerks are employed annually by NARF, most of them being Native American.

NARF's existence would not be possible without the efforts of the thousands of individuals who have offered their knowledge, courage and vision to help guide NARF on its quest. Of equal importance, NARF's financial contributors have graciously provided the resources to give our efforts life. Contributors such as the Ford Foundation have been with NARF since its inception. The Open Society Institute, the Bay and Paul Foundations and the Unger Foundation have also made long term funding commitments. Also, the positive effects of NARF's work are reflected in the financial contributions by a growing number of tribal governments like the Yocha Dehe Wintun Nation, the Seminole Tribe of Florida, the Chickasaw Nation, the San Manuel Band of Mission Indians, the Muckleshoot Tribe, the Mississippi Band of Choctaw Indians and the Poarch Band of Creek Indians. United, these financial, moral, and intellectual gifts provide the framework for NARF to fulfill its goal of securing the right to self-determination to which all Native American peoples are entitled. Finally, NARF's legal work was greatly enhanced by the generous pro bono contributions by the law firms of DLA Piper and Patton Boggs LLP. Their many hours of work made it possible for NARF to present the best positions possible and to move forward in insuring NARF's success.

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*"The man who sat on the ground in his tipi meditating on life and its meaning, accepting the kinship of all creatures and acknowledging unity with the universe of things was infusing into his being the true essence of civilization."*  
— Chief Luther Standing Bear

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#### **NARF's Priorities**

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

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



# Executive Director's Report



In 2011, the Native American Rights Fund continued providing legal advice and representation to Indian tribes, organizations and individuals in cases of major significance for the 41st year. Once again, our efforts resulted in several important victories and accomplishments for Native Americans.

In *McCrary v. Ivanof Bay Village*, the Alaska Supreme Court affirmed the federal tribal recognition of Ivanof Bay Village and the corollary right of the Village to claim sovereign immunity from suit over a contractual dispute. The Court rejected arguments that Congress has not approved the Department of the Interior's authority to acknowledge preexisting

tribal status in Alaska and relied on a previous case addressing the issue.

After many years of hearings, an Oregon Administrative Law Judge in the Klamath Basin Adjudication issued Proposed Orders in six cases quantifying the Klamath Tribes' water rights claims in flow amounts or water levels in each case sought by the Tribes and confirmed once again that the Tribal water rights are the most senior in the Klamath Basin. NARF has long represented the Klamath Tribes in their efforts to protect their reserved water rights to support their treaty hunting, fishing and gathering rights with a time immemorial priority date as well as water rights needed to satisfy the Tribes' agricultural needs. The Proposed Orders now move forward for review by the Oregon Water Resources Department's Adjudicator.

The Native Culture, Language, Access to Success in Schools (CLASS) Act, an Indian education bill that dramatically increases tribal sovereignty over elementary and secondary education, was approved by the United States Senate Committee on Indian Affairs and was introduced in the House of Representatives. The Act includes several provisions that the Tribal Education Departments National Assembly (TEDNA) represented by NARF has advocated for including an authorization for a tribal education agency pilot project, cooperative education agreements between tribes and states, increased roles for tribal governments in public schools, increased funding for tribal education agencies and other Indian education programs.

In addition, after over 20 years of work, NARF and TEDNA secured federal funding for tribal education departments in 2012. The funding will be distributed to tribal education departments by the Department of Education so they can participate in a pilot project that allows tribal education departments to operate federal education programs in public and



Bureau of Indian Education schools located on Indian reservations.

NARF and several other groups convened a Boarding School Healing Symposium at the University of Colorado Law School. The Symposium brought together individuals from across the U.S. and Canada that have been working on various aspects of the issue to discuss the priorities and strategies to achieve both national recognition of and apology for the wrongs visited on individuals and communities of U.S. tribes and reparations to provide the framework for healing of these historic and enduring wrongs. A coalition was formed to continue this work.

In *State of Alaska v. Tanana*, the Alaska Supreme Court issued a broad affirmation of tribal authority by holding that tribal courts in Alaska have authority to initiate and adjudicate Native children's cases without going through state courts. State recognition of those tribal court proceedings is critical to assure that the tribal court proceedings are respected by other state agencies. NARF represented several Alaska Native villages and a tribal couple in the case.

NARF represents 41 tribes in *Nez Perce Tribe v. Salazar*, a case filed in 2006 seeking accountings of tribal trust funds managed by the federal government. In 2011, the government provided the tribes with never-before provided trust account data and began settlement negotiations with the tribes to settle their cases.

In *Cobell v. Salazar*, a case that NARF helped to file in 1996 but is no longer active in, the federal district court for the District of Columbia approved a settlement of \$3.4 billion for the claims of over 300,000 individual Indian money account holders who are seeking an accounting of their trust funds held by the federal government. The federal district court's approval of the settlement has been appealed to the Court of Appeals for the District of Columbia.



*David Getches and  
John Echobawk in 1973.*

NARF's Indian Law Support Center, which works with the 32 basic Indian legal services programs around the country, once again helped to secure funding under the Indian Tribal Justice and Legal Assistance Act to supplement funding for Indian legal services programs for their representation of Indian people and Tribes which fall below federal poverty guidelines. Congress appropriated \$2.49 million for civil and criminal assistance in tribal courts.

These positive results in 2011 would not have been possible without the financial support of our many contributors and supporters. We thank you and hope that your assistance will continue as we continue our service to Indian country on these priority legal issues.

John E. Echobawk  
Executive Director

# Chairman's Message



*Jerry Danforth  
Chairman,  
Board of Directors*

About the time that the Native American Rights Fund was getting started, a 1969 US Senate report was describing some ideals that were believed to be fundamental principles about society in America. The Senate report stated in part "The American vision of itself is of a nation of citizens determining their own destiny; of cultural differences flourishing in an atmosphere of mutual respect; of diverse peoples shaping their lives and the lives of their children." While the concept sounds ideal, in reality, the outcome of this vision has not held true for too many Native American communities.

Yet today, more than forty years after that Senate report we still witness states such as South Dakota and Alaska, to be in violation of the Voting Rights Act. Voting is a right, fundamental to U.S. citizenship, and many jurisdictions go to great lengths to enable citizens to vote - yet these states choose efforts to limit voting rights to Native Americans.

States such as Wisconsin and Oklahoma have made great strides in educating citizens about state, federal and tribal court systems and have achieved milestones in judicial reciprocity. South Dakota and Alaska, however, continue to not recognize the self-governing rights of Indian tribes to assert their authority and responsibility, even over the welfare of their children.

On other matters, and far too often, federal and state governments appear blind to the destructive impact that certain regulations have on the sacred sites and burial places of Native Americans. Our highest court in the land, the U.S. Supreme Court, continues to deny justice to Indian tribes year after year. It is unbelievable to conceive how or why matters brought before the Roberts Court have lost in all seven cases, even when the lower courts have ruled in favor of the Indian tribes.

There are many examples from around the world that reflect the fight for protecting sacred land, preserving cultural values, defending ways of life. That type of determination and unwavering sense of responsibility is no less among Native American leaders, whether on the battle fields of war or in the halls of Congress or in state, federal, or tribal courts. Today these fights continue – they continue because the threat to the core values and the very fabric of what makes us who we are – Native Americans – is ever present.

For the past forty-one years, the Native American Rights Fund has been by the side of Native American tribes in their fight to protect and preserve these rights. For example, "The First Thirteen" Native American attorneys who argued before the U.S. Supreme Court will be discussing their experiences in a symposium in March 2012 at the University of New Mexico School Of Law in Albuquerque. NARF senior attorneys Melody McCoy and Heather Kendall-Miller are two of the thirteen. Two others, Arlinda Locklear and Jeanne Whiting, were NARF attorneys at the time of their arguments. Terry Pechota and Ray Cross had been NARF attorneys prior to making their arguments, and Rod Lewis was a former NARF Board member. That seven of the thirteen before the Court had direct ties with NARF is a matter of pride and underscores the determination and dedication that embodies NARF and those who serve.

The fight of Native Americans and tribal governments trying to protect their rights is far from over. The ability for NARF to serve those who are unable to afford legal counsel also continues to grow. Unfortunately, challenging economic circumstances are threatening the ability of NARF to provide counsel for the many cases that arise each day. The members of the Board and the staff at NARF earnestly solicit all the financial assistance possible in order to sustain the fight for survival in the courts and in Congress.

On behalf of the NARF Board of Directors, I thank all who have contributed to NARF in the past and encourage you to continue giving in the future. If you have not contributed in the past, please consider giving this year.

Yaw<sup>^</sup>Ko,  
Jerry Danforth  
Chairman, Board of Directors



## 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.

**NARF's Board of Directors:** (Left to Right) Gerald Danforth, Board Chairman (Oneida Indian Nation of Wisconsin); Buford L. Rolin (Poarch Band of Creek Indians); Barbara Smith (Chickasaw Nation); Ron His Horse Is Thunder, Board Executive Committee (Standing Rock Sioux Tribe); Mark Macarro (Pechanga Band of Luiseño Indians); Kunani Nibipali, Board Vice-Chairman (Native Hawaiian); Natasha V. Singh (Native Village of Stevens). (Not Pictured) Marshall McKay, Board Treasurer (Yocha Debe Wintun Nation); Richard Luarkie, Board Executive Committee (Pueblo of Laguna); Virginia Cross (Muckleshoot Indian Tribe); Beasley Denson (Mississippi Band of Choctaw Indians).

## National Support Committee

The National Support Committee 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 31 volunteers on the Committee are committed to upholding the rights of Native Americans.

Randy Bardwell, *Pechanga Band of Luiseño Mission Indians*

Jaime Barrientoz, *Grande Traverse Band of Ottawa and Chippewa Indians*

John Bevan

Wallace Coffey, *Comanche*

Ada Deer, *Menominee*

Harvey A. Dennenberg

Lucille A. Echohawk, *Pawnee*

Jane Fonda

James Garner

Eric Ginsburg

Jeff Ginsburg

Rodney Grant, *Omaha*

Chris E. McNeil, Jr., *Tlingit-Nisga'a*

Billy Mills, *Oglala Lakota*

Amado Peña, Jr., *Yaqui/Chicano*

Wayne Ross

Nancy Starling-Ross

Mark Rudick

Pam Rudick

Ernie Stevens, Jr., *Wisconsin Oneida*

Andrew Teller, *Isleta Pueblo*

Verna Teller, *Isleta Pueblo*

Richard Trudell, *Santee Sioux*

Rebecca Tsosie, *Pasqua Yaqui*

Tzo-Nah, *Shoshone Bannock*

Aine Ungar

Rt. Rev. William C. *Wantland, Seminole*

W. Richard West, *Southern Cheyenn*

Randy Willis, *Oglala Lakota*

Teresa Willis, *Umatilla*

Mary Wynne, *Rosebud Sioux*

# The Preservation of Tribal Existence



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

Specifically, NARF's legal representation centers on sovereignty and jurisdiction issues and also on federal recognition and restoration of tribal status. Thus, the focus of NARF's work involves issues relating to the preservation and

tribes are independent governmental entities with inherent authority over their members and territory. In treaties with the United States, Indian tribes ceded millions of acres of land in exchange for the guarantee that the federal government would protect the tribes' right to self-government. From the early 1800s on, the Supreme Court has repeatedly affirmed the fundamental principle that tribes retain inherent sovereignty over their members and their territory.

In *McCrary v. Ivanof Bay Village*, Appellant McCrary challenged the federal recognition of Ivanof Bay Village and the corollary right of the tribe to claim sovereign immunity from suit in the context of a contractual dispute. Appellant was represented by Don Mitchell, an Alaska attorney who has spent much of his career arguing that Congress has not approved the Department of Interior's authority to acknowledge preexisting tribal status.

The superior court dismissed McCrary's complaint for lack of subject matter jurisdiction and oral argument before the Alaska Supreme Court was held in May 2011. In December 2011, the Alaska Supreme Court agreed with NARF's legal arguments and upheld Alaska tribal government sovereignty. Tribal government legal status has now been clearly upheld by the Alaska Supreme Court in two successive decisions and McCrary has no other recourse in the state court system. McCrary recently filed a cert petition in the United States Supreme Court but it is unlikely that it will be granted.

Beginning with the decision in *Oliphant v. Suquamish Indian Tribe* in 1978 and with increasing frequency in recent years, the Supreme Court has steadily chipped away at this fundamental principle, both by restricting tribal jurisdiction and by extending state jurisdiction. These decisions by the Supreme Court have made this priority more relevant than ever and have led to a Tribal Sovereignty

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*“David Getches, Founder of the Native American Rights Fund. Defender and Advocate for Tribal Sovereignty, Treaty Rights and the Federal Trust Responsibility. Your piercing intelligence, diligent work and compassion for the Native cause fostered a legal revolution and brought hope and justice to Indian communities nationwide. We thank you and lift you up in our hearts.” (National Congress of American Indians Lifetime Achievement Award)*

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enforcement of the status of tribes as sovereign governments. Tribal governments possess the power to regulate the internal affairs of their members as well as other activities within their reservations. Jurisdictional conflicts often arise with states, the federal government and others over tribal sovereignty.

## **Tribal Sovereignty**

The focus of NARF's work under this priority is the protection of the status of tribes as sovereign, self-governing entities. The United States Constitution recognizes that Indian



Protection Initiative in partnership with the National Congress of American Indians (NCAI) and tribes nationwide to restore the traditional principles of inherent tribal sovereignty where those have been undermined and to safeguard the core of sovereignty that remains.

This Initiative consists of three components. The first component is the Tribal Supreme Court Project, the focus of which is to monitor cases potentially headed to the Supreme Court and those which actually are accepted for review. When cases are accepted, the Tribal Supreme Court Project helps to ensure that the attorneys representing the Indian interests have all the support they need and to coordinate the filing of a limited number of strategic amicus briefs. A second component of the Initiative is to weigh in on judicial nominations at the lower court and the Supreme Court levels. Finally, there is a legislative component to fight bills that are against tribal interests and to affirmatively push legislation to overturn adverse Supreme Court decisions.

The Tribal Supreme Court Project is a joint project staffed by the Native American Rights Fund and the National Congress of American Indians. The Tribal Supreme Court Project is based on the principle that a coordinated and structured approach to Supreme Court advocacy is necessary to protect tribal sovereignty — the ability of Indian tribes to function as sovereign governments — to make their own laws and be ruled by them. Early on, the Tribal Supreme Court Project recognized the U.S. Supreme Court as a highly specialized institution, with a unique set of procedures that include complete discretion on whether it will hear a case or not, with a much keener focus on policy considerations than other federal courts. The Tribal Supreme Court Project established a large network of attorneys who specialize in practice before the Supreme Court along with attorneys and law professors who specialize in federal Indian law. The Tribal Supreme Court Project operates under the



theory that if Indian tribes take a strong, consistent, coordinated approach before the Supreme Court, they will be able to reverse, or at least reduce, the on-going erosion of tribal sovereignty by Justices who appear to lack an understanding of the foundational principles underlying federal Indian law and who are unfamiliar with the practical challenges facing tribal governments.

Now in existence for ten years, the Tribal Supreme Court Project can look back to review whether its work has been effective. From year one through year ten, several developments are notable. First and foremost is the win-loss record for Indian tribes before the Court. Overall, the win-loss percentage has remained the same with the Tribes winning only about 25% of their cases. However, under the Rehnquist Court (year one to year four), Indian tribes increased their winning percentage to greater than 50%, – winning 4, losing 3, and 2 draws in 9 Indian law cases heard on the merits. This winning percentage was a vast improvement from a deplorable winning



NARF Board  
Vice-Chairman  
Richard Luarkie  
(Pueblo of Laguna)



percentage of 20% in that court. The work of the Tribal Supreme Court Project appeared to be paying major dividends. But in the past six terms of the Roberts Court (year five to year ten), Indian tribes have witnessed their winning percentage plummet to 0% — losing all 7 cases argued on the merits.

The end of the October 2010 Term (which ended on June 30, 2011) was anti-climatic, with the Court denying review in all of the remaining Indian law cases on its docket. With two prominent reservation disestablishment cases — *Osage Nation v. Irby* and *South Dakota v. Yankton Sioux Tribe* — up before the Court at the same time, many Court-watchers expected a grant of one, possibly both petitions for review. Indian law practitioners were also very concerned at the end of the Term when the Court invited the U.S. Solicitor General to file a brief expressing the views of the United States in *Brown (formerly Schwarzenegger) v. Rincon Band*, a case involving interpretation of “revenue” sharing under the Indian Gaming Regulatory Act. Fortunately, the Solicitor General recommended denial of the petition filed by the State of California and the Court followed that recommendation.

The Court issued opinions in two Indian law cases, both involving the ability of Indian tribes to sue the United States for mismanagement of tribal trust assets. In *United States v. Tohono O’odham Nation*, the Court reversed (7-1) the judgment of the U.S. Court of Appeals for the Federal Circuit and held that 28 U.S.C. § 1500 deprives the Court of Federal Claims (“CFC”) of jurisdiction over a claim (breach of trust claim for money damages) when a suit is pending in another court (breach of trust claim seeking trust accounting) that is based on substantially the same operative facts, regardless of relief sought in each suit. As a result and without opinion, the Court granted the government’s petition in *United States v. Eastern Shawnee Tribe of Oklahoma*, vacated the judgment, and remanded the case for consideration in light of its decision in *Tohono O’odham*. Then, in *United States v. Jicarilla Apache Tribe*, the Court once again reversed (7-1) the judgment of the U.S. Court of Appeals for the Federal Circuit and held that the fiduciary exception to the attorney-client privilege does not apply to the general trust relationship between the United States and Indian tribes. Justice Kagan did not participate in either decision.

The Court did grant review in one other Indian law case, *Madison County v. Oneida Indian Nation of New York*, which involved the question of whether the Tribe was entitled to the defense of sovereign immunity in foreclosure proceedings brought by the County for alleged non-payment of property taxes. However, the Oneidas recognized the severe challenges awaiting the Tribe on the merits and determined that the best strategy was to waive its sovereign immunity. As a result of the waiver, the Court vacated the judgment and remanded the case to the U.S. Court of Appeals for the Second Circuit. This remand is truly a victory for the Oneida Indian Nation and for all of Indian country. The Supreme Court had granted review based on a terse

concurring opinion written by Judge Cabranes of the Second Circuit in which two of the three judges – on a three-judge panel – made clear that although they were bound by Supreme Court precedent upholding tribal sovereign immunity, the decision “defies common sense” and “is so anomalous that it calls out for the Supreme Court to revisit its decisions in *Kiowa* and *Potawatomi*.”

Thus, in stark contrast to the previous term during which the Court did not issue a single Indian law decision, the Court had a very active Indian law docket. In all, thirty-one petitions for writ of certiorari were filed in Indian law cases during the October 2010 term. On average, twenty-six petitions have been filed in Indian law cases each year since 2001. Of the thirty-one petitions filed, four were granted and twenty-seven were denied. As always, the Tribal Supreme Court Project monitored each petition at the time it was filed, and provided resources in the preparation of the briefs where appropriate. For example, the Project worked directly on the development of strategy and the preparation of an amicus brief in support of the petition in *Osage Nation v. Irby* (reservation disestablishment). The Project also worked closely with attorneys representing tribal interests which prevailed in the lower courts to prepare response briefs to successfully oppose review. These cases included: *South Dakota v. Yankton Sioux Tribe* (reservation disestablishment); *Brown* (formerly *Schwarzenegger*) *v. Rincon Band* (IGRA “revenue” sharing); *Eagle v. Yerington Paiute* (tribal criminal jurisdiction over non-member Indians); *Glacier Electric Coop v. Estate of Sherburne* (tribal court civil jurisdiction over non-Indians); and *Hoffman v. Sandia Resort and Casino* (sovereign immunity).

If any one subject matter area dominated the field of thirty-one petitions filed this past term, it was the question of whether reservation boundaries had been diminished or disestablished. This issue encompassed five of

the six petitions filed related to the status of tribal lands. The next area to dominate the Court’s docket was four petitions involving the trust responsibility of the United States, of which, at the request of the United States, three petitions were granted review (*Tohono O’odham*, *Eastern Shawnee*, and *Jicarilla Apache*). There was also an uptick with three petitions seeking review of state authority to tax or regulate on-reservation activities (e.g., unstamped cigarettes) with no indication from the Court that it is interested in the questions raised by those cases. The Project continues to closely monitor cases challenging tribal sovereign immunity, but only two petitions were filed on that issue (with a near miss in relation to *Madison County*). Nonetheless, we may see a resurgence in this area given that two of the pending petitions for review next Term involve questions regarding the scope of tribal sovereign immunity. The remainder of the petitions encompassed a number of questions, including questions regarding tribal civil jurisdiction over non-Indians (2); water rights (2); political status, civil rights, and religious freedoms (3); interpretation of various statutes or regulations (4); Indian gaming (1); and criminal jurisdiction (1).

In addition to its work before the U.S. Supreme Court, the Project continues to monitor Indian law cases pending before the lower federal courts and in the state courts. In certain cases, the Project may become involved in the lower court litigation—coordinating resources, developing litigation strategy and/or filing briefs in support of tribal interests. The Project also continues to provide updates of Indian law cases pending in the lower courts, updating the cases by subject-matter area: Post-Carcieri Litigation; Criminal Jurisdiction (Federal and State); Civil Jurisdiction (Tribal and State); Diminishment/Disestablishment; Indian/Tribal Status; Sovereign Immunity; Taxation; Treaty Rights; Religious Freedoms; and Trust Relationship.

Hopefully, these efforts will help us identify trends or currents within distinct areas of Indian law that can be effectively addressed prior to reaching the Supreme Court.

The Judicial Selection Project prioritized the development of a process to identify, evaluate and promote qualified Native attorneys, tribal judges and state court judges for nomination to the federal bench. Currently, there are no active judges on the federal bench who are Native American. There are 866 federal judge-ships – nine on the Supreme Court, 179 on the Courts of Appeals and 678 for the district courts. And there are zero American Indian, Alaska Native and Native Hawaiian federal judges. A primary objective of the Judicial Selection Project is to ensure that qualified Native candidates are considered and nominated to fill current vacancies on the federal bench. To date, one Native American, Arvo Mikkanen, a federal prosecutor in Oklahoma City, has been nominated to the U.S. District Court for the Northern District of Oklahoma. However, Oklahoma Senators have refused to support his nomination so his confirmation is very unlikely. NARF and NCAI continue to work with the White House General Counsel Office, the White House Office of Intergovernmental Affairs and the U.S. Department of Justice Office of Legal Policy to ensure that qualified Native candidates are considered and nominated to fill other current vacancies on the federal bench.

Another part of NARF's work under this priority is the environmental law and policy initiative. 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 has worked with the National Tribal Environmental Council (NTEC) on comprehensive climate change legislation. NTEC, NARF, NCAI and the National Wildlife Federation worked together and created detailed legisla-

tive proposals recognizing the role of tribal governments in proposed federal mitigation and adaptation programs to address climate change. Unfortunately, climate change legislation stalled in the Congress.

Internationally, NARF and NTEC attended the United Nations Framework Convention on Climate Change (UNFCCC) Summit-COP 16 in Cancun, Mexico, in December 2010. A Cancun Agreement was reached, likely saving the UNFCCC process. The agreement contains increased mentions of indigenous peoples and of the U.N. Declaration on the Rights of Indigenous Peoples. There are safeguards calling for "The full and effective participation" of indigenous peoples in REDD+ (Reduce Emissions from Deforestation and Degradation) activities, and there are also a few references to taking into account traditional knowledge and traditional indigenous knowledge. In moving forward to COP 17 in Durban, South Africa, NARF, on behalf of NTEC, attended a negotiation session in June 2011 in Bonn, Germany. The two Subsidiary Bodies which give advice to the Conference of the parties, that is, the Subsidiary Body for Scientific and Technical Advice (SBSTA), each fought for more than 3 days of the first week just to agree on an agenda. Much of the work of interest to indigenous peoples occurs in these bodies, especially in SBSTA, relating to modalities to ensure reporting of information to allow an assessment of whether safeguards for indigenous rights are being implemented. SBSTA's work product at the end in Bonn was a bare-bones outline of what needs to be considered in future meetings. The final session before Durban was held in October 2011 in Panama.

In Durban, South Africa, November-December 2011, the countries, after running past the scheduled time by a day and a half, established a new Ad Hoc Working Group on the Durban Platform for Enhanced Action. The countries committed to adopt a universal legal agreement on climate change as soon as



possible, but not later than 2015, to go in to effect by 2020. Based on their commitment, a core of countries, led by the European Union, agreed to a second commitment period to the Kyoto Protocol (to which the U.S. is not a party). In addition, the Green Climate Fund, which is to be the major source of funding for international mitigation and adaptation activities, was agreed to and can start receiving funding. Basically no progress was made in SBSTA concerning modalities to ensure reporting of information to allow an assessment of whether safeguards for indigenous rights are being implemented.

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

The second category of NARF's work under this priority is federal recognition of tribal status. NARF currently represents Indian communities who have survived intact as identifiable Indian tribes but who are not federally recognized. Tribal existence does not depend on federal recognition, but recognition is necessary for a government-to-government relationship and the receipt of many federal services.

After twenty-two years of preparing the necessary historical, legal and anthropological documentation to support its petition for federal acknowledgment, the Pamunkey Indian Tribe, located on the Pamunkey Reservation in Virginia, filed its petition with the Office of Federal Acknowledgement (OFA) in October 2010. The Tribe received OFA's Letter of Technical Assistance (TA) in April 2011, and a response to the TA letter is being prepared. The Pamunkey Indian Tribe is the only tribe located in Virginia to have filed a fully documented petition. Established no later than 1646, the Tribe's Reservation is located next to the Pamunkey River, and adjacent to King William County. The Reservation comprises approximately 1,200 acres and is the oldest inhabited Indian reservation in America. NARF has represented the Tribe in this effort since 1988.



*NARF Board member  
Ron His Horse Is Thunder  
(Standing Rock Sioux)*

In October 2009, the Acting Assistant Secretary for Indian Affairs issued a Final Determination against recognition of the Little Shell Tribe of Chippewa Indians of Montana, overruling the decision in the Preliminary Determination. The stated rationale for the decision was the unwillingness to go along with the "departures from precedent" which the previous Assistant Secretary found to be justified by historical circumstances. In February 2010, the Tribe filed a Request for Reconsideration with the Interior Board of Indian Appeals (IBIA). The IBIA allowed interested parties, if any, to file opposition briefs by July 2010. No one filed an opposition brief. It is unclear how long the IBIA will take to rule. The Senate Indian Affairs Committee held a hearing on the recognition process in April 2011, at which the Tribe and NARF testified concerning Little Shell's experience with the process and defects of the process. The Tribe continues to pursue legislative recognition.

# The Protection of Tribal Natural Resources



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

NARF has been retained by the Eastern Shoshone Tribe of the Wind River Indian Reservation to analyze the legal implications of the Surplus Land Act of March 3, 1905, as it may have affected the boundaries of that Reservation. NARF is working with the Tribe's Attorney General and the Shoshone Business Council on a variety of fronts to secure the vindication of the boundary. The Shoshone Tribes and Arapaho Tribes, through their respective attorneys, are also cooperating in an application to the United States Environmental Protection Agency (US-EPA) for delegation of "treatment in the same manner as a state" (TAS) in the administration of certain Clean Air Act programs. The determination supporting delegation to the Tribes from US-EPA will require that US-EPA determine the location of the boundary of the Reservation. The TAS Application has been published by US-EPA and they have received comments. The Tribes filed their Response to the comments in March 2010. US-EPA also requested a written opinion from the Department of the Interior Solicitor on the boundary of the Wind River reservation. We are awaiting US-EPA's decision about the application of delegation of certain Clean Air Act programs that are dependent on the determination of the boundary.

NARF represents the Hualapai Indian Tribe of Arizona in preparing and submitting four applications for the transfer of 8 parcels of land owned in fee by the Tribe into trust status. The Tribe is located on the south rim of the Grand Canyon in Arizona and claims a boundary that runs to the center of the Colorado River. In addition, NARF assisted the Tribe with the transfer of lands gifted to the Tribe at Cholla Canyon Ranch. Because there were title concerns, NARF prepared a trust which the Tribe adopted and into which the lands were transferred. We also assist the Tribe with work as assigned from time to time, most recently related to the development of a local water supply.

*"The earth was created by the assistance of the sun, and it should be left as it was...The country was made without lines of demarcation, and it is no man's business to divide it....The earth and myself are of one mind. The measure of the land and the measure of our bodies are the same. Do not misunderstand me, but understand me fully with reference to my affection for the land. I never said the land was mine to do with it as I chose. The one who has the right to dispose of it is the one who has created it. I claim a right to live on my land, and accord you the privilege to live on yours." (Heinmot Tooyalaket – Chief Joseph – Nez Perce)*

very existence of tribes. Thus, much of NARF's work involves the *protection of tribal natural resources*.

## **Protection of Indian Lands**

Without a sufficient land base, tribal existence is difficult to maintain. Thus NARF helps tribes establish ownership and control over lands which are rightfully theirs.

Since 1981, NARF has represented the Alabama-Coushatta Tribe of Texas in their quest to secure compensation for the loss of use of millions of acres of fertile forest land they once occupied in southeast Texas. In 2002, the U.S. Court of Federal Claims ruled in favor of the Tribe 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. Negotiators for the U.S. and Tribe reached an agreement on the amount of damages for the loss of land – \$270.6 million – and the Court recommended the agreement to Congress in 2002. NARF is working with the Tribe to have a bill introduced in Congress to settle the Tribe's claims, accompanied by the Court's favorable recommendation.

In *Chalkitsik, et al v. United States*, the Tribe brought suit seeking judicial review of 25 C.F.R. Part 151 as it pertains to federally recognized tribes in Alaska. This regulation governs the procedures used by Indian tribes and individuals when requesting the Secretary of the Interior to acquire title to land in trust on their behalf. The regulation bars the acquisition of land in trust in Alaska other than for the Metlakatla Indian Community or its members. The case has been fully briefed and is waiting for decision.

## Water Rights

The culture and way of life of many indigenous peoples are inextricably tied to their aboriginal habitat. For those tribes that still maintain traditional ties to the natural world, suitable habitat is required in order to exercise their treaty-protected hunting, fishing, gathering and trapping rights and to sustain their relationships with the animals, plants and fish that comprise their aboriginal habitats.

Establishing tribal rights to the use of water in the arid west continues to be a major NARF



priority. The goal of NARF's Indian water rights work is to secure allocations of water for present and future needs for Indian tribes represented by NARF and other western tribes generally. Under the precedent established by the Supreme Court in 1908 in *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. Such a date will in most cases give tribes valuable senior water rights in the water-short west. Unfortunately, many tribes have not utilized their reserved water rights, and most of these rights are unadjudicated or unquantified. The major need in each case is to define or quantify the amount of water to which each tribe is entitled through litigation or out-of-court negotiated settlements. Tribes are generally able to claim water for any purpose which enables the tribe's reservation to serve as a permanent homeland.



The Klamath Tribes of Oregon hold reserved Indian water rights in the Klamath River Basin to support their treaty hunting, fishing and gathering rights with a time immemorial priority date, as well as water rights needed to satisfy the agricultural purposes of the Klamath Reservation. Their reserved water rights for these purposes are currently being quantified in a state-wide water adjudication, the Klamath Basin Adjudication. NARF represents the Klamath Tribes in asserting and defending their treaty-based water rights in the adjudication and in prosecuting contests against many junior water rights claims filed by non-Indian water users.

On December 1, 2011, the Oregon Office of Administrative Hearings issued Proposed Orders in the six cases quantifying the Tribal water rights claims in the amounts claimed by the Tribes and the United States Bureau of Indian Affairs, as trustee for the Tribes. The rulings were a resounding victory for the Tribal and federal claimants, as they adopted, across-the-board, the flow amounts or water levels in each case sought by the Tribes and confirmed,

once again, that the Tribal water rights are the most senior in the Basin. Rulings in the remaining two subcases are expected in April 2012.

Under Oregon's general stream adjudication process, the Proposed Orders are not final rulings, but are the Administrative Law Judge's proposals to the Oregon Water Resources Department's Adjudicator. In late 2012 or early 2013 the Adjudicator will issue a Findings of Fact and Order of Determination (FFOD) that will define not only the water rights of the Tribes, but the rights of all water claimants in the KBA. Upon its issuance, the water rights decreed in the FFOD become enforceable. Next, the Klamath Tribes will face a sequence of challenges in Klamath County Circuit Court and possibly subsequent appeals courts. Nevertheless, Judge Allen's rulings in the Proposed Orders mark a very significant victory for the Claimants, one that puts the Tribes and the BIA in the best position possible for the next stages of the Adjudication.

NARF has represented the Nez Perce Tribe in Idaho in its water rights claims in the Snake River Basin Adjudication (SRBA) – both litigation and settlement phases – for over 16 years. Congress enacted the Snake River Settlement Act of 2004 and President Bush signed it into law on December 8, 2004. We continue to work with the Tribe, on a very limited basis, to secure final approval of the settlement by the state water court, and on the federal appropriations process. We were successful in securing FY 2011 appropriations for the Tribe and are working now on the FY 2012 appropriations. Additionally, we are representing the Tribe in the drafting and negotiations with the United States, the State and private water interests in the final unified decree that will be the capstone document closing the SRBA adjudication. It is anticipated that the final decree will be signed by the judge in 2012.

After almost 30 years of advocacy, the Tule River Indian Tribe, represented by NARF,

*NARF Board member  
Mark Macarro  
(Pechanga Band of  
Luiseño Indians)*



successfully settled its water rights in November of 2007 by signing a Settlement Agreement with water users on the South Fork Tule River of California. The Settlement Agreement secures a domestic, municipal, industrial and commercial water supply for the Tribe. The Tribe now seeks federal legislation to ratify the Settlement Agreement and authorize appropriations to develop the water rights through the creation of water infrastructure and reservoirs on the Tule Reservation. Bills introduced in the House and Senate in 2007, 2008 and 2009 did not pass.

With the current Congress, we are engaged in strategy meetings with the California Congressional delegation regarding the possible introduction of a water settlement bill, in the 2012 legislative year. Additionally, we are continuing work with the federal Bureau of Reclamation on necessary studies for the feasibility and design of the Tribe's water storage project.

In June 2006, the Kickapoo Tribe in Kansas, represented by NARF, filed a federal lawsuit in U.S. District Court in an effort to enforce express promises made to the Tribe to build a Reservoir Project. The Nemaha-Brown Watershed Joint Board # 7, the Natural Resources Conservation Service of the U.S. Department of Agriculture and the State of Kansas made these promises to the Tribe over a decade ago. In the intervening years these parties have been actively developing the water resources of the watershed, resulting in the near depletion of the Tribe's senior federal water rights in the drainage.

According to the Environmental Protection Agency, the water supply for the Reservation is in violation of the Safe Drinking Water Act of 1974. The Kickapoo people are unable to safely drink, bathe or cook with tap water. There is not enough water on the reservation to provide basic municipal services to the community, and the Tribe is not even able to provide local



schools with reliable, safe running water. The Fire department cannot provide adequate fire protection due to the water shortage. The proposed Reservoir Project is the most cost-effective and reliable means by which the Tribe can improve the water supply.

By early August 2007 the parties expressed an interest in taking a break from the litigation track to explore mutual benefits from settlement. The U.S., the State and the local watershed district all concede the existence of the Tribe's senior Indian reserved water rights; the real issue ultimately will be the amount of water to satisfy the Tribe's needs, and the source or sources of those rights. The Tribe and the U.S. are also discussing funding to quantify the Tribe's water rights. We continue with active negotiations with the State and the local water interests on an agreed quantity of water for the Tribe.

In March of 2011, the watershed district rejected a Condemnation Agreement that the State and Tribe had approved. That agreement created the mechanism for condemning the property for the water storage project. NARF succeeded in restructuring the litigation to place the immediate focus on discovery against the watershed district and on getting

*NARF celebrating  
"Earth Day."*

the condemnation dispute resolved by the federal court. NARF also continues to investigate the possibility of a comprehensive settlement of the water right's issues in the case.

The Oglala Sioux Tribe (OST) has been working on the delivery of a safe, reliable and adequate source of municipal, industrial and rural water through the federally authorized and funded Mni Wiconi Project. A critical element of the delivery of safe drinking water to the people of the Pine Ridge Indian Reservation is to ensure the security of the pipeline that distributes the water to the users. NARF has assisted the OST Department of Water Maintenance and Conservation in fulfilling its responsibility to secure the pipeline through the development and adoption of an OST Pipeline Security Ordinance. The Department of Water Maintenance and Conservation is now faced with enforcement of the Ordinance in a number of important situations, including individuals who do not accept that they cannot waste the water provided through the Mni Wiconi Distribution system on the Reservation. NARF is assisting the Department with the development and refinement of the necessary forms, standards, and protocols to accomplish enforcement of the Ordinance and with the training of Department personnel on the Ordinance's enforcement.

### **Protection of Hunting and Fishing Rights in Alaska**

The subsistence way of life is essential for the physical and cultural survival of Alaska Natives. 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.

On January 5, 2005, the State of Alaska filed a lawsuit in the U.S. District Court for the District of Columbia challenging the final rule

implementing the mandate in a prior Alaska Native subsistence case, *John v. United States*. The prior case, in which NARF represented Katie John, an Alaska Native, established that the United States must protect subsistence uses of fisheries in navigable waters where the United States possesses a reserved water right. In this new lawsuit, the State challenges the Federal agencies' implementation of the mandate by arguing that the reserved waters doctrine requires a quantification of waters necessary to fulfill specific purposes. Katie John immediately filed a motion for limited intervention for purposes of filing a motion to dismiss for failure to join an indispensable party. The United States filed a motion to transfer venue to the U.S. District Court for the District of Alaska in February 2005. Judge Collyer entered an Order in July 2005, transferring the case to the federal court in Alaska. The case was then consolidated with *John v. Norton* (below). The issues in the two cases were bifurcated for briefing with the State's claims addressed first. In May 2007, the district court entered an Order upholding the agencies rule-making process identifying navigable waters in Alaska that fall within federal jurisdiction for purposes of Title VIII's subsistence priority.

In January 2005, Katie John, represented by NARF, filed a lawsuit in the U.S. District Court for the District of Alaska challenging the Federal Agencies' Secretaries' final rule implementing the prior Katie John mandate as being too restrictive in its scope. Katie John's complaint alleges that the Federal agencies should have included Alaska Native allotments as public lands and further that the federal government's interest in water extends upstream and downstream from the Conservation Units established under the Alaska National Interest Lands Conservation Act. The State of Alaska intervened and challenged the regulations as illegally extending federal jurisdiction to state waters. On September 9, 2009, the Court entered an order upholding the agencies' final rule as reasonable. While rejecting Katie John's



claim that the agency had a duty to identify all of its federally reserved water rights in upstream and downstream waters, the court stated that the agency could do so at some future time if necessary to fulfill the purposes of the reserve. The case was appealed to the U.S. Court of Appeals for the Ninth Circuit and has been fully briefed. Argument took place in July 2011 and we are now waiting decision by the Court.

In *Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham v. Evans*, NARF represents five Chugach villages that sued the Secretary of Commerce to establish aboriginal rights to their traditional-use areas on the Outer Continental Shelf of Alaska, in Cook Inlet and the Gulf of Alaska. In September 2002, the federal district court ruled against the Chugach. NARF appealed to the U.S. Court of Appeals for the Ninth Circuit, and in July 2004, the Ninth Circuit en banc panel vacated the decision of the district court and remanded for determination of whether the Tribes can establish aboriginal rights to the areas. In September 2004, the district court denied previous summary judgment motions as moot and ordered that new motions for summary judgment be submitted by December 2004. The Chugach chose not to file a Motion for Summary Judgment given the remaining fact disputes, but the government did submit one in December 2004. After gathering updated evidence, the Chugach filed their Opposition in June 2005. Oral argument on the motion for summary judgment was held in November 2006, and summary judgment was denied shortly thereafter in December 2006.

Trial on whether these Tribes hold aboriginal rights to hunt and fish in federal waters was held in the second half of August 2008. In August 2009, the federal court held that although the five Chugach Tribes had established that they had a "territory" and had proven they had used the waters in question, that the Tribes could not hold aboriginal rights



*Youth from the Oglala  
Lakota Reservation  
visiting NARF*

as a matter of law. The Chugach have appealed to the Ninth Circuit en banc panel which has retained jurisdiction over this case and briefing was completed in April 2010. Oral argument was held in front of the en banc panel in San Francisco on September 21, 2011, and we are awaiting a decision.

As ocean temperatures rise due to climate change, marine mammals and fish are moving north. Commercially valuable fish that have traditionally been in the Gulf of Alaska are shifting toward the Northern Bering Sea, and the large-scale fishing fleets are planning to follow them and expand their operations into this highly sensitive ecosystem. This fleet employs bottom trawling, a highly destructive practice in which weighted nets are dragged inches above the sea floor, removing everything in their path. Nevertheless, the North Pacific Fishery Management Council (NPFMC) currently allows bottom trawling in the Central Bering Sea, and it is having a profound effect on sensitive habitat and local Yup'ik communities. In addition, the NPFMC has

*John Echobawk meeting  
with a group of public  
school teachers  
from Kansas*



begun a process to consider whether to allow these fleets to expand into the Northern Bering Sea, home to threatened species like the walrus, endangered species such as the Steller sea lion and the spectacled eider, and many isolated Yup'ik and Inupiaq villages who have been the stewards of this diverse ecosystem for centuries.

The Bering Sea Elders Group is an alliance of thirty-nine Yup'ik and Inupiaq villages that seeks to protect the sensitive ecosystem of the Bering Sea, the subsistence lifestyle and the sustainable communities that depend on it. NARF has designed a comprehensive plan to help this group of Alaska Native villages in their efforts to protect the area and become more engaged in its management. Over the last year, NARF has been working with the Elders Group on both issues, and we have: (1) researched potential aboriginal rights that the Elders Group and its constituent tribes may possess based on their long-term exclusive use and occupancy of the area, (2) prepared the Elders Group for negotiations with the trawl fishermen, and (3) assisted the Elders Group with its participation in the NPFMC process.

### **Climate Change Project**

Global warming is wreaking havoc in Alaska. In recent years scientists have documented

melting ocean ice, rising oceans, rising river temperatures, thawing permafrost, increased insect infestations, animals at risk and dying forests. Alaska Natives are the peoples who rely most on Alaska's ice, seas, marine mammals, fish and game for nutrition and customary and traditional subsistence uses; they are thus experiencing the adverse impacts of global warming most acutely. In 2006, during the Alaska Forum on the Environment, Alaska Native participants described increased forest fires, more dangerous hunting, fishing and traveling conditions, visible changes in animals and plants, infrastructure damage from melting permafrost and coastal erosion, fiercer winter storms, and pervasive unpredictability. Virtually every aspect of traditional Alaska Native life is impacted. As noted in the Arctic Climate Impact Assessment of 2004, indigenous peoples are reporting that sea ice is declining, and its quality and timing are changing, with important negative repercussions for marine hunters. Others are reporting that salmon are diseased and cannot be dried for winter food. There is widespread concern about caribou habitat diminishing as larger vegetation moves northward. Because of these and other dramatic changes, traditional knowledge is jeopardized, as are cultural structures and the nutritional needs of Alaska's indige-



nous peoples. Efforts are continuing to convene Congressional hearings on climate change impacts on indigenous peoples.

In *Native Village of Kivalina v. Exxon Mobil*, NARF represents the Native Village of Kivalina, which is a federally recognized Indian Tribe, and the City of Kivalina, which is an Alaskan municipality, in a suit filed on their own behalf and on behalf of all tribal members against defendants ExxonMobil Corp., Peabody Energy Corp., Southern Company, American Electric Power Co., Duke Energy Co, Chevron Corp. and Shell Oil Co., among others. In total there are nine oil company defendants, fourteen electric power company defendants and one coal company defendant. The suit claims damages due to the defendant companies' contributions to global warming and invokes the federal common law of public nuisance. The suit also alleges a conspiracy by some defendants to mislead the public regarding the causes and consequences of global warming.

In October 2009, the District Court granted the Defendant's motion to dismiss on the basis that Kivalina's federal claim for nuisance is barred by the political question doctrine and for lack of standing under Article III of the Constitution. Although this was a setback, it was not a surprise. The case is now on appeal to the U.S. Court of Appeals for the Ninth Circuit where the appellate court may be more persuaded by the reasoning of the U.S. Court of Appeals for the Second Circuit in the recent decision *Connecticut v. American Electric Power Company*. That ruling held that plaintiffs, including states and private entities, may bring suits. In short, the court held that: (1) the plaintiffs' claims do not present political questions that the courts cannot / should not address; (2) the plaintiffs have standing to bring their claims; (3) the complaint states claims under the federal common law of nuisance; and (4) the plaintiffs' claims are not displaced by any federal legislation. The U.S. Supreme Court recently reviewed the



*Connecticut* decision. In a four-four decision, the Supreme Court in *Connecticut* tied on the standing, political question and prudential question issues which affirms that there is jurisdiction in federal court over the case. The only issue lost on was whether the Environmental Protection Agency's authority to regulate greenhouse gases under the Clean Air Act preempts or displaces plaintiffs' right to pursue a federal common law claim. The Supreme Court held that the authority of EPA to regulate greenhouse gas emissions preempts a federal common law case seeking GHG emissions limits, even if EPA does not exercise such authority.

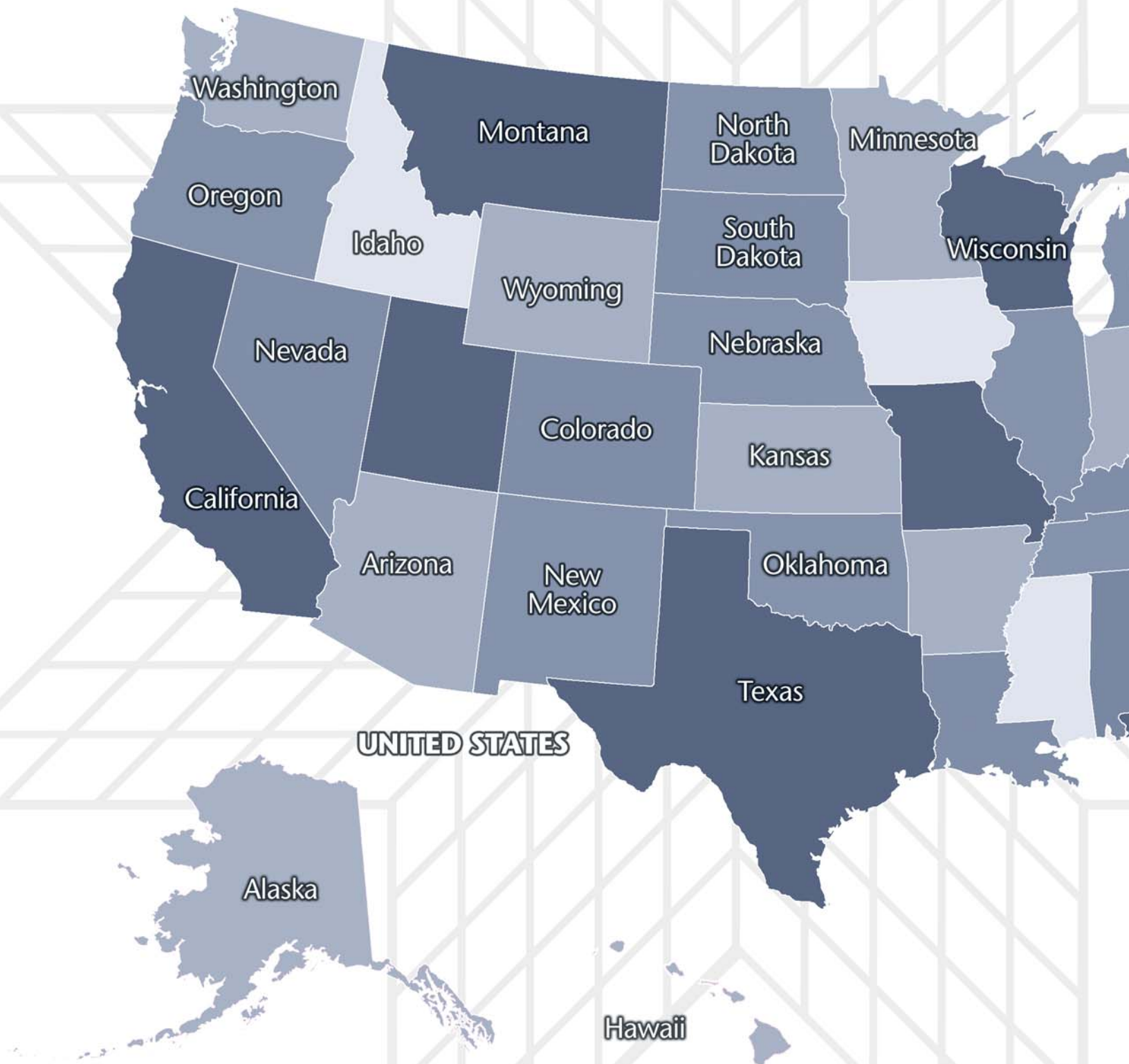
The holding in *Connecticut* allows Kivalina's case to proceed in that we have stated a proper federal common law claim upon which relief may be granted and that the monetary damages relief we seek distinguishes the case from one that seeks to displace EPA's authority to regulate. The stay was lifted and the case was set for oral argument. Argument before the Ninth Circuit Court of Appeals took place in July 2011 and we are now waiting decision by the Court.

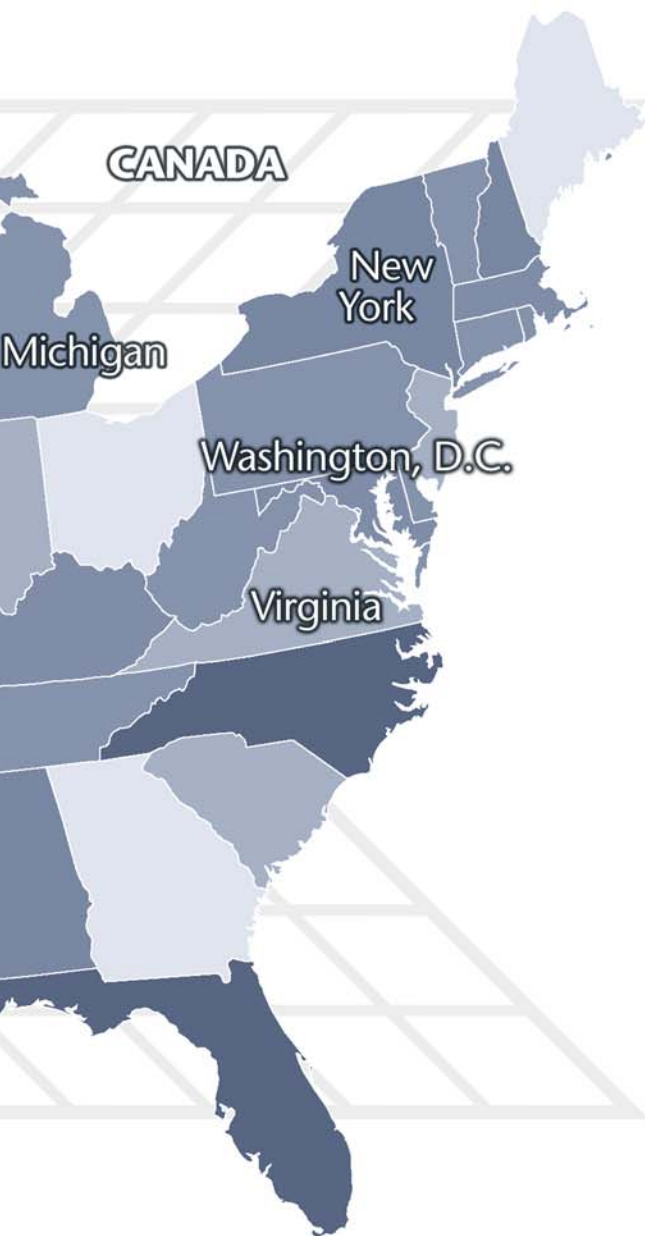
NARF staff (L to R)  
Jennifer Redbone,  
Melody McCoy,  
Ray Ramirez  
and Jennie Tsikewa





# MAJOR ACTIVITIES 2011 - NARF CASE MAP





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Aleut Community of St. Paul Island – Tribal Trust Funds

Chilkoot Indian Association – Land into Trust

Chalkyitsik – Land into Trust

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Churyung v. Alaska – Indian Child Welfare

Native Villages of Eyak, Tatitlek, Chenega, Nanwalek, and Port Graham – Subsistence & Aboriginal Title

Ivanof Bay Village – Sovereign Immunity

Kaltag Tribe – Indian Child Welfare

Native Village of Kasigluk – Voting Rights Act Suit

Katie John v. Norton – Subsistence

Kenaitze Indian Tribe – Tribal Trust Funds

Native Village of Kivalina - Global Warming Project

Native Village of Kwigillingok – Voting Rights Act Case

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**NARF WASHINGTON, D.C. OFFICE**

Tribal Supreme Court Project

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Declaration on the Rights of Indigenous Peoples/Climate Change Issues – Organization of American States and United Nations

# The Promotion of Human Rights



Although basic human rights are considered a universal and inalienable entitlement, Native Americans face an ongoing threat of having their rights undermined by the United States government, states and others who seek to limit these rights. Under the priority of the promotion of human rights, NARF strives to enforce and strengthen laws which are designed to protect the rights of Native Americans to practice their traditional religion, to use their own language and to enjoy their culture. NARF also works with Tribes to ensure the welfare of

(NAGPRA) implementation issues. NARF continued a decade-long effort as a member of the Colorado Commission of Indian Affairs to work out agreements and protocols with the Colorado State Historical Society for the repatriation and reburial of hundreds of Native American human remains, both culturally affiliated and unaffiliated. Part of the work also involved the development of a protocol for the future identification and disposition of Native American remains disturbed on state or private lands, which specifies a process for consultation with interested tribes and for the reburial on site of those remains whenever possible.

*"We sang songs that carried in their melodies all the sounds of nature – the running of waters, the sighing of winds, and the calls of animals. Teach these to your children that they may come to love nature as we love it. We had our statesmen and their oratory has never been equaled. Teach the children some of these speeches of our people... Why not teach the children more of the wholesome proverbs and legends of our people? Tell them how we loved all that is beautiful. That we killed game only for food, not for fun... Tell your children of the friendly acts of Indians to the white people who first settled here. Tell them of our leaders and heroes and their deeds... Put in your history books the Indians' part in the World War. Tell them how the Indians fought for a country of which he was not a citizen, for a flag to which he had no claim, and for a people that have treated him unjustly. We ask this to keep sacred the memory of our people." (Grand Council Fire of American Indians 1927)*

their children. In the international arena, NARF is active in efforts to negotiate declarations on the rights of indigenous peoples.

## Religious Freedom

Because religion is the foundation that holds Native communities and cultures together, religious freedom is a NARF priority issue.

Legal work continues on a number of Native American Graves Protection and Repatriation

The massive Chuitna Coal project threatens to destroy a vital salmon habitat stream that the Tyonek Native Village utilizes for subsistence fisheries. After agreeing to assist the Tribe in protecting its subsistence fisheries resources, legal research established that much more was at stake, as recent field surveys and excavations found numerous house pits, cultural features, and religious remains in the project area. Under such circumstances the National Historic Preservation Act (NHPA) requires that the federal agency tasked with jurisdiction immediately contact the impacted Tribe to seek consultation regarding the protection of the historic resources. Under existing law Tyonek should be granted the opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties and participate in the resolution of adverse effects. Neither the federal agency nor its state counterpart have contacted the Tribe, as required by law, to invite it to participate in assessing whether these historic cultural features deserve protection and listing under the NHPA. NARF's representation of the Tribe is now focused on ensuring that its cultural resources are protected accordingly.



NARF has been assisting the Denver area Native American community and interested tribes for almost a decade to give voice to the need to clean up and preserve a prominent geologic feature just to the northeast of Boulder, Colorado. Valmont Butte is an ancient volcanic uplift that sits prominently on the outskirts of town, just overlooking the north fork of Boulder Creek. In pre-contact times it was the location of Ute and then Arapaho village sites. Use and occupation of the area is known to go back at least 10,000 years in antiquity. The property, owned by the City of Boulder since 2000, is known to contain substantial prehistoric materials, including burial areas. The Butte has also until recent years been the site of an active sweat lodge. There is an abandoned mill on the property, and tailings from the fifty-plus years of milling activities are now contained on the eastern end of the property about forty acres in size. The City purchased the property to locate a composting facility or fire training center. The tribes and the local Native community successfully opposed these facilities. In recent years, the effort has been to monitor the development of the City's proposed cleanup plan and also to secure a County landmark designation for the Butte and surrounding acreage.

NARF has recently agreed to represent the Kaibab Paiute Tribe in their dispute with the King County Water District and the Army Corps of Engineers who are preparing to build a dam over a burial ground that is known to contain the remains of almost 100 people. The Water District and the Corps have not finished their study to determine exactly how many people are still buried there, and the Kaibab do not want the dam built or the reservoir filled until the full extent of the burials are known and steps can be taken to protect the site and the people.

The Native American Rights Fund is part of a working group of Indian organizations and tribal leaders to address government interven-



tion in the lives of Native people who work with or use eagle feathers in traditional ways. Since time-immemorial, the eagle and other raptor birds have been an integral part and intrinsic to the traditions, culture and religion of many tribes, pre-dating U.S. colonization. The U.S. Fish and Wildlife Service (FWS) and other federal law enforcement agencies had been conducting raids, confiscations and interrogations on many Indian reservations and pow-wow events, in at least 14 states of the western United States under what purportedly is referred to as an "Eagle Feather Sting Operation."

The immediate purpose of these investigations by the FWS was to address the illicit sale of eagles and eagle parts and the poaching of eagles. However, the impact of these investigations has awakened fear that the U.S. government is once again encroaching upon tribal culture and religious practices, to the point where the tribal culture and religion may be forced underground once again.

The working group met with the FWS and the Department of Justice (DOJ) in 2009 to express tribal concerns about raids that were conducted by the FWS, FBI and other law enforcement officials who seized feathers and

*Lessons for a sweat lodge ceremony led by Wallace Black Elk (1970s)*

demanded documentation. Under federal law, only Native people can possess eagle feathers through gifts or inheritance, or from a government-run repository near Denver which issues permits specifically for individual birds or parts, generally after lengthy waits.

As a result of this meeting, FWS and DOJ pledged to take action regarding their lack of effective outreach and education to tribes on policies regarding the possession, use, gifting and crafting of eagle feathers and other endangered birds. FWS proposed the development of a Tribal Advisory Group to work out long-term solutions to the issues that tribes raised.

The National Congress of American Indians (NCAI) adopted a resolution supporting the establishment of Tribal Advisory Group to the U.S. Fish and Wildlife Service in order to provide consultation on the policies, regulations and procedures for the acquisition, possession, gifting, crafting and use of eagles and other migratory birds by tribal members. It was also resolved that NARF shall serve as a central clearinghouse for the cases appertaining to the "Eagle Feather Sting Operation" being conducted by the FSW and other federal law enforcement agencies.

NARF and NCAI have continued meetings with the FSW and other federal law enforcement agencies to discuss and seek solutions as to the effects and impacts of eagle feather confiscations and to discuss the drafting of an all-inclusive bill to "fix" the gap between current law and administrative policies, regulations and procedures.

NARF has also continued its representation of the Native American Church of North America in addressing issues concerning the sacramental use of peyote in their ceremonies.

## **Indian Education**

Recent developments mark a historical shift in Indian education law and policy by taking the first step in accomplishing "educational tribal sovereignty." NARF, other Indian organizations and tribes have been advocating for systemic changes to American Indian/ Alaska Native (AI/AN) education. Changes that would increase involvement of tribal governments, educators, parents, and elders in what AI/AN students are taught, how they are taught, who teaches them, and where they learn. Tribal control of these core issues can amount to educational tribal sovereignty.

NARF represents the Tribal Education Departments National Assembly (TEDNA). TEDNA is a national advocacy organization for tribal education departments and agencies (TEDs/TEAs) that works to strengthen the legal rights of tribes to control the formal education of tribal members. NARF started TEDNA in 2003 with a group of tribal education department directors from Indian tribes across the Country. Since its inception, NARF has hosted National meetings with TEDNA to 1) identify obstacles impeding educational tribal sovereignty, 2) develop policy initiatives to address such obstacles, and 3) advocate and provide technical assistance on such policy initiatives.

After over 20 years of work, NARF and TEDNA secured federal funding for TEDs/TEAs in the Labor, Health, and Human Services Fiscal Year 2012 Appropriations Bill for the first time in history. The funding will go to the Department of Education to be distributed to TEDs/TEAs to participate in a pilot project that allows TEDs/TEAs to operate federal education programs in schools (public and Bureau of Indian education) located on Indian reservations.

Both Houses of Congress have introduced the Native Culture, Language, and Access for Success in Schools Act (Native CLASS Act), a pro-tribal sovereignty bill that amends the Elementary and Secondary Education Act. The

Native CLASS Act's key areas are language and culture based education, tribal control of education, support for Native American teachers, juvenile justice, and many other key provisions. The Act amends the No Child Left Behind Act by making tribes eligible for and to operate federal education grants and programs and by adding new programs to support AI/AN students.

In July of 2011 the Senate Committee on Indian Affairs held a hearing on the Native CLASS Act and invited NARF to testify. NARF testified on the importance of the Native CLASS Act stressing the importance of supporting educational tribal sovereignty in federal law as a means to increase graduation rates and test scores of AI/AN students. In October, the Senate Committee on Indian Affairs passed the Native CLASS Act out of Committee. The Act waits for full consideration by the Senate and to be passed out of the House Committee on Education and the Workforce.

In December 2011, President Obama signed the Executive Order, Improving American Indian and Alaska Native Educational Opportunities and Strengthening Tribal Colleges and Universities. The Executive Order states it is the policy of the Obama Administration to support activities that improve educational outcomes for AI/AN students and to provide an opportunity to learn native languages and histories, and improve educational opportunities at tribal colleges and universities.

NARF and TEDNA worked on the policies supported in the Executive Order since the Department first contacted NARF in 2008. Indeed, the Executive Order's support for capacity building for TEDs/TEAs and increased partnerships with TEDs/TEAs is a direct result of TEDNA and NARF's persistent advocacy. In addition, its support for culture and language based education is an answer to TEDNA's

memberships constant requests to the Department.

The Executive Order establishes a White House Initiative (Initiative) on AI/AN education that will work to expand opportunities for AI/AN students to learn Native languages, cultures, and histories, and receive complete and competitive educations preparing them for college and careers. The Initiative will be overseen by an executive director who will serve as a senior-level, Department of Education official, who will also be the Secretary of Education's senior policy advisor on federal policies affecting AI/AN education.

During the 19th and into the 20th century, pursuant to federal policy, Native American children were forcibly abducted from their homes to attend Christian and government-run boarding schools. The purpose was to "civilize" the Indian and to stamp out native culture. It was a deliberate policy of ethnocide and cultural genocide. Cut off from their families and culture, the children were punished for speaking their native language, banned from conducting traditional or cultural practices, shorn of traditional clothing and identity of their native culture, taught that their culture and traditions were evil and sinful and that they should be ashamed of being Native American. Placed often far from home, they were frequently neglected or abused physically, sexually and psychologically. Generations of these children became the legacy of the federal Boarding School Policy. They were returned to their communities, not as the Christianized farmers that the Boarding School Policy envisioned, but as deeply scarred human beings with none of the acculturated skills – community, parenting, extended family, language, cultural practices – gained by those who are raised in their cultural context.

There has been scant recognition by the U.S. federal government that initiated and carried out this policy, and no acceptance of



responsibility for the indisputable fact that its purpose was cultural genocide. There are no apparent realistic legal avenues to seek redress or healing from the deep and enduring wounds inflicted both on the individuals and communities of tribal nations. Lawsuits by individuals have been turned aside, and unlike other countries that implemented similar policies – e.g., Canada and Australia – there has been no official U.S. proposal for healing or reconciliation.

NARF, working with several other groups, convened a Boarding School Healing Symposium in May 2011 at the University of Colorado Law School. The Symposium brought together individuals from across the U.S. and Canada that have been working on various aspects of the issue to discuss the priorities and strategies to achieve both national recognition of and apology for the wrongs visited on individuals and communities of U.S. tribes, and reparations to provide the framework for healing of these historic and enduring wrongs. The symposium participants agreed that it was necessary to continue the work on the issue and formed a Coalition to formulate a specific strategy and framework to pursue broader support and participation. The Coalition has developed a plan to organize a non-profit corporation that will carry out the work identified at the Symposium.

### **Civil and Cultural Rights**

From the embryonic days of our Nation, Indian tribes have long struggled against the assimilationist policies instituted by the United States which sought to destroy tribal cultures by removing Native American children from their tribes and families. As an example, the federal government failed to protect Indian children from misguided and insensitive child welfare practices by state human service agencies, which resulted in the unwarranted removal of Indian children from their families and tribes and placement of those children in

non-Indian homes. Statistical and anecdotal information show that Indian children who grow up in non-Indian settings become spiritual and cultural orphans. They do not entirely fit into the culture in which they are raised and yearn throughout their life for the family and tribal culture denied them as children. Many Native children raised in non-Native homes experience identity problems, drug addiction, alcoholism, incarceration and, most disturbing, suicide.

In order to address these problems facing tribes as a result of the loss of their children, the Indian Child Welfare Act (ICWA) was enacted by Congress in 1978. It established minimum federal jurisdictional, procedural and substantive standards aimed to achieve the dual purposes of protecting the right of an Indian child to live with an Indian family and to stabilize and foster continued tribal existence. Since that time, there have been misinterpretations and, in some cases, outright refusal to follow the intent of the law by state agencies and courts.

In March 2011, the Alaska Supreme Court issued a broad affirmation of inherent tribal authority in *State of Alaska v. Tanana*. The Court ruled that tribal courts have authority to initiate and adjudicate children's cases without going through state courts. The case was brought in 2004 on behalf of the Villages of Tanana, Nulato, Akiak, Kalskag, Lower Kalskag and Kenaitze along with a tribal couple. The case was brought after Governor Murkowski's administration, on the advice of former Attorney General Greg Renkes, abruptly stopped recognizing tribal court decrees in cases that did not originate in state court. Renkes argued that only state courts could initiate children's cases and, if they chose, transfer those cases to tribal courts. He also instructed state employees to stop recognizing or enforcing tribal court decrees. The case was brought to overturn Renkes' opinion and to force the State, its agencies and officials to

formally recognize valid tribal court decrees without regard to any state court involvement.

State services frequently do not reach village Alaska. Tribal courts must therefore handle most cases involving the welfare of village children. State recognition of those tribal court proceedings is therefore critical to assure that proceedings which occur in tribal court are then respected by other state agencies. Otherwise, adoptive parents may not be able to participate in state-funded assistance programs, to secure substitute birth certificates necessary to travel out of state, to enroll children in school, or to secure medical care. The tribal couple faced just such a dilemma. After adopting a special needs child in Tanana tribal court, they had difficulty accessing health care. They were also frustrated in their plans to travel out of state when they were told that they could not acquire a substitute birth certificate for their adoptive child since the child had been adopted in a tribal rather than state court proceeding.

Following the Alaska Supreme Court's March 2011 decision upholding tribal authority to initiate children's proceedings, NARF has been working with the Alaska State Attorney General's office to formalize policy and protocol to implement the *Tanana v. State* decision. In addition to policy revisions that will be inserted into the State's Office of Child Services manual, a committee is developing a proposed Rule that would provide a procedure for Tribes to petition state courts to have tribal court decrees registered and enforced by state law officers.

In another Alaska ICWA case, the Native Village of Kotzebue requested NARF's assistance to ensure that the superior court abide by the Tribe's pre-adoption placement preference under ICWA. One of the primary legal questions at issue is the proper burden of proof that the Office of Child Services must establish in order to move a child from one placement



*Former NARF staff  
Rick Williams preparing  
for a sweat lodge  
ceremony (1970s)*

to another. The placement hearing has been set for 2012.

NARF filed a lawsuit, *Nick v. Bethel and State of Alaska*, in federal court in 2007 alleging that Alaska (through its agents the Lieutenant Governor and the Division of Elections, among others) had violated the Voting Rights Act (VRA) by failing to provide language assistance to the thousands of Yup'ik-speaking voters in the Bethel Census Area. The first claim was under Section 203 of the VRA, which requires that jurisdictions covered by the Act provide oral and written assistance sufficient to enable the voter to cast a meaningful ballot. While the languages covered (meaning those for which the State has to provide assistance) varies statewide to correspond to the number of people who speak that language, in the Bethel Census Area, the covered language is Yup'ik. However, as the complaint alleged, there is little to no oral language assistance provided and absolutely no written assistance provided to the Yup'ik voter. The second claim was

under Section 208 of the VRA which provides that a voter who needs help reading and writing may bring anyone they like into the voting booth to help them cast a ballot.

In July 2008, the District Court issued a Preliminary Injunction ordering the State to provide comprehensive language assistance in time for the 2008 August primary and November general elections. This relief included providing written ballots in the Yup'ik language, publicizing all election notices and information in Yup'ik and creation of a new statewide position to oversee Native language assistance. Additionally, the State must report to the Court before and after each election that they have taken these steps.

The Plaintiffs settled with the City of Bethel in 2009 and settled with the State in January 2010. The comprehensive agreement includes translation and interpretation assistance for all Yup'ik-speaking voters throughout the registration and voting process. The court has retained jurisdiction to oversee the State's compliance with the settlement agreement. NARF monitored the State's compliance with the settlement agreement for the 2010 and 2011 election cycles and will continue to do so through the 2012 election cycle.

### **International Recognition of Indigenous Rights**

The development of international laws and standards to protect the rights of indigenous peoples greatly benefits Native American peoples. NARF and the National Congress of American Indians (NCAI) entered into an attorney-client relationship several years ago for the purpose of working in the international arena to protect indigenous rights.

In 2007, the United Nations General Assembly overwhelmingly adopted the Declaration on the Rights of Indigenous Peoples. The Declaration recognizes that Indigenous peoples have important collective

human rights in a multitude of areas, including self-determination, spirituality, and lands, territories and natural resources. The Declaration sets out minimum standards for the treatment of Indigenous peoples and can serve as the basis for the development of customary international law. In December 2010, President Obama made the historic announcement that the United States has reversed its previous negative vote and now endorses the United Nations Declaration on the Rights of Indigenous Peoples.

The United States is the last of four countries who voted against the Declaration in September 2007 to reverse its vote and to join the international chorus of voices recognizing the fundamental rights of indigenous peoples. Australia, Canada and New Zealand had previously reversed their opposition to the Declaration. Indigenous peoples worldwide have worked on the Declaration since the late 1970s. NARF has worked on the Declaration with its client NCAI since 1999. The Declaration affirms the collective human rights of Indigenous peoples across a broad range of areas including self-determination, spirituality, land rights and rights to intellectual property.

The adoption of the U.N. Declaration on the Rights of Indigenous Peoples (U.N. DRIP) will have an impact on the Organization of American States (OAS) process. NARF also represents NCAI in this process. In recognition of this, the OAS held a "reflection" session in Washington, D.C., in November, 2007, to discuss that import. It was agreed that the U.N. DRIP would be used as the foundation for an OAS document, in that all the terms of the OAS document would be consistent with, or more favorable to, Indigenous rights than the U.N. DRIP.

The group further agreed that all the terms would be met through a consensus-based decision making process which includes the Indigenous representatives. The United States



and Canada expressed their opposition to a document that would be consistent with the U.N. DRIP, against which they had voted, but agreed they would not oppose the process moving forward.

The 11th meeting of Negotiations in the Quest for Points of Consensus was held in Washington, D.C., in April 2008. A session of reflection on the process was held in December 2008, to consider the issues which specifically need to be addressed in the Western hemisphere in regards to indigenous peoples. In June 2009, the General Assembly met and adopted a resolution which renewed the mandate of the Working Group and instructed the Working Group to hold, between August 2009 and March 2010, up to two meetings of negotiations. A negotiation session was held in November-December 2009, in Washington, D.C. Modest progress was made at that session, but disturbingly the second week of negotiations was canceled.

Disappointingly, the U.S. and Canada are not actively participating, even though they both now support the U.N. DRIP. Two short negotiation sessions were authorized to be held in 2011. One was held in January 2011. In September 2011, the technical committee for the indigenous caucus met in Kuna Yala, Panama, to prepare for the second authorized negotiation session. This session has not been scheduled, and there are serious questions about the commitment in the OAS to get this done.

NARF represents the Pottawatomi Nation of Canada, a band of descendants from the Historic Pottawatomi Nation, which from 1795 to 1873 signed a series of treaties with the United States. These treaties provided for the payment of certain annuities. The ancestors of the present-day Canadian Pottawatomi fled to Canada following the signing of the final treaty and were never paid their annuities as promised. The American Pottawatomi Bands



recovered the payment of these annuities in the Indian Claims Commission (ICC), but the Pottawatomi members who now reside in Canada could not bring a claim in the ICC. In 1993, NARF brought suit on behalf of the Pottawatomi Nation in Canada in the Court of Federal Claims, by way of a congressional reference bill, to seek redress. The Nation and the U.S. Department of Justice reached a settlement in principle and the Court of Federal Claims accepted the settlement in September 2000 and recommended the settlement to Congress in January 2001.

Attempts to pass congressional legislation approving the settlement agreement have stalled on several occasions. In January 2011, Senator Inouye introduced Senate Bill 60 for consideration during the 112th Congress. Senate Bill 60 has been referred to the Senate Committee on the Judiciary. In September 2011, Congressman Kildee introduced HR 2928 which was referred to the House Subcommittee on Indian and Alaska Affairs. NARF is working closely with the leadership for the Pottawatomi Nation in Canada and is developing a legislative strategy for approval of the settlement by both the House and Senate this session.

*Indian inmates preparing to enter a sweat lodge (Swift Bird Project 1970s)*

# The Accountability of Governments



Contained within the unique trust relationship between the United States and Indian nations is the inherent duty for all levels of government to recognize and responsibly enforce the many laws and regulations applicable to Indian peoples and the trust duties to which those give rise. Because such laws impact virtually every aspect of tribal life, NARF maintains its involvement in the legal matters pertaining to *accountability of governments* to Native Americans.

In *Nez Perce Tribe v. Salazar*, NARF represents forty-one plaintiffs – the Nez Perce Tribe; the Mescalero Apache Tribe; the Tule River Indian

Tribe; the Hualapai Tribe; the Klamath Tribes; the Yurok Tribe; the Cheyenne-Arapaho Tribe; the Pawnee Nation of Oklahoma; the Sac and Fox Nation; the Santee Sioux Tribe of Nebraska; the Tlingit and Haida Indian Tribes of Alaska; Aleut Community of St. Paul Island; Bad River Band of Lake Superior Chippewa Indians; Bois Forte Band of Chippewa; Cachil Dehe Band of Wintun Indians of Colusa Rancheria; Confederated Salish & Kootenai Tribes; Confederated Tribes of Siletz Indians; Grand Traverse Band of Ottawa and Chippewa Indians; Kaibab Paiute Tribe; Kenaitze Indian Tribe; Kickapoo Tribe in Kansas; Lac Courte Oreilles Band of Ojibwe; Lac Du Flambeau Band of Lake Superior Chippewa; Leech Lake Band of Ojibwe; Minnesota Chippewa Tribe; Native Village of Atka; Noocksack Indian Tribe; Prairie Island Indian Community; Pueblo of Zia; Qawalangin Tribe; Rincon Luiseno Band of Indians; Samish Indian Nation; San Luis Rey Indian Water Authority; Sault Ste. Marie Tribe of Chippewa; Shoalwater Bay Tribe; Skokomish Tribe; Spirit Lake Dakota Nation; Spokane Tribe; Summit Lake Paiute Tribe; Tulalip Tribes; and, Ute Mountain Ute Tribe – in an action in the federal district court for the District of Columbia seeking full and complete accountings of their trust funds. Such accountings never have been provided by the federal government which is the trustee for the funds.

Pending before the Court is the government's motion to dismiss the action for lack of jurisdiction, which the Tribes have opposed. A ruling on that is expected at any time. In the meantime, NARF has begun settlement negotiations in this case and the other tribal trust fund mismanagement cases. In 2011, the government provided these Tribes with never-before provided trust account data that the Tribes are now reviewing and analyzing. In December 2011, claims settlement negotiations became very active.

In *Cobell v. Salazar*, NARF and private co-counsel filed this class action case in federal

*“It may be regarded as certain, that not a foot of land will ever be taken from the Indians without their own consent. The sacredness of their rights is felt by all thinking persons in America as much as in Europe.” (Thomas Jefferson, 1786)*





district court in Washington, D.C., in 1996 to force the federal government to provide an accounting to approximately 300,000 individual Indian money account holders who have their funds held in trust by the federal government. Through years of litigation, decisions of the federal district court and the federal court of appeals held that the government was in breach of trust and must provide an accounting. NARF was active in the case until 2006 when the case was fully staffed and NARF's resources were shifted over to help 41 unrepresented Tribes who faced a deadline to file suit against the federal government for accountings of their tribal funds held in trust by the federal government under the same system. That tribal trust fund litigation, *Nez Perce Tribe v. Salazar*, is proceeding.

On December 8, 2010, President Obama signed into law a settlement in *Cobell v. Salazar* of \$1.5 billion to be paid to the 300,000 individual Indian money account holders with another \$1.9 billion made available to pay individual Indians who want to sell their small fractionated interests in their trust lands to the federal government to be turned over to their Tribes. The total \$3.4 billion in settlement funds will be paid out if the Court of Appeals for the District of Columbia approves the settlement. The federal district court approved the settlement on June 20, 2011, and the decision was appealed. In February and May of 2012, the Court of Appeals will be hearing oral arguments about the appeals of the decision to approve the settlement.

In *Pembina Chippewa v. U.S.*, NARF represents the Turtle Mountain Chippewa, Chippewa Cree, White Earth Band of Minnesota Chippewa, and Little Shell Chippewa Tribes in this case against the federal government for misaccounting and mismanagement of their tribal trust fund, the Pembina Judgment Fund (PJF), since the inception of the fund in 1964. In 2006 the Tribes defeated the United States' motion to have the case



*Crazy Horse Singers  
at NARF*

dismissed. Since August 2007, the parties have been trying to resolve the Tribes' claims, primarily through alternative dispute resolution (ADR) proceedings before a Settlement Judge of the Court. In August 2009, the parties reached agreement at least for settlement negotiations on the population of "baseline" (non-investment) transactions in the PJF. NARF is now proceeding to negotiate the claims of the government's investment mismanagement of the PJF. Three in-person ADR settlement negotiations sessions have been held: (1) March 2010 at the U.S. Court of Federal Claims in Washington, D.C.; (2) April 2011 at the U.S. District Court for the District of North Dakota in Bismarck, ND; and (3) July 2011 at the U.S. Court of Federal Claims in Washington, DC. All in-person negotiations have been attended by representatives of the clients.



# The Development of Indian Law



The coordinated *development of Indian law* and educating the public about Indian rights, laws and issues is essential for the continued protection of Indian rights. This primarily involves establishing favorable court precedents, distributing information and law materials, encouraging and fostering Indian legal education, and forming alliances with Indian law practitioners and other Indian organizations. NARF has three ongoing projects which are aimed at achieving this goal: the Indigenous Peacemaking Initiative; the National Indian Law Library; and the Indian Law Support Center.

practices. This project provides NARF with an opportunity to support traditional peacemaking and community-building practices as an extension of Indian law and sovereign rights. Peacemaking is a community-directed process to develop consensus on a conflict resolution plan that addresses the concerns of all interested parties. The peacemaking process uses traditional rituals such as the group circle, and Clan structures, to involve the parties to a conflict, their supporters, elders and interested community members. Within the circle, people can speak from the heart in a shared search for understanding of the conflict, and together identify the steps necessary to assist in healing all affected parties and prevent future occurrences and conflicts.

*"If we fight for civil liberties for our side, we show that we believe not in civil liberties, but in our side. But when those of us who never were Indians and never expect to be Indians fight for the Indian cause of self-government, we are fighting for something that is not limited by accidents of race and creed and birth; we are fighting for what Las Casas, Vitoria and Pope Paul III called the integrity or salvation of our own souls. We are fighting for what Jefferson called the basic rights of man. We are fighting for the last best hope of earth. And these are causes which should carry us through many defeats." (Felix Cohen, U.S. Solicitor – Circa 1940)*

NARF has focused its initial efforts on the creation of the clearinghouse, conducting needs assessment of peacemaker resources and developing a sustainable business model for the program. Most recently, NARF is in the process of analyzing the results of a national survey of peacemaking needs in Indian communities. Approximately 230 survey forms were filled out and returned. We will use the survey results to help shape a national conference on peacemaking set for Spring 2012 in Oklahoma City, hosted by the Chickasaw Nation.

## The National Indian Law Library

The National Indian Law Library (NILL) is the only law library in the United States devoted to Indian law. The library serves both NARF and members of the public. Since it was started as a NARF project in 1972, NILL has collected nearly 9,000 resource materials that relate to federal Indian and tribal law. The Library's holdings include the largest collection of tribal codes, ordinances and constitutions; legal pleadings from major Indian cases; and often hard to find reports and historical legal information. In addition to making its catalog and extensive collection available to the public,

## Indigenous Peacemaking Initiative

The Indigenous Peacemaking Initiative's (IPI) mission is to promote and support Native peoples in restoring sustainable peacemaking

NILL provides reference and research assistance relating to Indian law and tribal law and its professional staff answers over 2,000 questions each year. In addition, the Library has created and maintains a huge web site that provides access to thousands of full-text sources to help the researcher. See [www.narf.org/nill/index.htm](http://www.narf.org/nill/index.htm).

The National Indian Law Library is celebrating its 40th anniversary. Please visit the library web site for more information about the history of the library and to learn how you can help sustain the unique and valuable services it provides to the public.

### Indian Law Support Center

Since 1972, NARF's Indian Law Support Center (ILSC) has served 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. NARF continues to perform Indian Law Support Center duties by sending out regular mailouts to Indian Legal Services (ILS) programs, handling requests for assistance and working with Indian legal services programs to secure a more stable funding base from Congress.

The Indian Tribal Justice and Legal Assistance Act of 2000 authorizes the Department of Justice (DOJ) to provide supplemental funding to Indian legal services programs for their representation of Indian people and Tribes which fall below federal poverty guidelines. Congress appropriated \$2 million in FY 2003 under the Act, and ILSC and ILS programs worked with the DOJ to devise an allocation methodology. The DOJ awarded a grant of \$1,987,000 to NARF on June 7, 2004, most of which was contracted out to ILS programs with a small portion used to cover NARF administrative costs. Funding in the amount of \$1,726,626 for calendar year 2005 was appropriated by Congress for the project. Funding via 2007, 2008 and 2009 Congressional appropriations



*NARF attorneys hosting students from Harvard University*

was unsuccessful. In 2010 NARF secured a line item appropriation of \$2.35 million from Congress. In FY 2011 Congress appropriated \$2.49 million for civil and criminal assistance in tribal courts. NARF is now working on FY 2012 funding.

### 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 it possesses with these groups and individuals working in support of Indian rights and to foster the recognition of Indian rights in mainstream society.

# 2011 Financial Report



Based on our *audited* financial statements for the fiscal year ending September 30, 2011, the Native American Rights Fund reports **unrestricted** revenues of \$7,755,340 against total expenditures of \$8,150,036. Total revenue and net assets at the end of the year came to \$7,119,917 and \$4,267,834, respectively. Due to presentation requirements of the audited financial statements in terms of recognizing the timing of certain revenues and expenses, they do not reflect the fact that, based on NARF's internal reporting, expenses and other cash outlays exceeded revenue resulting in a decrease of \$447,810 to NARF's reserve fund. When compared to fiscal year 2010: the increase in Public Contributions is mostly due to the increase in bequests (this area can vary widely from one year to the next) and an anonymous donation of almost \$130,000. We received a number of new Tribal

Contributions in fiscal year 2011, many of those supporting our 40th Anniversary and other special events. The increase in Federal Award relates to our new Bureau of Justice Assistance contract (the majority of which is also included in expenses since it is paid-out to sub-recipients). We received both new and increased funding from Foundations to support specific projects and also for general purposes. The decrease in Legal Fees represents the continued decline in activity for fee paying clients and settlements. Along with the overall investment markets, NARF's investments took a hit near the end of the fiscal year.

Unrestricted revenue and Expense comparisons between fiscal year 2011 and fiscal year 2010 are shown below (not including contributed services).

## Unrestricted Support and Revenue Comparison

	2011		2010	
	dollars	percents	dollars	percents
Public Contributions	\$ 1,869,051	27.9%	\$ 1,604,342	26.5%
Tribal Contributions	1,614,621	24.0%	1,321,750	21.8%
Federal Awards	1,359,848	20.3%	10,000	0.2%
Foundation Grants	750,429	11.2%	528,580	8.7%
Legal Fees	1,135,010	16.9%	2,192,905	36.3%
Return on Investments	(55,381)	(0.8%)	351,278	5.8%
Other	32,291	0.5%	43,312	0.7%
<b>TOTALS</b>	<b>\$ 6,705,869</b>	<b>100%</b>	<b>\$ 6,052,167</b>	<b>100%</b>

## Expense Comparison

	2011		2010	
	dollars	percents	dollars	percents
Litigation and Client Services	\$4,871,455	68.6%	\$4,889,392	68.4%
National Indian Law Library	200,342	2.8%	178,529	2.5%
<b>Total Program Services</b>	<b>5,071,797</b>	<b>71.4%</b>	<b>5,067,921</b>	<b>70.9%</b>
Management and General	713,086	10.1%	770,152	10.8%
Fund Raising	1,315,682	18.5%	1,311,551	18.3%
<b>Total Support Services</b>	<b>2,028,768</b>	<b>28.6%</b>	<b>2,081,703</b>	<b>29.1%</b>
<b>TOTALS</b>	<b>\$ 7,100,565</b>	<b>100%</b>	<b>\$ 7,149,624</b>	<b>100%</b>

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



# NARF Acknowledgment of Contributions: Fiscal Year 2011

We thank each and every one of our supporters for their commitment to the goals of NARF. NARF's success could not have been achieved without the generosity of our many donors throughout the nation. NARF receives contributions from foundations, corporations, religious organizations, tribes and Native organizations, bequests and trusts, benefactors, private donations, and in-kind contributions. We gratefully acknowledge these gifts received for fiscal year 2011 (October 1, 2010 through September 30, 2011).



## Tribes and Native Organizations

Miami Tribe of Oklahoma Indians	Stockbridge Munsee Community Band of Mohican Indians
Chickasaw Nation	Sycuan Band of Kumeyaay Indians
Citizen Potawatomi Nation	Tulalip Tribes
Confederated Tribes of Siletz Indians	Wildhorse Foundation
Cow Creek Band of Umpqua Tribe of Indians	Yavapai-Prescott Indian Tribe
First Nations Development Institute	Yocha Dehe Wintun Nation
Fond du Lac Band of Lake Superior Chippewa Indians	
Fort McDowell Yavapai Nation	
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## Foundations, Corporations and Law Firms

# NARF Acknowledgment of Contributions: Fiscal Year 2011



Smith, Shelton &  
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## **Corporate Matching Gifts –**

Currently, more than 20 foundations and corporations nationwide make matching gifts to NARF on a regular basis.

Employers match their employees' contributions sometimes doubling or even tripling their donation. Please check with your human resources office and request a matching gift form.

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# NARF Acknowledgment of Contributions: Fiscal Year 2011



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### **In-Kind Donations**

There are many ways to support the Native American Rights Fund, in addition to cash gifts. People who volunteer their time and talents, or donate valuable goods and services, provide crucial support for the NARF mission. We would like to

expressly thank the following individuals and organizations for their generosity:

DLA Piper

Patton Boggs LLP

James R. Botsford,  
*Wisconsin Judicare*

Sheila D. Corbine,  
*Lac Courte Oreilles*

Gerald L. Danforth,  
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Ada Deer,  
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Mark Johnson, Esq.  
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Cher Lyn

Robert McCoy

Samuel Newman

Eugene White-Fish,  
*Forest County  
Potawatomi*

Kimberly M. Vale,  
*Mohican*

Other Anonymous  
Individuals

# NARF Acknowledgment of Contributions: Fiscal Year 2007



**Native Ways Federation** – The Native Ways Federation (Native Ways) is the only workplace giving program in the United States to exclusively fund Native nonprofits that serve people and communities in Indian Country. Native Ways has been tested in the workplaces of the seven founding Native nonprofits, and has received W.K. Kellogg Foundation funding to expand the program more broadly. To learn more about Native Ways and the participating nonprofits, or to see how your company can support Indian Country through workplace giving, please visit [www.nativewaysfederation.org](http://www.nativewaysfederation.org). Your business can make a difference!

**Boulder-Denver Advisory Committee**

– Lucille A. Echohawk, Thomas W. Fredericks, Ava Hamilton, Jeanne Whiteing, Charles Wilkinson.

**Federated Workplace Campaigns**

Thank you to the thousands of federal, state, municipal and private sector employees throughout the country who through their payroll deduction plans contributed \$77,370 in fiscal year 2011.

**Show Your Support in NARF's programs**

– NARF receives contributions from foundations, corporations, religious organizations, tribes and Native organizations, bequests and trusts, benefactors, private donations, and in-kind contributions. Below are descriptions of NARF's donor programs and additional ways you can get involved.

**Peta Uha Membership** – Peta Uha in the Lakota (Sioux) language means firekeeper. One that honors tribal members who made a solemn commitment to ensure that the sacred flame, source of light, heat and energy for his people, always be kept burning. Like the firekeepers of old, members of the Peta Uha Council can

demonstrate constancy and vigilance by helping to ensure that the critical work of the Native American Rights Fund continues to move ever forward. For benefits associated with each level of Peta Uha membership, please contact our Development Department, 303.447.8760.

**Tsanáhwit Circle** – Tsanáhwit is a Nez Perce word meaning equal justice. Tsanáhwit Circle members provide a regular source of income to NARF by pledging and making monthly contributions at any level of your choice. You may sign up to receive monthly pledge reminders in the mail or your credit card may be billed automatically.

**Otu'han Gift Membership** – Otu'han is the Lakota Sioux word translated as giveaway. Otu'han is a memorial and honoring gift program modeled after the tradition of the Indian giveaway in which items of value are gathered over a long period of time to be given away in honor of birthdays, marriages, anniversaries, and in memory of a departed loved one.

**Circle of Life** – NARF's Circle of Life are donors who provide a lasting legacy to the Native American Rights Fund by including NARF in estate planning or deferred gifts. The circle is an important symbol to Native Americans representing unity, strength and the eternal continuity of life. These lasting gifts help ensure the future of NARF and our Indian clients nationwide.

**Endowments** – NARF has two established endowments, the 21st Century Endowment and the Living Waters Endowment. The 21st Century Endowment is a permanent fund in which the principal is invested and interest income is used for NARF's programs. This endowment is designed to provide a permanent, steady income that can support the ever-increasing costs of



providing legal representation to our tribal clients. The Living Waters Endowment directly funds the 21st Century Endowment. It allows donors to honor friends and loved ones by making an endowment gift of \$10,000 or more. By designating a gift to either endowment, you can be sure that your contribution will continue to generate annual funds in perpetuity. Endowment supporters are recognized on a special wall plaque displayed at NARF. Supporters will also receive a memorial piece for their home and be acknowledged in NARF's annual report.

**Workplace Campaigns** – NARF is a member of America's Charities, a national workplace giving federation. Giving through your workplace is as easy as checking off NARF's box, #10350 on the Combined Federal Campaign (CFC) pledge form authorizing automatic payroll deduction. NARF is also a member of Community Shares of Colorado (CSC), member #5037.

**Matching Gifts** – Currently, more than 20 foundations and corporations nationwide make matching gifts to NARF on a regular basis. Employers match their employees' contributions sometimes doubling or even tripling their donation. Please check with your human resources office and request a matching gift form.

**E-Action** – Sign up for our e-action network by providing NARF with your email address. This is a great way to get periodic case updates, calls-to-action, special events information, invitations and other activities. Your e-mail address is confidential and we will not share it with any outside sources. For further information about any of the programs or services, please contact NARF's Development Department at 303-447-8760. Thank you.



# NARF STAFF



## CORPORATE OFFICERS

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Member/Attorney

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Litigation Management  
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Melody McCoy  
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Skadden Fellow Attorney

Jonathan Briggs  
Legal Administrative  
Assistant

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Colby Duren  
Legal Assistant

## **The “Native American Rights Fund Statement on Environmental Sustainability.”**

“It is clear that our natural world is undergoing severe, unsustainable and catastrophic climate change that adversely impacts the lives of people and ecosystems worldwide. Native Americans are especially vulnerable and are experiencing disproportionate negative impacts on their cultures, health and food systems. In response, the Native American Rights Fund (NARF) is committed to environmental sustainability through its mission, work and organizational values. Native Americans and other indigenous peoples have a long tradition of living sustainably with the natural world by understanding the importance of preserving natural resources and respecting the interdependence of all living things. NARF embraces this tradition through its work and by instituting sustainable office practices that reduce our negative impact on our climate and environment. NARF is engaged in environmental work and has established a Green Office Committee whose responsibility is to lead and coordinate staff participation in establishing and implementing policies and procedures to minimize waste, reduce energy consumption and pollution and create a healthful work environment.”







**Native American Rights Fund**

1506 Broadway  
Boulder, CO 80302  
303-447-8760 • [www.NARF.org](http://www.NARF.org)