



# Legal Review

NATIVE AMERICAN RIGHTS FUND

## A VICTORY FOR RULE OF LAW AND TRIBAL CHILDREN



PHOTO CREDIT: SARAH ORTEGON HIGHWALKING

On July 17, 2023, the United States Supreme Court issued its decision in *Haaland v. Brackeen*. The Court affirmed the constitutionality of the Indian Child Welfare Act (ICWA), a 1978 law that Congress passed to address the mass removal of Indian children from their families, communities, and Tribes. In the *Brackeen* case, ICWA's constitutionality had been challenged by a small coalition of anti-tribal interests, groups that seek to limit the powers of the federal government, groups that financially

benefit from the adoption of Indian children, and individual adoptive families. Similar small groups of ICWA opponents brought multiple federal court challenges in the previous seven years; *Brackeen* was the most significant.

The Court's 7-2 decision upholding ICWA's protections in their entirety was a resounding victory for Indian children, Indian families, Tribal Nations, and best practices in child welfare. Tribes have repeatedly asserted that the law is on their side in these cases, and the Supreme Court vindicated that position. While there is much to celebrate with this victory, now also is the time to redouble efforts to improve ICWA compliance, raise the floor set by ICWA, and support tribal child welfare programs.

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## A Notable Case

Though every Supreme Court case is important, *Haaland v. Brackeen* was notable for several reasons. First, federal courts rarely hear cases related to child welfare—child welfare cases most often take place in state courts and in tribal courts. (Although Congress passed ICWA nearly 45 years earlier, *Brackeen* was only the third ICWA case to go before the Supreme Court.) The case also was unique for the number of constitutional doctrines at issue, each with varying subparts. Broadly, those who were challenging ICWA argued that it was unconstitutional because:

- Enacting ICWA did not fall within Congress's powers enumerated in Article I of the Constitution.
- In ICWA, the federal government overstepped its authority and commandeered states, violating the Tenth Amendment.
- ICWA, or a part of ICWA, is a race-based classification that violates equal protection rights.
- ICWA, in part, transfers Congress' lawmaking ability to other entities and violates the non-delegation doctrine.

These arguments had the potential to upend the relationship between the federal government and Tribal Nations, greatly restrict Congressional powers, and disrupt the broader field of child welfare. The Court, however, rejected all of these challenges to the law—some on the merits and others for lack of standing (a legal standard that focuses on whether litigants have an actual injury that is caused by and is redressable by the party that they are suing). Justice Barrett wrote the majority opinion and was joined by Chief Justice Roberts and Justices Sotomayor, Kagan, Gorsuch, Kavanaugh, and Jackson. Though much of the Court's opinion and the briefing addressed constitutional issues, there are several key pieces of writing from the case that are particularly relevant for those whose work focuses on children, families, child welfare policy, and broader issues of equity.

## A Focus on Children, Families, and Child Welfare Policy

First, the *Brackeen* case elicited an enormous outpouring of support for ICWA, including 21 pro-

ICWA briefs submitted to the U.S. Supreme Court from a variety of experts with lived and professional expertise in child welfare and policy development. The Native American Rights Fund (NARF), through its Tribal Supreme Court Project, worked to coordinate the broad pro-ICWA strategy behind these briefs, and they are excellent resources for learning more about history, current practice, and the law from a variety of perspectives.

Often, the voices of those who are actually affected are missing from Supreme Court briefing, but a brief from tribal citizens who went through the child welfare system details lived experiences in foster care and dispels misconceptions about Indian children's experiences with ICWA. Building on that perspective, a brief from the National Association of Council for Children and 30 other children's rights organizations addresses how ICWA supports the best interests of children in state child welfare proceedings. Likewise, a brief from organizations that represent parents in dependency cases discusses the constitutional rights afforded to parents and children, how those rights intersect with the child welfare system, and the importance of ICWA in establishing procedures that ensure child safety and protect family integrity.

Those interested in research-based approaches to child welfare will appreciate the brief from Casey Family Programs and 26 leading child welfare, adoption, foster care, and social work organizations. It cites extensive research and explains why ICWA is a model for child welfare best practices. In addition, the brief filed by the American Academy of Pediatrics and the American Medical Association describes the effects of historical trauma on the health of Native children, and the brief from the American Psychological Association details ICWA's research-supported benefits for Native children.

Those who are interested in how the federal government and states exercise authority over child welfare will be interested in a brief from the American Bar Association, which describes how child welfare has long been governed by a combination of state and federal law, as well as a brief filed by Los Angeles County, which is the largest child welfare system in the country as well as home to the largest American

Indian and Alaska Native population in the United States. Finally, a bipartisan brief filed by 23 states and the District of Columbia highlights how ICWA both allows and encourages tribal-state collaboration in the area of child welfare.

### ***The Court Documents Indian Child Removal and Looks to a Better Future***

Beyond the pro-ICWA briefs in the case, the concurring opinion from Justice Gorsuch (that was signed, in part, by Justices Sotomayor and Jackson) is a must-read for anyone who works in child welfare or who seeks to better understand the relationship between the federal government and Tribal Nations.

Justice Gorsuch contextualizes ICWA as a law specifically designed to remedy the long history of the forced removal of Indian children from their families and communities through federal and state policies aimed at weakening tribal governments and assimilating generations of Native people into the broader American society. The concurrence begins by tracing federal policies that resulted in the widespread removal of Indian children from their families, first to Indian boarding schools where students faced “[r]ampant physical, sexual, and emotional abuse; disease; malnourishment; overcrowding; and lack of health care,” and later, by incentivizing state-facilitated family separations that were intended to encourage private adoptions. Justice Gorsuch notes that these practices had led to a crisis in which “an estimated 25 to 35 percent of all Indian Children had been separated from their families and placed in adoptive homes, foster care, or institutions” in the late twentieth century, and that the legacy of these practices remains embedded within modern state welfare apparatuses.

Justice Gorsuch also describes the inherent bias that often informs child welfare decisions, noting that Indian children have been disproportionately placed with non-Indian families by state and private adoption organizations that “routinely penalize Indian parents for conditions of ‘poverty, poor housing, lack of modern plumbing and overcrowding[.]’ and the persistent and destructive belief by non-Native child welfare workers ‘that an Indian reservation is an unsuitable environment for a child.’” As Justice

Gorsuch points out, the mass removal of Indian children had “often-disastrous consequences,” causing “severe distress” that “interfere[d] with [Indian children’s] physical, mental, and social growth and development[.]” and exposed children to higher rates of “physical, sexual, [and] emotional abuse in foster and adoptive homes.”

Justice Gorsuch’s concurrence is significant for at least two reasons. First, Tribal Nations, legal experts, and historians filed briefs before the Court describing this history and its ongoing harms. Justice Gorsuch’s writing put those facts into the Supreme Court’s own body of work, providing a detailed recounting of the violence that centuries of federal and state policies have inflicted on Indian children, Indian families, and tribal communities.

Second, while many Americans may understand this history, most are unfamiliar with Tribal Nations. Instead they imagine Tribes as static and in the past tense. Justice Gorsuch rejects this framing and affirms the ongoing role of Tribal Nations in our constitutional structure and in the modern world:

Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands. But that is not because this Court has no justice to offer them. Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it. . . . In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history.

### ***Moving Forward: ICWA Compliance and Investing in Tribal Systems***

The Supreme Court’s decision in *Brackeen* brought an end to a multi-year litigation battle. It also presents an opportunity to redouble efforts to increase ICWA compliance, enact state-based ICWA laws that build on ICWA’s strong foundation, and—most importantly—increase funding and support for tribal child welfare and tribal justice systems. The



*Brackeen* decision was a successful end to one case, but that case was only one chapter in the long effort to correct a system that consistently has failed Native American children and families.

ICWA is a state-facing law that, as Justice Gorsuch noted, “installs substantive and procedural guardrails” in state proceedings “against the unjustified termination of parental rights and removal of Indian children from tribal life.” There is no doubt that ICWA “has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities,” as Justice Gorsuch noted. However, he also recognized what most Indian child welfare advocates already know, which is that many states have struggled with effective ICWA implementation. Native children remain dramatically overrepresented in state child welfare systems. Indeed, some states continue to have the same or similar “shocking” disparities in state removal of Indian children vs. non-Indian children as they did when Congress passed ICWA in 1978. For example, in Alaska, Alaska Native people make up about 20% of the population yet approximately 55% of children in state custody are Alaska Native.

There are a number of efforts to improve state ICWA compliance that deserve greater research and support, including the development of specialized state ICWA courts, state child welfare agency partnerships with Tribal Nations, and state ICWA laws. NARF, and our partner organizations, have been involved in and supportive of these efforts for years as part of a larger strategy to both improve state services to Native children and their families and to improve ICWA compliance.

While these state-facing efforts are no doubt important, the reality is that when Indian children are involved in state child welfare systems, the services are usually provided by, and the decisions are usually made by, non-Indian people who may have

a fundamentally different worldview than the child or her family. For this reason, NARF encourages Tribal Nations and child welfare advocates to look for opportunities to build and strengthen tribal child welfare systems and courts. Going forward, the work must honor the generations of tribal advocacy for tribal children (including the work that helped get ICWA passed), honor ICWA and the collective work of the last 45 years, and go beyond ICWA—a law focused on state actions—and get the federal government to focus instead on supporting tribal solutions.

Tribes have inherent jurisdiction over the well-being of their citizens, including tribal children. This jurisdiction predates the United States and is concurrent with state jurisdiction. Many Tribal Nations operate their own child welfare systems that focus on prevention, rehabilitation, and family reunification, and provide culturally based services. Tribes also operate tribal court programs that are similarly grounded in cultural and traditional forms of dispute resolution. And as a practical matter, Tribes are frequently the governments that are located closest to their citizen children and families and are thus more able to recognize and respond to difficulties a family may be facing.

Tribal Nations know that their communities, cultures, and strength as sovereign nations is inseparable from the health and wellness of their children. As child welfare experts have noted, tribal programs are on par with, or exceed, what many states provide. Yet, despite being best positioned to respond to children and families, Tribes often are overlooked by funders and policy makers. To honor the generations of children removed from their communities and the goals articulated in ICWA, now is the time for a meaningful investment in tribal systems.

**Ed. Note:** All of the briefs mentioned above from *Haaland v. Brackeen* can be found at <https://icwa.narf.org/>.



# Case Updates



## TRIBES LEAD PROCESS TO BRING CHILDREN HOME FROM CARLISLE

On September 17, 2023, Spirit Lake Tribe and Sisseton Wahpeton Oyate arrived at Carlisle Barracks Post Cemetery to bring two of their children, Amos LaFromboise and Edward Upright, home. On the morning of their arrival, as the Tribes sang their honor songs for the first time on Carlisle's grounds, the rain began to pour. Two days after their arrival, the Tribes carefully wrapped the boys' remains in buffalo robes and prepared for the long journey home. After nearly 150 years, the Tribes were finally bringing their boys home to lay them to rest next to each other at the Tribes' repatriation grounds.

A week before, the two Tribes finalized a first-of-its-kind signed Plan of Action with the U.S. Army for the return of their children's remains. The Plan was established to provide a robust set of terms to ensure a manageable and culturally appropriate

process for the disinterment and return of the remains. The predictability and assurance the Plan provided was invaluable after the Tribes spent nearly seven years working to have their children's remains returned to them.

The disinterment began at 10 am and continued until midnight. Despite relentless rainfall, tribal members gathered around the boys' graves as they were disinterred and remained there until the disinterment was complete. Spirit Lake Tribe's Chairwoman Lonna Street stood in the rain at the front of Edward Upright's grave for the duration of his disinterment.

"Even though it's a good day, it's still a sad day to leave the remainder of the children here," said Chairwoman Street. "We pray and hope that the rest of the children be returned to their homelands." 🙏





The first citizen of the Shingle Springs Band of Miwok Indians to register to vote at the new facilities.

## SHINGLE SPRINGS VOTERS GAIN REGISTRATION ACCESS

On September 12, 2023, Shingle Springs held a special tribal council meeting at its Rancheria, located in the hills outside of Sacramento, California. The purpose of the gathering was to designate the Tribe's local health center as a voter registration agency under the National Voter Registration Act. At the event, Shingle Springs Band of Miwok Indians

Chairwoman Regina Cuellar explained why voting in federal and state elections is important for the tribe, "We want to always have our Native voices heard. Native voices help shape policies that come out, and we have a right to make sure those policies are Native friendly and support our goals and communities."

Native communities across the United States have faced significant barriers when it comes to participating in the electoral process. Discriminatory policies and systemic obstacles have often limited their ability to exercise their right to vote effectively.

However, NARF aims to change that. NARF is proud to support tribes like the Shingle Springs Band of Miwok Indians as they work toward equal access to the state and federal democratic systems. 🗳️

# Tribal Supreme Court Project

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and the Native American Rights Fund (NARF). The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purposes of the Project are to promote greater coordination and improve strategies on litigation that may affect the rights of all Tribal Nations.

We encourage Tribes to contact the Project, especially when considering a petition for a writ of certiorari, prior to the Supreme Court accepting a case for review. You can find copies of briefs and opinions on the major cases we track at <https://sct.narf.org>.

October 2, 2023, was the first day of the Court's new term. Several pending petitions were denied. As of this update, the Court has not accepted any Indian law cases for review. The Project is watching closely *Becerra v. San Carlos Apache Tribe* (22-250) and *Becerra v. Northern Arapaho Tribe* (22-253) (Indian Self-Determination and Education Assistance Act Contract Support Costs). These selected cases and others are detailed further below.

## **ALASKA V. UNITED STATES (220157)**

In January 2023, the U.S. Environmental Protection

Agency issued a Final Determination under the Clean Water Act that concluded that the proposed Pebble Mine on state-owned land would lead to unacceptable adverse effects on anadromous fishery areas. The Final Determination limits the use of certain waters in the Bristol Bay watershed as disposal sites for the discharge of dredged or fill material associated with the Mine. The State of Alaska filed a Motion for Bill of Complaint alleging the Court's original jurisdiction under 28 U.S.C. § 1251(b). Alaska claims that EPA's Final Determination essentially vetoes or prohibits the mine, and seeks a determination that the Final Determination, is arbitrary, capricious, an abuse of discretion, not in accordance with law, and in excess of statutory jurisdiction, authority, or limitations; a vacation and set aside of the Final Determination; and an injunction from enforcing the Final Determination.

## **BECERRA V. NORTHERN ARAPAHO TRIBE (22-253)**

The Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301 et seq., permits eligible tribes to contract with the federal government to operate certain federal health care programs to eligible individuals. The contracts entitle tribes to the amount of appropriated funds that the U.S. Indian Health Service (IHS) otherwise would have allocated for federal operation of the programs.



And IHS must pay “contract support costs,” which are funds added to the operational amounts to cover administrative costs that tribes incur with the contracted programs. When they provide health care services to covered individuals, contracting tribes are permitted to collect payment from third-party payors, like private insurers, Medicare, and Medicaid. The U.S. Court of Appeals for the Tenth Circuit held that “contract support costs” includes the cost to tribes of administering and collecting these third-party payments, and IHS also must reimburse tribes for these costs.

***KLAMATH IRRIGATION DISTRICT V.  
U.S. BUREAU OF RECLAMATION (23-216)***

Private water users filed a declaratory action in state court against the U.S. Bureau of Reclamation, challenging the Bureau’s operating procedures to maintain specific lake levels and instream flows to comply with the Endangered Species Act and to safeguard the federal reserved water rights of the Hoopa Valley and Klamath Tribes in the Klamath River Basin. After the Bureau removed the action to federal court, the water users sought a remand to state court on the ground of lack of federal court jurisdiction and exclusive state court jurisdiction. Remand was denied, and, in a 2-1 panel decision, the U.S. Court of Appeals for the Ninth Circuit affirmed.

***TINGLE V. FLORIDA DEPARTMENT OF  
HEALTH (23-246)***

Florida has a constitutional and statutory regulatory framework for regulating medical marijuana. To address claims of past discrimination, recent amendments are intended to address the state’s licensure of Black medical marijuana farmers.

No similar amendments are provided for Native American farmers. Donovan Craig Tingle, a Native American farmer, alleges that this is discriminatory under the Florida and U.S. Constitutions. The Florida district court disagreed, and the Florida Court of Appeals affirmed.

**CONTRIBUTIONS TO THE TRIBAL  
SUPREME COURT PROJECT**

**NCAI and NARF welcome contributions to the Tribal Supreme Court Project. Please send any general contributions to:**

NCAI, attn: Accounting  
1516 P Street, NW  
Washington, DC 20005

NARF, attn: Accounting  
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**Please contact us if you have any questions or if we can be of assistance:**

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# National Indian Law Library

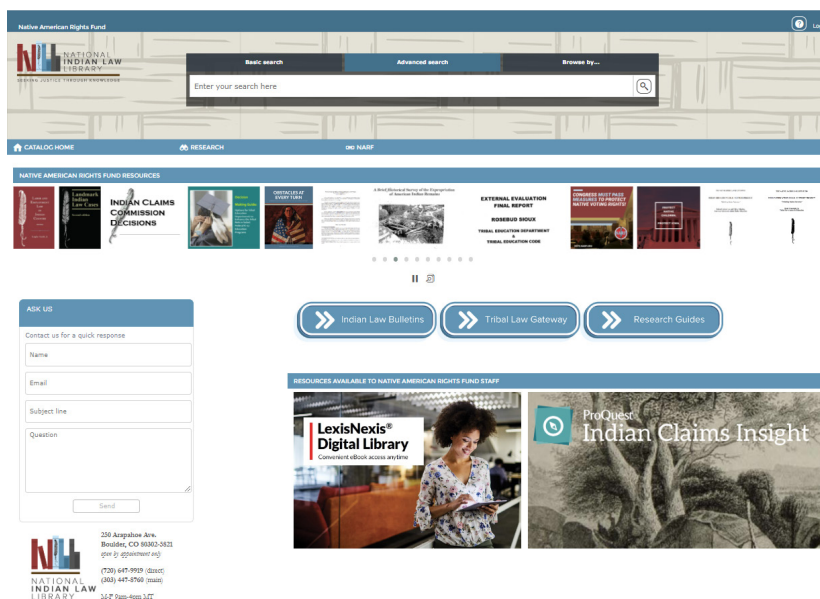
National Indian Law Library Catalog Gets a Reboot

The National Indian Law Library (NILL) houses a truly unique collection. Devoted to American Indian Law, this one-of-a-kind institution contains a vast number of tribal self-governance documents, case documents that exist nowhere else, legislative information, and many more relevant items obtained during NARF's more than 50-year long history.

At the heart of this collection is NILL's online catalog. Without an organized system to locate these items, it can be unclear what the library has and where to find it. After this year's move to NARF's new Boulder office, NILL librarians have been hard at work sorting, cataloging, and arranging what the library owns, better organizing what is there, and unearthing items that were not previously entered in the online catalog. Cleaning up individual records and evaluating NILL's overall collection is a long-term project, but it is one that is made significantly easier with recent updates to the cataloging system. The latest system reboot gave the online catalog added search functionality and a new appearance.

## Searching made simpler

Running a search is front and center on the catalog's new design. Catalog users can easily complete a keyword search in the basic search bar or head to the advanced search area to specify in more detail what they need. It is now easier to narrow down search results with improved item types—such as articles, court cases, e-books, and more—or by locations based on NILL's new space and layout at 250 Arapahoe. After running an initial search, one can click on “modify results” on the lefthand side of the screen to filter what they've found. Users also can browse the NILL collection by author, subject, or several other categories. These browsable fields will become even more streamlined and accurate as record data is cleaned up!



## New and improved appearance

In addition to the structural improvements, the NILL catalog underwent a much-needed design makeover. Featuring the library's new logo and better matching the Native American Rights Fund's brand, it is now easier than ever to locate NARF's publications, navigate to other NARF services such as the Indian Law Bulletins and Tribal Law Gateway, or ask a research question from the catalog home page.

Check out the NILL catalog by visiting <https://narf.org/nill> and clicking on “catalog.”

We're interested in your thoughts—please reach out to us by using our “askNILL” feature with your questions or feedback.





## CALL TO ACTION

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

We encourage other tribes and organizations to become contributors and partners with NARF in fighting for justice for our people and in keeping the vision of our ancestors alive. We thank the following tribes and Native organizations for their generous support of NARF in the 2023 fiscal year (October 1, 2022 to September 30, 2023):

### **AMERIND**

**Buena Vista Rancheria of Me-Wuk Indians**  
**Cachil DeHe Band of Wintun Indians of the**  
**Colusa Indian Community Council**  
**Chickasaw Nation**  
**Confederated Tribes of Siletz Indians**  
**Cow Creek Band of Umpqua Tribe of Indians**  
**Cowlitz Indian Tribe**  
**Foxwoods Resort Casino**  
**Hualapai Indian Tribe**  
**Indian Gaming Association**  
**Jamestown S'Klallam Tribe**  
**Keweenaw Bay Indian Community**  
**Muckleshoot Indian Tribe**  
**Oneida Nation**  
**Poarch Band of Creek Indians**  
**San Manuel Band of Mission Indians**  
**Seminole Tribe of Florida**  
**Shakopee Mdewakanton Sioux Community**  
**Tanana Chiefs Conference, Inc.**  
**Tulalip Tribes of Washington**  
**United Tribes of Bristol Bay**  
**Yavapai-Prescott Indian Tribe**

To join these tribes and organizations and support the fight for Native rights and tribal sovereignty, contact Don Ragona at [ragona@narf.org](mailto:ragona@narf.org)



# The Native American Rights Fund

The Native American Rights Fund (NARF) is a Native-led, nonprofit legal organization defending and promoting the legal rights of Native American people on issues essential to our tribal sovereignty, natural resource protections, and human rights.

Since 1970, we have provided legal advice and representation to Native American tribes, individuals, and organizations on high impact issues. Our early work was instrumental in establishing the field of Indian law. NARF—when very few would—steadfastly stood for religious freedoms and sacred places, subsistence hunting and fishing rights, as well as basic human and civil rights. We continue to take on complex, time-consuming cases that others avoid, such as government accountability, climate change, voting rights, and the education of our children. We have assisted more than 300 tribal nations with critical issues that go to the heart of who we are as sovereign nations.

NARF's first Board of Directors developed five priorities to guide the organization. Those priorities that continue to lead NARF today:

- Preserve tribal existence
- Protect tribal natural resources
- Promote Native American human rights
- Hold governments accountable to Native Americans
- Develop Indian law and educate the public about Indian rights, laws, and issues

Under the priority to preserve tribal existence, NARF constructs the foundations to empower tribes to live according to their traditions, enforce their treaty

rights, ensure their independence on reservations, and protect their sovereignty.

An adequate land base and control over natural resources are central to economic self-sufficiency and self-determination. They are vital to the very existence of tribes. Thus, much of NARF's work aims to protect tribal natural resources.

In order to promote human rights, NARF strives to enforce and strengthen laws that protect the rights of Native Americans to exercise their civil rights, practice their traditional religion, use their languages, and enjoy their culture.

Contained within the unique trust relationship between the United States and tribal nations is the inherent duty for all levels of government to recognize and responsibly enforce the laws and regulations applicable to Native people. NARF will hold governments accountable to Native Americans.

For the continued protection of Indian rights, we must develop Indian law and educate the public about Indian rights, laws, and issues. This priority includes establishing favorable court precedents, distributing information and law materials, fostering relevant legal education, and forming alliances with Indian Law practitioners and other organizations.

Requests for legal assistance should be addressed to NARF's main office at 250 Arapahoe Ave, Boulder, CO, 80302. NARF's clients are expected to pay what they can toward the costs of legal representation.

**NARF Legal Review** is published biannually by the Native American Rights Fund. There is no charge for subscriptions, however, contributions are appreciated.

**[www.narf.org](http://www.narf.org)**

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