

NARF Legal Review

Native American Rights Fund

Katie John Prevails in Subsistence Fight

"The State of Alaska will not appeal the Katie John case to the United States Supreme Court." With those words, Governor Tony Knowles of Alaska greeted Katie John by telephone on the morning of August 27, 2001. He went on to tell her "...that from this time on, the State will do everything we can to protect her subsistence rights."

A few weeks before making his decision, Governor Knowles traveled to the headwaters of the Copper River to meet personally with subsistence plaintiff Katie John, an 86 year old mother of 14 children and adopted children, with more than 150 grand children, great grandchildren, and great-great grandchildren. As they sat near a stream where Katie John's father and mother subsistence fished to feed their family, Governor Knowles heard a simple but compelling message. "Katie John said she only wants to protect her right to subsistence so she can raise and provide for her family the best way she knows how, in the way taught by her parents and earlier generations."

Upon his return, the Governor revealed "...I learned more that day than is written in all the boxes of legal briefs in this long lasting court battle. I understand the strength,

care and values that subsistence gives to Katie John's family, and to the thousands of similar families from Metlakatla to Bethel, to Norvik to Ft. Yukon to Barrow. I know - we all know - that what Katie John does is not wrong. It is right - right for her, right for her family, right for the village." He acknowledged that the State of Alaska has not been protecting the basic right of rural Alaskans to provide for themselves and their families.



On notification of the Governor's decision, NARF staff attorney and Katie John's attorney Heather Kendall-Miller stated that "...The Governor has recognized that the State has to meet its obligation to protect subsistence... It can't hide behind the argument of state's rights any longer."

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

Earlier this year on May 7, 2001 the Ninth Circuit Court of Appeals issued an opinion in favor of protecting Alaska Native subsis-



Katie John and Alaska Governor Tony Knowles at Batzulnetas fish camp. (copyright Bill Hess)

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

The case received a favorable ruling in 1995 when the Ninth Circuit Court of Appeals ruled in favor of two Athabaskan elders, Katie John and Doris Charles, long time Native American Rights Fund (NARF) clients who were denied their right to subsistence fishing by the State of Alaska and the federal government. The Ninth Circuit held that the federal government has the obligation to provide subsistence fishing priority on all navigable waters in Alaska in which the United States has a federally reserved water right. The Court instructed the Departments of Interior and Agriculture to identify those waters for the purpose of implementing federal, rather than state regulation of subsistence activities.

In July 2000, the State of Alaska was granted rehearing by the full panel of Ninth Circuit judges following entry of final judgment in the Alaska federal district court.

NARF staff attorney Heather Kendall-Miller and co-counsel William E. Caldwell argued the case on December 20, 2000. Three of the 11 judges who heard the *en banc* appeal concurred and would have adopted the district court’s more expansive reasoning and extended the priority for subsistence fisheries to all navigable waters in Alaska. Three other judges would have reversed the prior decision and upheld State jurisdiction over all navigable waters in the State.

John Echohawk, the Executive Director of the Native American Rights Fund, was pleased with the Ninth Circuit’s decision. John said, “The Alaska National Interest Lands Conservation Act of 1980 made it clear that the federal government would step in to protect subsistence fishing as traditionally practiced by rural Alaskans.” This is the impetus of NARF’s involvement to see that justice is afforded the Alaska Native people.

In urging Governor Knowles not to appeal the Ninth Circuit’s opinion, NARF Board member and Chairman of the Alaska Inter-Tribal Council Mike Williams stated that “...Both sides in the



Ahtna country (Ray Ramirez)

Katie John case face substantial risk in any further appeal because either side could lose everything. The state risks losing management authority over all navigable water, while rural subsistence users risk losing virtually all federal protections for subsistence fisheries.”

Arthur Lake, President of the Association of Village Council Presidents Inc., added that if the Supreme Court should reverse the Ninth Circuit Court of Appeals decision, “...Our people would increasingly be forced into civil disobedience,

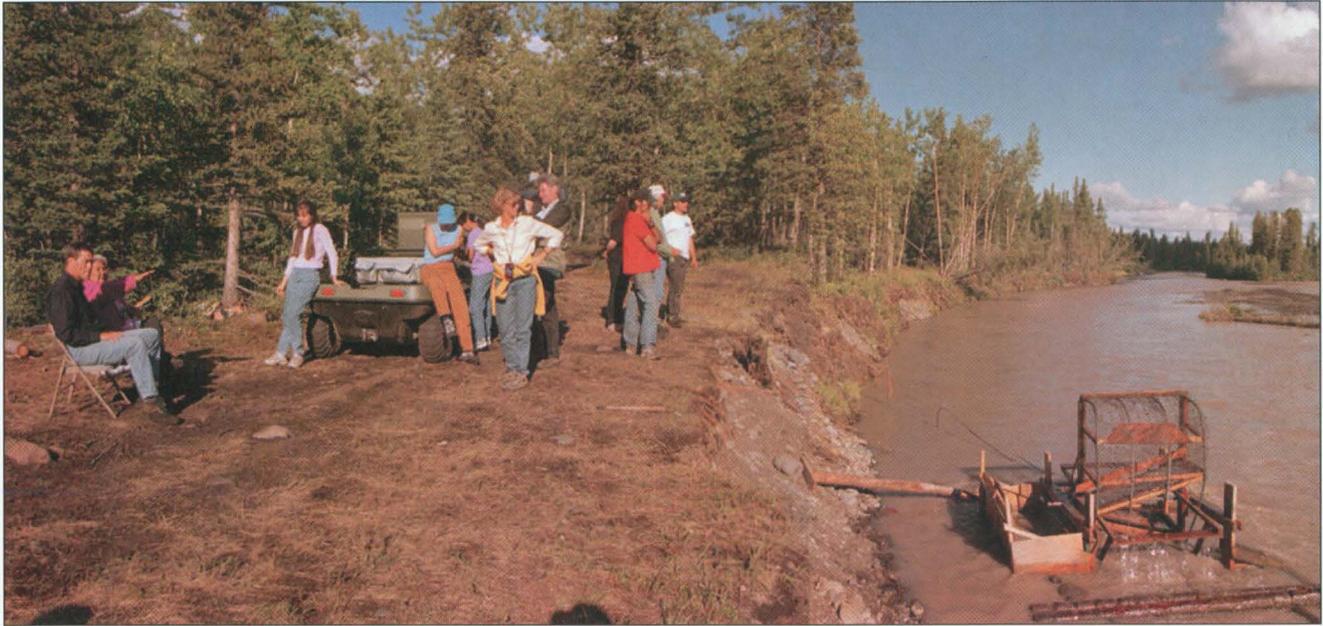
just to maintain our way of life as we have since time immemorial...and the Native peoples of Alaska would forever recognize the state as a mortal enemy, bent on destroying our cultures and our way of life.”

The State of Alaska had 90 days to appeal the case to the Supreme Court. On August 6, just one day before the deadline, the State of Alaska received a 60-day extension by the U.S. Supreme Court. Governor Tony Knowles of Alaska requested the extension to allow time to organize a summit to bring 42 key leaders from all walks of life together to form recommendations on the best course of action to accomplish three goals: to regain state management of fish and game on federal lands; protect subsistence; and, unite urban and rural Alaskans. As a result of this summit, a declaration was issued declaring that “...subsistence is integral to the lives and essential to the survival of Alaska Native peoples and communities. The subsistence way of life for Alaska Natives and rural Alaskans is a unique and important Alaska value that must be protected by our state government. The Legislature shall adopt a constitutional amendment guaranteeing a rural subsistence priority for use of Alaska’s fish and game resources.”



Road to Native Village of Mentasta (Ray Ramirez)

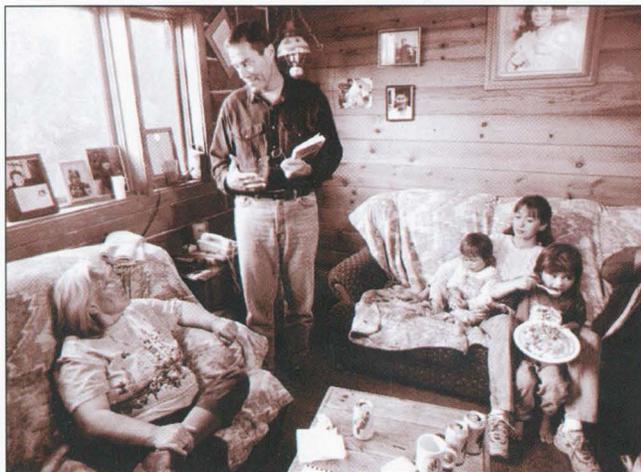




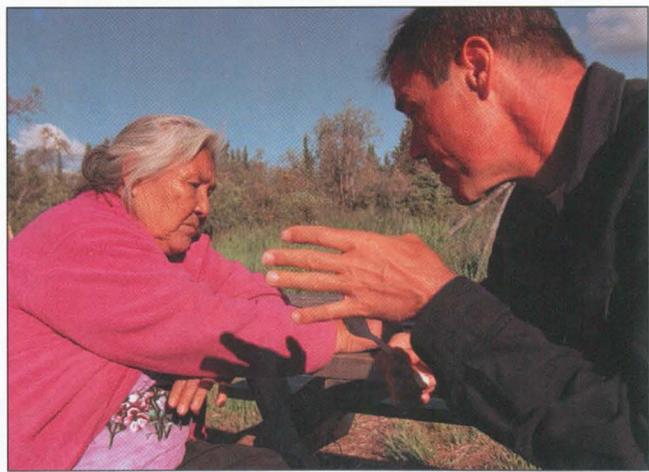
Batzulnetas fish camp (copyright Bill Hess)

In 1984, NARF opened a new office in Alaska. NARF's work for the most part would be consumed by advocating for and protecting the tribal sovereignty and subsistence rights of Alaska Natives. "The word 'subsistence' reminds most Americans of dirt-poor farmers, scratching a hard living from marginal land. In Alaska, however, subsistence means hunting, fishing, and gathering. More than that, it means a way of life that – far from being marginal – fulfills spiritual as well as economic needs." (T.Berger, *Village Journey*)

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



Katie John and family with Governor Knowles (copyright Bill Hess)



Katie John and Governor Knowles discussing subsistence (copyright Bill Hess)



Katie John and NARF attorney Heather Kendall-Miller (copyright Bill Hess)

residents harvest 34-40 million pounds of food annually for subsistence uses and most of that harvest is fish – approximately 60% according to Alaska Department of Fish and Game statistics.

As important as Native hunting and fishing rights are to Alaska Natives’ physical, economic, traditional, and cultural existence, the State of Alaska has been and continues to be reluctant to recognize the importance of the subsistence way of life. The State views subsistence as nothing more than a taking of a natural resource, and as something that all citizens of the state should be entitled to engage in on an equal opportunity basis with little distinction between sport and trophy hunting and subsistence needs.

Unlike tribes in the contiguous 48 states, Native hunting and fishing rights in Alaska were never recognized through treaty. The treaty making period ended in 1871 and thus had long since passed by the time Congress finally got around to dealing with the aboriginal claims of Alaska Natives. It wasn’t until 1971 that Congress extinguished aboriginal claims to lands in Alaska through the Alaska Native Land Claims Settlement Act (ANCSA). ANCSA set aside 44 million acres of land to be deeded in fee title to newly created Native corporations, and provided for a cash settlement of nearly \$1 billion dollars. ANCSA also extinguished aboriginal hunting and fishing rights. Section 4(b) provided: “All aboriginal titles, if any,



NARF attorneys Heather Kendall-Miller and Lare Aschenbrenner, Katie John, and former NARF attorney Bob Anderson. (Ray Ramirez)

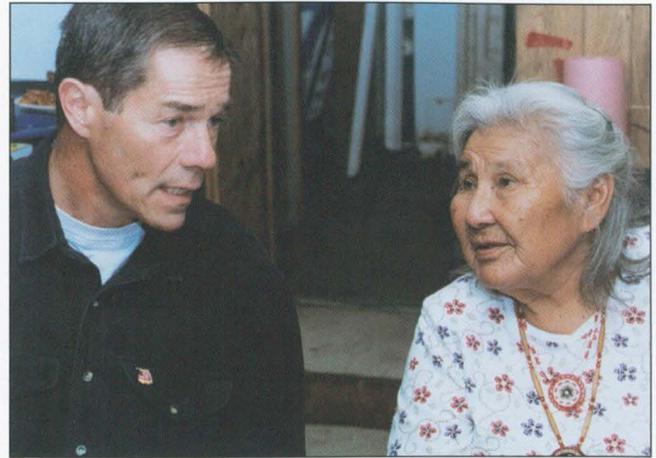
and claims of aboriginal title in Alaska based on use and occupancy,... including any aboriginal hunting and fishing rights that may exist, are hereby extinguished.” Despite this extinguishment, Congress made clear its intent to continue federal protection of Native hunting and fishing rights. The ANCSA Conference Report states: “The Conference Committee expects both the Secretary and the State to take any action necessary to protect the subsistence needs of the Native.”

By the late 1970s, however, it was clear that the State and Secretary were not living up to the expectations of Congress. At least until 1980, it was a fact of Alaska political life that non-Native urban, sports and commercial hunting [and] fishing interests dominated the State’s Department of Fish and Game. Work thus began on a subsistence title for inclusion in what became the Alaska National Interest Lands Conservation Act (ANILCA).

Title VIII of ANILCA granted rural subsistence users a priority to harvest fish and game on public lands whenever the resource was insufficient to accommodate all other consumptive users. An agreement was struck with the State, allowing the State to regulate fish and game on public lands as long as the State likewise adopted a preference for subsistence users analogous to ANILCA. In anticipation of



Ray Ramirez presenting NARF gift to Katie John at the victory celebration (copyright Bill Hess)



Governor Knowles and Katie John at victory celebration, Mentasta Village (Ray Ramirez)

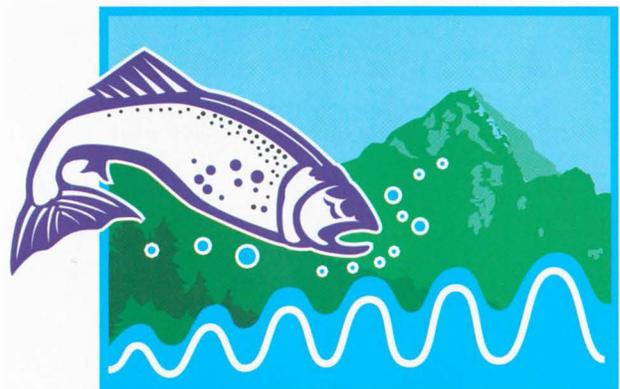
ANILCA's passage, Alaska enacted its first subsistence law in 1978. At the State's insistence, Congress elected to adopt a rural, rather than purely Native, priority. Congress was advised and believed that "because of restrictions imposed on State action by the Alaska Constitution... it would have been impossible for the State of Alaska to have developed a subsistence management program which provided a priority for Alaska Natives."

In 1984, four years after ANILCA was signed into law, Katie John and Doris Charles submitted a proposal requesting the Alaska State Board of Fisheries to open Batzulnetas to subsistence fishing. Their request was denied, despite the fact that downstream users were permitted to take hundreds of thousands of salmon for sport and commercial uses. NARF filed suit against the State in late 1985 pursuant to Title VIII of ANILCA to compel the State to re-open the historic Batzulnetas fishery.

Batzulnetas, which means "Roasted Salmon Place," is a historic upper Ahtna village and fish camp and is located at the confluence of Tanada Creek and Copper River within the Wrangell-St. Elias Park. The upper Ahtna consider Batzulnetas as a revered spot and have fiercely protected this site for generations. The upper Ahtna occupied Batzulnetas on a year-round basis until the mid-1940s when the villagers were relocated to Mentasta so that their children could attend school. Batzulnetas continued to remain an important summer fish camp.

Alaska achieved Statehood in 1958 and assumed management of fish and game in 1960. In 1964, the State used its authority to close down the subsistence fishery at Batzulnetas and nearly all the other traditional fishing sites in the upper Copper River and its tributaries. Closure of Batzulnetas to subsistence fishing ended its regular use as a fish camp. Nevertheless, Katie John, Doris Charles, other residents of Mentasta village and former residents of Batzulnetas returned regularly to visit grave sites and to experience the spiritual and cultural satisfaction derived from being present at the place where they grew up.

We can now only pray that Katie John and other Alaska Natives can now maintain their way of life, as did their ancestors, without continued attacks by the state. If history has a lesson - this fight is not over. ❁



CASE UPDATES

Two U.S. Supreme Court Justices Visit Tribal Courts

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

After observing tribal courts in action, the Justices were impressed but also noted that there were some jurisdictional and funding problems that perhaps should be addressed by Congress. The Justices also listened to the tribes' concerns over the recent decisions rendered in the *Nevada v. Hicks* and the *Atkinson Trading Co. v. Shirley* cases which limited tribal jurisdiction over non-Indians within reservation boundaries. NARF Executive Director John Echohawk stated that "...There's

tribal courts can do to the man. There is no jurisdiction, and the local or federal authorities choose not to become involved."

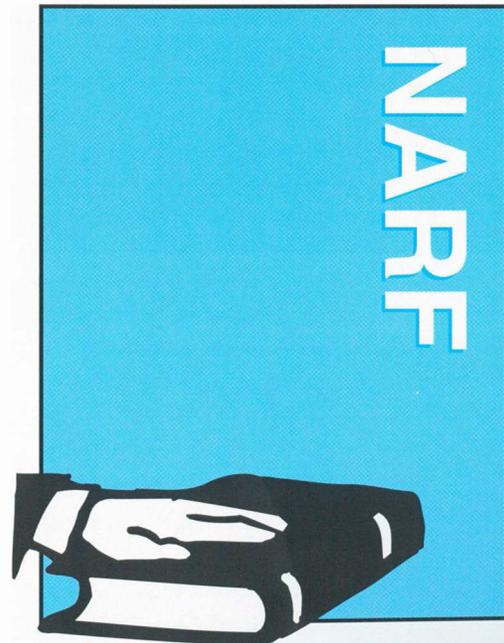
NARF Board member and President of the National American Indian Court Judges Association Mary Wynne, recounted that "... frequently, the Court issues a ruling in this area, and the perception among the tribes is that the justices reached up and got their principles out of the air. These are two different worlds, and they need to talk to each other. Not to do so is a recipe for insanity."

John Echohawk went on to say that "...The visit was a healthy thing. It was inspiring for the justices to take note of what tribal courts do and see it firsthand. It gave the tribal judges a boost, even if there were disagreements."

In seeing the lack of staff and the overload of tribal courts, the Justices encouraged tribal leaders to look to Congress for both their jurisdictional and funding concerns. 🌟

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been a history of adverse Supreme Court rulings that cause problems for the tribes. So it probably wasn't a real big surprise for the justices to hear what was said." In discussing one of the concerns that the Justice's heard, Echohawk went on to say "... If a non-Indian man is married to an Indian woman, and there is domestic violence, there is nothing the



U.S. Supreme Court Deals Another Blow to Tribal Sovereignty

On June 25, 2001, the U.S. Supreme Court issued another blow to tribal sovereignty in its unanimous decision in the *Hicks v. Nevada* case. In overturning a Ninth Circuit Court decision, the Court held that the Fallon-Paiute Shoshone tribal court lacks the authority to hear a civil rights lawsuit brought by a tribal member against state game officials. The court ruled that state officers who are investigating tribal members on Indian reservations for alleged off-reservation crimes are not subject to suit in tribal court for their conduct in the course of their investigations. Further, the Court held that the state officers need not get the permission of the Tribe to enter the reservation to conduct their investigations. These are damaging rulings for tribal sovereignty.

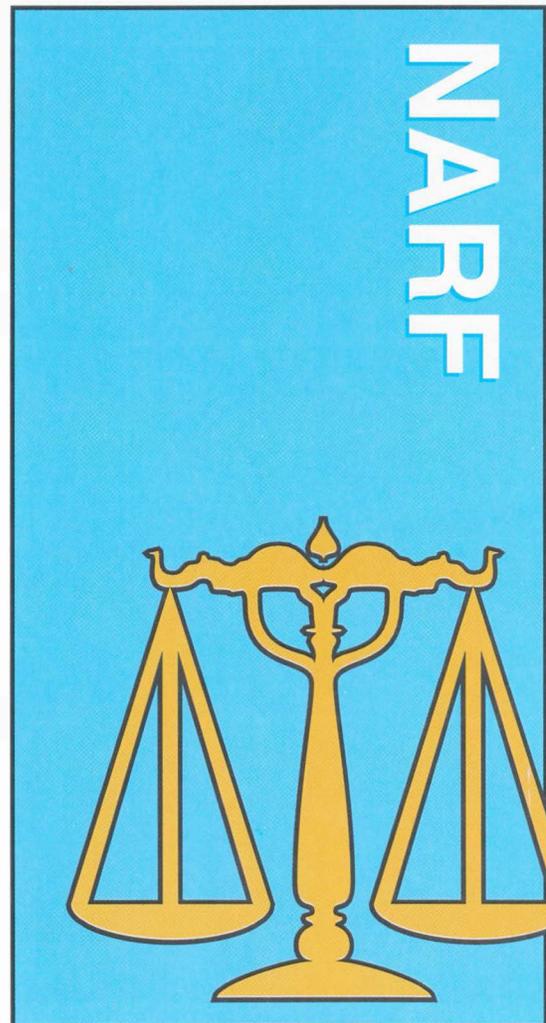
have to use the tribal system to conduct their investigation. It's a terrible limit on tribal sovereign jurisdiction and uncalled for... The Court has definitely given states more power than its been generally understood that they have."

Although the decision was unanimous, Justice Sandra Day O'Conner wrote that "... The majority's sweeping opinion, without cause, undermines the authority of tribes to make their own laws and be ruled by them." Justice O'Conner was joined by Justices John Paul Stevens and Steven Breyer filing a concurring opinion. ❁

"...The majority's sweeping opinion, without cause, undermines the authority of tribes to make their own laws and be ruled by them."

NARF has represented the Fallon Paiute-Shoshone Tribe in this case since 1994. The case arose when a tribal member sued state game wardens in Tribal Court in their individual capacities for money damages. The game wardens had conducted two search and seizures of the tribal members' property before ceasing their investigation and bringing no charges against him. The Tribal Court of Appeals, The Federal District Court, and the United States Court of Appeals for the Ninth Circuit had all upheld tribal jurisdiction before the U.S. Supreme Court reversed.

NARF attorney Melody McCoy stated that the judgment went to far by allowing state officials to come onto reservations without fear of accountability. "The majority says that when the state is investigating tribal members for alleged off-reservation crimes, they do not



NARF Enters Kennewick Man Case

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

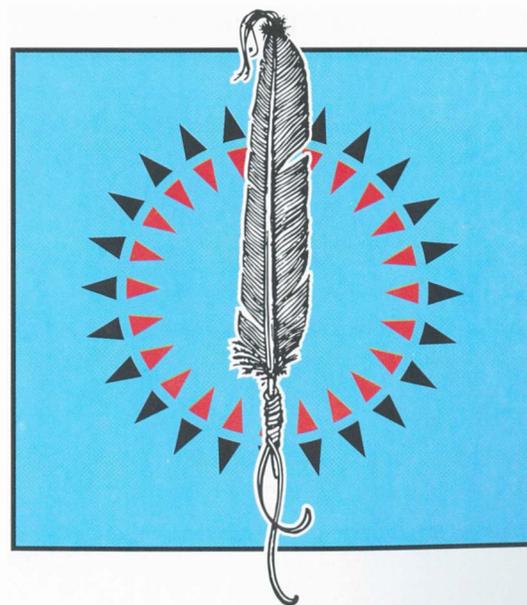
Several scientists, *i.e.*, anthropologists, archeologists, museumologists, petitioned DOI for permission to conduct extensive studies of the remains before reburial by the Tribes. DOI denied the scientists petition and granted the Tribes’ petition. At that point, the scientists sought review and reversal of DOI’s decision in the federal district court of Oregon. The court heard arguments and issued an opinion requiring DOI to reconsider its decision in light

of analysis of a number of questions posed in the Court’s opinion. DOI reconsidered and adhered to its original decision. The scientists again filed suit in Oregon court seeking review and reversal of DOI’s decision. Briefs were filed and oral argument was held on June 23, 2001. The Court invited NCAI to sit at counsel table and participate in oral argument. NARF attorney Walter Echo-Hawk argued for NCAI.

The *Bonnichsen* case raises several important issues requiring interpretation of the Native American Graves Protection and Repatriation Act. These issues include whether the scientists have free speech rights to study the remains; whether the use of oral religious traditions by DOI as a basis for finding “cultural affiliation” between the remains and the Tribes violates the anti-establishment of religion clause of the Constitution; whether DOI’s decision was arbitrary and capricious; and whether the remains are “Native American” as defined in NAGPRA. ❁

NEW BOARD MEMBER

Karlene Hunter, Oglala Lakota, was elected to the Native American Rights Fund Board of Directors, replacing David Archambault who completed three terms on the Board. Ms. Hunter has a Masters Degree from Oglala Lakota College in Lakota Leadership and Management. She has over 20 years experience in direct marketing and fundraising. She is the founder and principal owner of Lakota Express and has also served as the CEO of Lakota Express for the past five years. Karlene built the company from a corner in her basement to a brand new 6,000 square foot state-of-the-art direct marketing center, which is now one of the largest non-government employers on the Pine Ridge Reservation. The staff and Board look forward to having Karlene on the Board of Directors of the Native American Rights Fund. ❁



National Indian Law Library

The National Indian Law Library (NILL) located at the Native American Rights Fund in Boulder, Colorado has announced that its library catalog is now available on the Internet. Over the past twenty-seven years NILL has collected nearly 12,000 resource materials that relate to federal Indian and tribal law. The Library's holdings include tribal codes, ordinances and constitutions; legal pleadings from major American Indian cases; law review articles on Indian law topics; handbooks; conference materials; and government documents. Library users can access the searchable catalog which includes bibliographic descriptions of the library holdings by going directly to: <http://wanderer.aescon.com/webpubs/webcat.htm> or by accessing it through the National Indian Law Library link on the Native American Rights Fund website at www.narf.org. Once relevant materials are identified, library patrons can then choose to review their selected materials, request mailed copies for a nominal fee, or borrow materials through interlibrary loan. In addition to making its catalog and extensive collection available to the public, the National Indian Law Library provides reference and research assistance relating to Indian law and tribal law. NILL serves a wide variety of public patrons including attorneys, tribal and non-tribal governments, Indian organizations, law clinics, students, educators, prisoners and the media. The National Indian Law Library is a project of the Native American Rights Fund and is supported by private contributions. For further information about NILL, visit: <http://www.narf.org/nill/nillindex.html> or contact Law Librarian David Selden at 303-447-8760 or dselden@narf.org. Local patrons can visit the library at 1522 Broadway, Boulder, Colorado.

The National Tribal Justice Resource Center (NTJRC) began operations in the National Indian Law Library building last September, and is well on the way to meeting its first year goals.

Created by the National American Indian Court Judges Association and funded by a grant from the U.S. Department of Justice, the

Resource Center was developed to serve the growing needs of tribal justice systems by providing legal resources to tribal court personnel and by assisting with legal inquiries from American Indian and Alaska Native justice systems.

With their web presence now established, the Resource Center, under the direction of CEO Judge Jill Shibles, is working with National Indian Law Library staff on the important project of digitizing tribal codes and constitutions to post online. The partnership is ideal, as NILL has the largest collection of tribal codes and self-governance documents in the nation.

For their website, the NTJRC will utilize select tribal constitutions and code provisions that specifically detail tribal court proceedings and judicial provisions. NILL embraces a larger goal, and has plans to digitize entire tribal codes for the NILL site.

Both projects will be immensely beneficial to tribes that are working both to update their existing materials and to create new self-governance documents. Online access to codes and constitutions will give tribes quick access to sample provisions, and will assist them in developing and revising their codes and constitutions in an effort to strengthen their governments.

NILL has already digitized a number of codes and constitutions, including those of the Turtle Mountain Band of Chippewa Indians, the Yavapai-Apache Indian Community of the Camp Verde Reservation, and White Earth Band of Chippewa tribes, to name just a few.

In addition to the ongoing digitization project, the NTJRC also offers training and technical assistance to tribal court personnel, and is developing a free, searchable, online database of tribal court opinions. The Resource Center is proving to be a vital resource for all tribal court systems and can be found at <http://www.tribalresourcecenter.org>. ☎

The Native American Rights Fund

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

NARF strives to protect the most important rights of Indian people within the limit of available resources. To achieve this goal, NARF's Board of Directors defined five priority areas for NARF's work: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law. Requests for legal assistance should be addressed to NARF's main office at 1506 Broadway, Boulder, Colorado 80302. NARF's clients are expected to pay whatever they can toward the costs of legal representation.

NARF's success could not have been achieved without the financial support that we have received from throughout the nation. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. ☀

NARF's website awarded "Standard of Excellence" by the Web Marketing Association. Visit NARF's award winning website at www.narf.org

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

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Tax Status. The Native American Rights Fund is a nonprofit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the

provisions of Section 501 C (3) of the Internal Revenue Code, and contributions to NARF are tax deductible. The Internal Revenue Service has ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

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

Washington, D.C. Office: Native American Rights Fund, 1712 N Street, NW, Washington, D.C. 20036 (202-785-4166) (FAX 202-822-0068).

Alaska Office: Native American Rights Fund, 420 L Street, Suite 505, Anchorage, Alaska 99501 (907-276-0680) (FAX 907-276-2466).



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