NARF Legal Review

Native American Rights Fund

NARF WINS BIG VICTORY AS FEDERAL COURT ALLOWS PEMBINA CHIPPEWA DAMAGES CLAIMS TO GO FORWARD

In 1863 and 1892, plaintiffs' ancestors ceded lands totaling some 20 million acres to the United States. The Indian Claims Commission and this court awarded compensation for those lands. The compensation awarded was then held in trust by the United States. This suit seeks damages for mismanagement by the United States of the funds it held in trust.

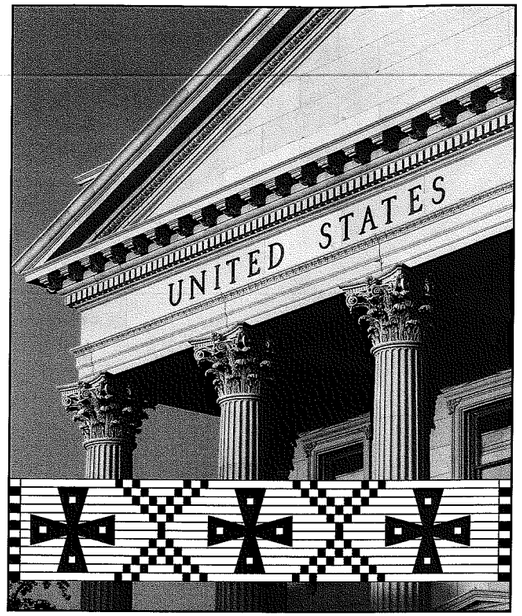
So begins the Opinion of the U.S. Court of Federal Claims in its opinion dated January 26, 2006, in the case *Chippewa Cree Tribe of the Rocky Boy's Reservation, Little Shell Tribe of Chippewa Indians of Montana, Turtle Mountain Band of Chippewa Indians, and the White Earth Band of Minnesota Chippewa Indians, et al. v. United States.*

The Court's fifty-five (55) page opinion is a stunning victory for these four tribes, who also are known as the "Pembina Chippewa Tribes." It comes almost fourteen years after the case was filed by the Native American Rights Fund (NARF) on behalf of the Pembina Chippewa Tribes. It rejects four major arguments by the United States to get the case dismissed or substantially reduced. It allows the case to go forward to determine whether the United States breached its trust responsibilities to the Pembina Chippewas with respect to their trust funds, and to determine an amount of damages for which the United States is liable for those breaches.

The Pembina Chippewas' $53 million judgment award is the second largest Indian judgment award

The Pembina Chippewas' trust fund is not small. In 1991 as the U.S. Department of the Interior's Bureau of Indian Affairs entered into a contract with the accounting firm of Arthur Andersen to "reconcile" all 1500 tribal trust funds held by the United States, the Pembina Chippewa trust fund was listed as the "second largest" judgment fund being managed by the United States at that time. The total awards to the Pembina Chippewas by the Indian Claims Commission (ICC) – in 1964 and1980 – were about $53 million. Only the ICC awards to the Lakota (Sioux) Nations of about $200 million exceeded those of the Pembina Chippewas.

While the Lakota Judgment Funds have yet to be distributed, the government has made several distributions of the Pembina Chippewas' judgment fund. In 1984, 1988, 1990, and 1994, large amounts of the fund were, at the request of the Pembina Chippewa Tribes' leaders and with congressional approval, distributed in the form of one-time "per capita payments" to members and non-members of the Tribes eligible to receive such payments under the congressional Pembina Distribution Acts of 1971 and 1982. The per capita payments ranged from $44.00 to $1400.00. In addition, under the 1982 Distribution Act, and also at the request of the tribal leaders, twenty percent (20%) of each tribe's share is held by the United States in trust for tribal economic and social programs. The tribes are allowed to receive approved program funds from the interest earned on their 20% shares.



The filing of this case in 1992

But, particularly in 1988, at the time of one of the per capita distributions, the tribal leaders of the Turtle Mountain Band of Chippewa Indians were dismayed at the overall lack of money available for distribution. The Tribe sought an audit of the Pembina Judgment Fund (PJF) from the Interior Department's Office of the Inspector General. The Tribe also hired independent accountants who confirmed to the Tribe that on this issue, "you don't need an accounting firm, you need a law firm." The Tribe retained NARF to file a breach of trust lawsuit over the government's fiduciary management – accounting and investment – of the PJF from the inception of the Pembina Awards in 1964 to the present. A case for money damages was filed in the U.S. Court of Federal Claims in September 1992. It was filed as a class action on behalf of "all beneficiaries to the PJF."

The United States' efforts to reconcile tribal trust funds

For many years after it was filed, the case was stayed upon agreement of the parties and with the Court's approval to allow the completion of the Arthur Andersen tribal trust fund reconciliation project. In the early 1980s, critical reports by the U.S. General Accounting Office and the Interior Department's Office of the Inspector General documented major problems in the United States' fiduciary management of tribal trust funds. By 1987 Congress had mandated an audit and reconciliation of the tribes' funds – which had never been done even though some of the funds date back to treaties of the early 1800s. And yet the United States was required to hold these funds in trust for tribes under its own federal law.

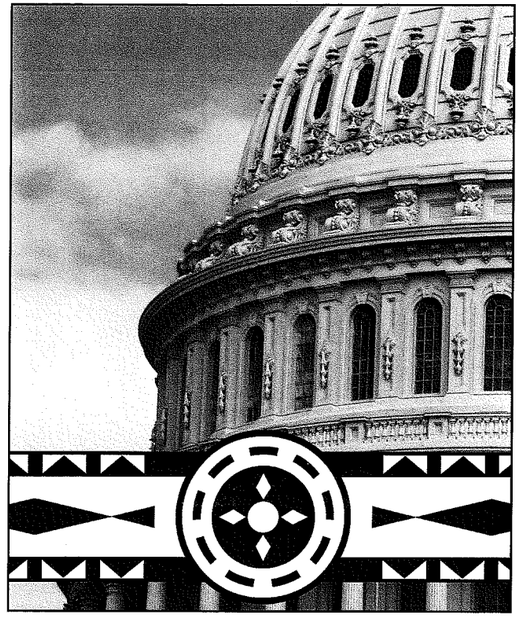
Eventually, the Bureau of Indian Affairs admitted that it was incapable of conducting an audit and reconciliation itself, and so it bid out the project. The contract was awarded to Arthur Andersen, and at the end cost the government $21 million dollars. But Arthur Andersen admittedly was unable to perform a historical accounting, a standard audit, or even a full reconciliation of the tribal trust funds – largely due to poor or non-existent record keeping on the part of the government. Instead, Arthur Andersen performed a very limited reconciliation on tribal trust funds for the time period 1972 to 1992. This limited reconciliation project resulted in reports to tribes in 1996.

After studying their Arthur Andersen reports, in July 1997, at the Court's request, the Pembina Chippewa Tribes filed their response to the reports. The Tribes were adamant that the Arthur Andersen reports did not resolve any of their claims in this case, and in fact the reports supported the Tribes' claims of misaccounting and mismanagement of the PJF. In November 1997, the government replied that it was willing to entertain proposals from the Tribes in an effort to resolve this case by means of a negotiated settlement.

Efforts to resolve this case by means of negotiated settlement

For the next several years, the case again was stayed by the agreement of the parties and with the Court's approval. During this time period, the parties worked together to identify, locate, and collect the documents pertaining to the PJF. For the Arthur Andersen reconciliation period, much of the information had been collected. Still, the process was arduous. "If you or I go to a private bank or trustee and ask for our account records, we will get them within a reasonable time," says Melody McCoy, who has served as NARF's lead attorney on this case since September 1996. "That is not the situation where the federal government is your trustee," she cautions. "It takes the government about five years to produce all of the records for a tribal trust fund. The records are in various storage facilities literally across the country – from San Francisco to Albuquerque to Denver to Kansas to Chicago to Virginia. Until recently they were not sorted or indexed by tribe or by account. The government is undertaking that effort only now, in light of repeated mandates of Congress and lawsuits like that of the Pembina Chippewas. And at the end of the day you'll never know whether you've gotten all of your trust records. You'll just never know."

But NARF nevertheless persisted on behalf of the Pembina Chippewas' claims. Accounting and investment experts were hired to piece together what evidence there was of the government's accounting and management of the PJF. By August 2000, the experts had prepared and the Tribes had approved a report to the government on their view of the government's accounting of the PJF from 1964 to September 1992, the end of the Arthur Andersen reconciliation project. The Tribes' report showed that, based on the documents provided to the Tribes to date, for this time period there were over 11,000 transactions in the PJF accounts. About 10,000 of these appeared to be investment transactions, and about 1000 of them appeared to be non-investment transactions. Of the 1000 non-investment transactions, at least 250, (one quarter or 25%) were lacking sufficient documentation or validity under the criteria governing such transactions as set forth in the government's own tribal trust fund accounting and management manuals. These questionable non-investment transactions totaled over $63 million.



Over the next several years, many in-person meetings were held to discuss the 250 non-investment transactions. By March 2003 the

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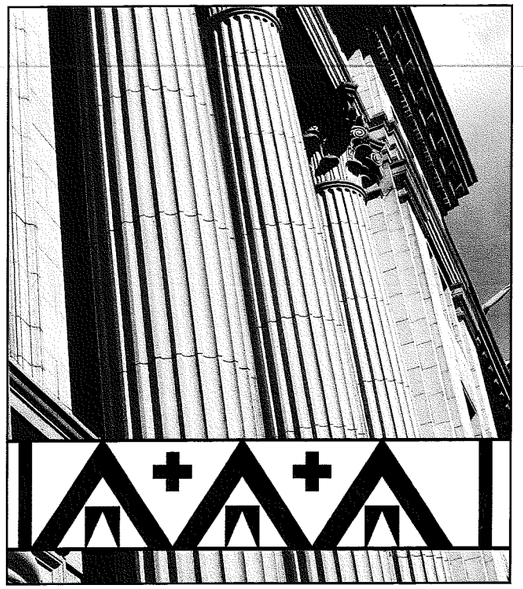


government had produced sufficient documentation of the validity of many of the questioned transactions that the parties were in agreement at least for purposes of a negotiated settlement on all of the non-investment transactions for the 1964 Pembina Award (which reflected the ICC compensation for lands ceded by the Treaty of 1863 that are today located in western Minnesota and eastern North Dakota) up through the time of the per capita distribution of this Award that began in 1984. And the parties generally were in agreement about the dates, timing, and amounts of about eighty percent (80%) of the non-investment transactions for the 1980 Pembina Award (which reflected the ICC compensation for lands ceded by an Agreement of 1892 that are today located in northern North Dakota), up through the time of a major per capita distribution of that Award that began in 1988.

The United States goes back to court to try to get the case dismissed

The parties then agreed to turn their attention to the claims that the PJF had been underinvested by the government. In January 2004 the Tribes' submitted to the United States a "Partial Preliminary Report on Estimate of Damages" that showed the gap in how the PJF funds were actually invested compared to how in the Tribes' view they should have been invested had the trustee properly and fully managed the PJF. It was around this time that the United States returned to Court and sought to get this case either dismissed or substantially limited.

The Court set a schedule for briefing by the parties on the issues that the United States was raising. Essentially, the United States was making four arguments: 1) that the PJF funds were not as a matter of law held in trust by the government; 2) that Congress has not created any fiduciary duties on the part of the government to manage the PJF such that the government can be held liable in court for money damages for breaches of trust; 3) that the claims in this case were untimely – that is, they were brought to court too late; and, 4) that class certification should be denied, largely because of a lack of commonality among the proposed class of all PJF beneficiaries.

The Court rejects all of the government's dismissal arguments

The briefing on these issues was completed in October 2005. On October 25, 2005, the Court heard oral argument for over three hours by the attorneys in Washington, DC on these issues. On January 26, 2006, the Court issued its opinion on the issues. The Court ruled against the United States and for the Pembina Chippewas on all of the issues.

The Court first held that as a matter of law the PJF was held by the United States in trust from the time of the appropriations of the awards by Congress in 1964 and 1980. The Court found sufficient evidence of the trust status of the PJF Awards from the Permanent Appropriations Repeal Act of 1934, 31 U.S.C. Sec. 1321(a)(67) (which classifies judgment funds such as the PJF as "tribal trust funds"); the classification by the U.S. Treasury Department of the PJF Awards as trust accounts; and, the Office of Management and Budget's Interpretation of the trust obligations with respect to Indian trust funds.

Further, the Court found nothing in the PJF Appropriations or Distributions Acts that negated the trust character of the PJF Awards.

The Court also held that Congress has created statutory duties on the part of the United States to invest the PJF Awards, and the Court can hear and resolve claims for money damages of alleged breaches of these trust duties. NARF argued that the statutory duties are in the general tribal trust fund investment statutes, 25 U.S.C. Secs. 161a and 162a. The United States argued that these laws merely *authorize* (as opposed to *require*) the government to invest the funds. The Court agreed with NARF and held that in the tribal trust fund statutes, Congress created specific fiduciary duties on the part of government agencies for the "productive investment of trust funds" such as the PJF. And the Court found that a "breach of those fiduciary duties gives rise to a Tucker Act claim for damages."

The United States made several arguments that some or most of the claims in this case are untimely under the six-year statute of limitations that governs generally claims against the United States. For example, the United States argued that claims regarding the 1964 PJF Award, which was largely distributed in 1984, should have been brought within six years of the distribution rather than in 1992. NARF pointed out, however, that Congress, in a series of laws beginning in 1990 has clarified that claims against the United States as trustee for tribal trust funds do not accrue until the United States provides the beneficiaries with an accounting "from which the beneficiary can determine whether there has been a loss." NARF further argued that no such accounting had been provided regarding the 1964 Award or the 1980 Award.

The Court agreed with NARF and held that all claims for breach of trust in this case with regard to both the 1964 and 1980 Awards are timely and properly before the Court. The Court agreed with NARF that annual and monthly account statements generated by the government in the 1980s were not an accounting from which losses could be determined. The Court also held that the PJF per capita distributions in 1984 and 1994 were insufficient to constitute the requisite accounting. The Court also rejected the United States' argument that because it did the distributions it need not provide an accounting.

> The court understands the government to be arguing that a trustee can avoid liability for malfeasance by handing back whatever is then held in trust and walking away. This is not the law... Defendant's attempt to avoid liability by arguing that its duty to trust fund beneficiaries terminated with the distribution of the funds is unavailing.

As noted above, the plaintiff Tribes that filed this case intended it from its inception to be a class action on behalf of all PJF beneficiaries. The United States argued vehemently against class certification. In the end, the Court agreed with NARF that the case met the requirements for class certification. The Court, however, was of the view that there is another and perhaps better means by which this case can proceed – under 28 U.S.C. Sec. 1505 as a claim against the United States brought by an "identifiable group of American Indians."

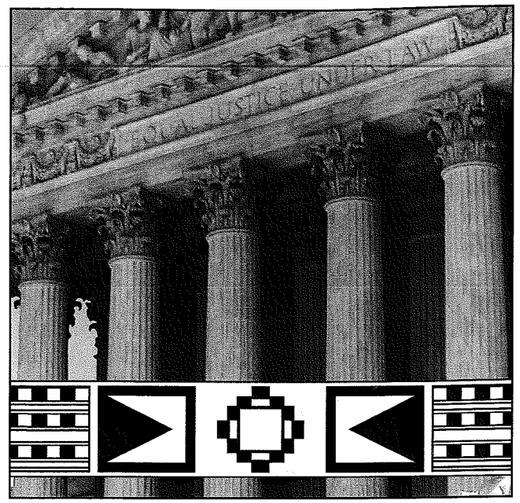
On this point, the Court noted that the PJF beneficiaries already have been recognized as an "identifiable group of American Indians" under 28 U.S.C. Sec. 1505, by both the ICC in the proceedings that led to the PJF Awards and Congress.

> The group of beneficiaries of the 1964 and 1980 Awards, as defined in the 1971 and 1982 Distribution Acts, including their heirs, descendants, and successors-in-interest, are an "identifiable group." The court finds that the "beneficiaries of the Pembina Judgment Fund... are an 'identifiable group of American Indians' under the terms of 28 U.S.C. Sec. 1505 and were entitled to bring suit against the government at the time the Complaint was filed.

The Court further was of the view that recognizing the beneficiaries of the 1964 and 1980

Awards as an identifiable group offers a number of advantages over either a class action under RCFC 23 or permissive joinder under RCFC 20. By recognizing the group of beneficiaries as a single group plaintiff under the original complaint, the parties may proceed to litigate the claims before the court without delay for notification to all class members or to all potential plaintiffs entitled to joinder. A second advantage is that any amount of damages that may be awarded could be shared by all group members and not only by successful class members or particular beneficiaries joined as plaintiffs.

Thus, the Court viewed the single group plaintiff approach as being the most expedient and fair approach in this action.



What will happen next

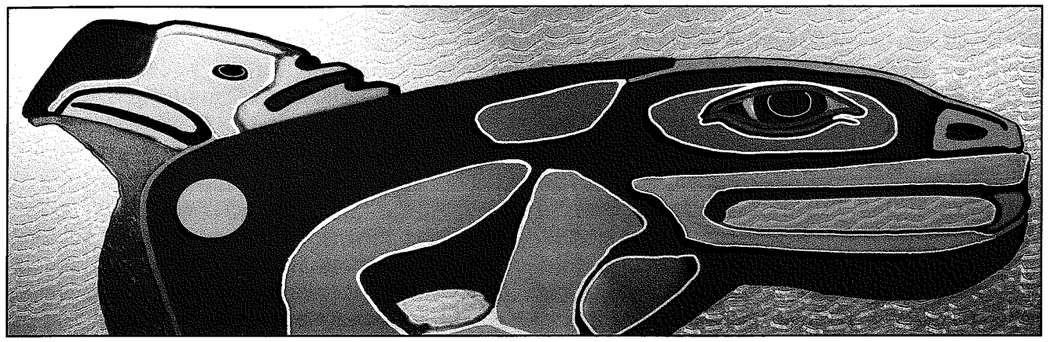
NARF initially was hopeful that in light of this opinion that is so favorable to the Pembina Chippewas, meaningful negotiations between the parties on this case would resume. In February 2006 the United States informally told NARF that it was not likely to appeal the Court's rulings in the January 26, 2006 Opinion. The attorneys for the parties proceeded to comply with the Court's directive to propose jointly a form and method of notice to members of the plaintiff group "as shall serve reasonably to publicize the pendency of this action and the opportunity to participate..." Notice discussions quickly stalled, however, when the United States decided that it was not happy with the case proceeding in the posture of a group plaintiff.

On April 10, 2006 the United States filed a Motion for Reconsideration of a Portion of the Court's Opinion. The United States seeks reconsideration of one of the four issues on which it lost – that portion of the January 26, 2006 Opinion that declares "that the PJF beneficiaries are an identifiable group under the 28 U.S.C. Sec. 1505 for purposes of litigating claims that the United States mismanaged PJF monies..." The United States argues that proceeding as a group plaintiff in this case does not meet requirements of Due Process (notice and an opportunity to be heard) applicable under the U.S. Constitution.

NARF is presently in the process of opposing the United States' Motion for Reconsideration. NARF believes that group plaintiffs in Indian breach of trust cases against the government expressly have been provided for by Congress in the ICC Act and in 28 U.S.C. Sec. 1505, which clarifies the Court of Federal Claims' jurisdiction over such claims. A ruling by the Court on the United States' Motion for Reconsideration is expected later this year.

It also is likely that the government will try to bring at least a few more issues to the Court before it seriously considers settlement of the case. Nevertheless, after over thirteen years of representing the Pembina Chippewas in this case, NARF is extremely pleased with the Court's January 26, 2006 Opinion which allows the case to go forward as it originally was filed – for money damages on behalf of all of the beneficiaries to the PJF 1964 and 1980 Awards. Assuming that the United States' Motion for Reconsideration is denied, NARF will have helped the Pembina Chippewa Tribes clear many potential hurdles. NARF will look forward to getting to the merits of the underlying issue in the case – how much money should there have been in the PJF to distribute to the beneficiaries had the trustee properly and timely accounted for and invested the PJF. ✪

The Voting Rights Act and Alaska



The Native American Rights Fund, in conjunction with the National Congress of American Indians, is working with a coalition of civil rights organizations under the direction of the Leadership Conference on Civil Rights (LCCR) to ensure that Congress reauthorizes certain remedial provisions within the Voting Rights Act (VRA) that are scheduled to expire in 2007. In preparation for upcoming legislative hearings, NARF prepared testimony and authored a comprehensive report that was submitted to members of Congress. This report, the first of its kind, details Alaska's experience under the VRA and concludes, rather surprisingly, not only that Alaska should continue to be covered under the VRA but also that *Alaska has never complied* with the current mandate under the VRA with respect to Alaska Natives. The following is the executive summary to the report, which was authored by Natalie Landreth of the Alaska office, Richard Guest of the DC office, and Boalt Hall law student Moira Smith.

General Report Findings

The 1965 Voting Rights Act (VRA) is arguably one of the most important pieces of legislation ever adopted by Congress. The state of Alaska, which has the single largest indigenous population in the United States, is covered by section 5 (the preclearance provision) and sections 4(f)4 and 203 (the language assistance provisions) of the VRA. Yet, little is known about the impact of the VRA in Alaska over the past 40 years, including whether state voting practices or procedures discriminate against minority voters, or how well the state is complying with the minority language assistance provisions.

"Rural" Alaska is a term of art, qualitatively distinct from rural Nebraska or rural Montana. As the state with the largest land area and with the lowest population density of any state in the United States, rural Alaska includes nearly 200 Native villages and communities that are not accessible by road. They are only accessible by small propeller plane. The fewer than 300 Alaska Natives who reside in each of these villages still practice their traditional way of life – living off the land through subsistence fishing, hunting and gathering. Alaska Natives are by far the largest minority population in Alaska, currently making up 19 percent of the total state population, with numbers growing in both urban and rural Alaska. Despite certain gains, Alaska Natives are still the largest group of the total Alaskan population to live in poverty, with the highest unemployment and the lowest level of education.

Voting in rural Alaska can be a very different experience than voting elsewhere in the country. Voting can involve crossing a river, or asking your grandchildren to translate for you and explain what is on the ballot. One example is Kasigluk, a Yup'ik village fifteen minutes from Bethel by air. There, the local election official ▸

NATIVE AMERICAN RIGHTS FUND

announces through a borrowed marine radio that anyone who wants to vote has to come down to the community center by 11:30 a.m. At 11:30, she promptly collects the election materials, packs up the single ballot machine, drives it down to the river by four-wheeler and loads it onto a boat (there is no bridge) to cross over to the other side of the river to the old village site where she sets up the ballot machine again at the school. The principal then announces on the radio that the poll is open. The State Division of Elections says there are about 150 communities like Kasigluk. It is also important to note that 24 Native villages did not even have polling places in 2004.

Alaska Natives not only inhabit a unique geographical place, they also possess a unique political status in the landscape of Alaska. Following the adoption of the 1971 Alaska Natives Claims Settlement Act (ANSCA) terminating aboriginal title to lands in Alaska, three different types of Native groups or organizations emerged in co-existence: (1) 231 federally recognized Indian tribes; (2) 13 for-profit Native corporations; and (3) 12 regional non-profit corporations. These Native groups intersect with the internal political structure of Alaska, which is divided into 16 boroughs and one large area referred to as the unorganized borough (an area encompassing most of the rural Native villages). Those who reside in the 16 boroughs generally receive their services through their organized and state-funded regional governments, while those who reside in the unorganized borough must generally rely on the local Native village tribal government for services.

A History of Discrimination and Section 5 Preclearance

In the early years of the twentieth century, the burgeoning Alaska Territory passed laws limiting the ability of Alaska Natives to be citizens, to participate in the political process, and to enter certain public establishments. In 1924, when the U.S. Congress conferred citizenship on "all noncitizen Indians born within the territorial limits of the United States," the Territorial Legislature responded by enacting a literacy law the next year requiring that "voters in territorial elections be able to read and write the English language." Alaska's Constitution, which became operative with the Formal Declaration of Statehood on January 3, 1959, also included an English literacy requirement as a qualification for voting which was not repealed until 1970.

During World War II, the Aleuts were forcibly relocated from their island homelands and interned in overcrowded "duration villages" with no electricity, plumbing, clean water or medical care. After the war, there were still signs in stores and restaurants that read "No Natives Allowed" and "No Dogs or Indians." This history of discrimination is indicative of why Alaska is a covered jurisdiction under Section 5 of the VRA.

But continuing attempts by the state to dilute the Alaska Native vote speak to the need for reauthorization of Section 5 of the VRA. Following the 1990 census, the state adopted a legislative redistricting plan that was harshly criticized on the grounds that it diluted Native votes, disregarded the differences between Alaska Native groups, and was prepared in secret under the influence of some questionable dealings. A coalition of Native interests appealed to the U.S. Department of Justice (DOJ) imploring DOJ not to preclear the plan under Section 5 of the VRA and identified some of the discriminatory components of the proposed "anti-Native" plan. DOJ requested more information and ultimately declared the plan legally unenforceable because of its negative effects on Alaska Native voters. Thus, throughout the redistricting process and litigation, the VRA and DOJ stood as the last lines of defense. Without Section 5 preclearance, retrogressive practices would have been implemented with the approval of the Alaska courts.

As a general matter, the 2000 redistricting proceeded without significant problems. However, three aspects of the 2000 redistricting are relevant to the need for reauthorization: (1) compliance with the VRA was clearly the driving force behind several of the State's new districts; (2) the redistricting board hired a national voting rights expert whose report revealed that certain areas in Alaska still have racially polarized voting; and (3) in the litigation following the 2000 redistricting, the Alaska Supreme Court set forth a new standard of deviation that will require future monitoring by the DOJ.

Finally, in both the 2000 and 2004 elections, the state made significant changes to its elections laws shortly before the election, including changing absentee ballot requirements, acceptable forms of identification and polling places. None of these changes were "precleared" prior to the election and the state later withdrew some of these changes. While the change of a polling place may not raise a red flag in most jurisdictions, in rural Alaska it can have a significant impact on the ability of Native voters to get to the right poll. In short, the Section 5 preclearance provision has resulted in some important changes in Alaska's districts and election laws.

Native Languages and Sections 4(f)(4) and 203 Language Assistance

There are 20 different languages still spoken in Alaska. The largest groups of language speakers are Inupiaq (more than 3,000 speakers), Siberian Yup'ik (about 1,100 speakers), and Central Yup'ik (about 10,000 speakers). Siberian Yup'ik and Central Yup'ik are particularly important here because they are still the primary language of many of the villages and the first language that children learn at home. Maintaining and preserving these languages is critically important to the Native population because language expresses a culture's worldview, and is, according to the Alaska Native Languages Center, "the glue that sticks everything together."

There is and has always been a significant disparity in educational opportunities for Alaska Natives, resulting in many Native language speakers having limited English proficiency ("LEP"). Beginning in the early territorial days, official government policy established a segregated school system, ultimately leading to a boarding school policy that resulted in the State of Alaska not building high schools in rural villages. Native students had to travel hundreds of miles, sometimes out of state, to obtain a high school education. At the time the VRA was extended in 1975, only a total of 2,400 Alaska Natives had graduated from high school. As a result of litigation, educational opportunities and graduation rates have improved for Alaska Native students. But further litigation has revealed that the state still discriminates, providing inadequate funding to rural Alaska schools.

Although Congress amended the VRA in 1975 to remedy the discrimination faced by language minorities in voting, there is little evidence of compliance with sections 4(f)(4) and 203 by the State of Alaska in the past 30 years. While voter registration and turnout appear to be relatively high in Alaska, Alaska Native turnout is difficult to discern because the State chooses not to collect racial data.

Although there are no formal barriers to registration such as literacy tests, there are still barriers. Alaska continues its practice of English-only elections, adversely impacting the ability of Alaska Natives to exercise their right to vote. Alaska only provides registration materials printed in English and many Alaska Natives find the English-only ballot language confusing. Further, Alaska has a re-registration requirement that disproportionately affects Alaska Natives, who are the most mobile segment of the population.

In short, Alaska appears to have not complied with its obligations to provide minority language assistance to Alaska Native voters. The state offers intermittent oral language assistance and no written assistance for Alaska Natives. While Alaska seems to provide translators upon request in many places, this reflects a commitment to fulfill its obligations under state law to assist qualified voters needing assistance in voting. By contrast, Alaska does provide written election materials for the 2 percent of the Alaska population that is Filipino.

Thus, Alaska is arguably out of compliance with the VRA and has been since the mandate was imposed on the state 30 years ago. As Congress contemplates reauthorization of the language provisions, it should take into account this non-compliance and the ongoing need for some assistance demonstrated in this report. Alaska Native voters still experience what the VRA was meant to eradicate 30 years ago.✪

CASE UPDATES

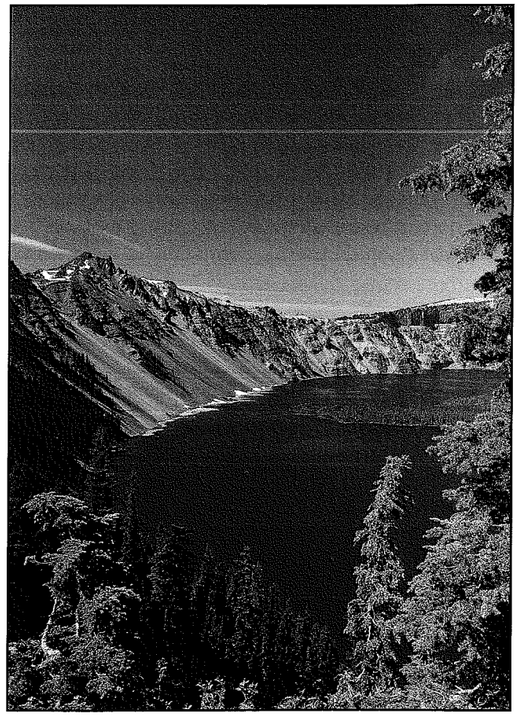
Klamath Basin Adjudication

NARF represents the Klamath Tribes in the Klamath Basin Adjudication (KBA). The KBA is a general stream adjudication commenced by the State of Oregon to quantify all water rights in the Klamath River system in Southern Oregon. The Klamath Tribes, various federal agencies and hundreds of private water users, and numerous irrigation districts filed claims. Adjudication of their claims in several hundred separate contest proceedings has been underway for the past several years.

One of the largest, most complex contests is Case 003, which involves the water and storage claims for the enormous Klamath Irrigation Project operated by the U.S. Bureau of Reclamation (BOR). The Project stores water in Upper Klamath Lake to irrigate about 200,000 acres in Oregon and California that are served by approximately 16 irrigation districts, including two important National Wildlife Refuges. The Klamath Tribes have an interest in the operations of this vast Project, because Upper Klamath Lake is also home to an important treaty fishery which includes several endangered species of fish. The Tribes want to be sure that the Project continues to operate after the adjudication in accordance with the Federal Government's legal obligations under the Endangered Species Act (ESA) and its Indian trust obligations, both of which are needed to provide adequate legal protection for the endangered treaty fishery.

In Case 003, the irrigation districts filed water and storage claims for the Project that conflict with BOR's claims, asserting that private water users own all of the water and storage rights for the Project, and BOR owns nothing at all. This position, if successful, would reduce federal involvement in Project operations and therefore restrict, if not eliminate, the need to comply with existing federal ESA and tribal trust duties that are currently imposed upon BOR's Project operations. To prevent the striping away of existing legal protections for its fishery, the Tribes took the position in Case 003 that BOR, not the private water users, owns the Project water and storage rights.

Following a month-long trial, thousands of exhibits and hundreds of pages in post-trial briefs, the Administrative Law Judge (ALJ) upheld the Tribes' position that BOR is the proper holder of Project water and storage rights, and that the private water users own no water rights at all. Accordingly, their claims were denied. The opinion states that the water users hold only contract rights to the use of Project water and nothing more. Given the vast amount of litigation resources poured into Case 003 by the coalition of irrigation districts, it is likely they will ask the ALJ to reconsider the decision or otherwise appeal the decision at the appropriate time. ✪



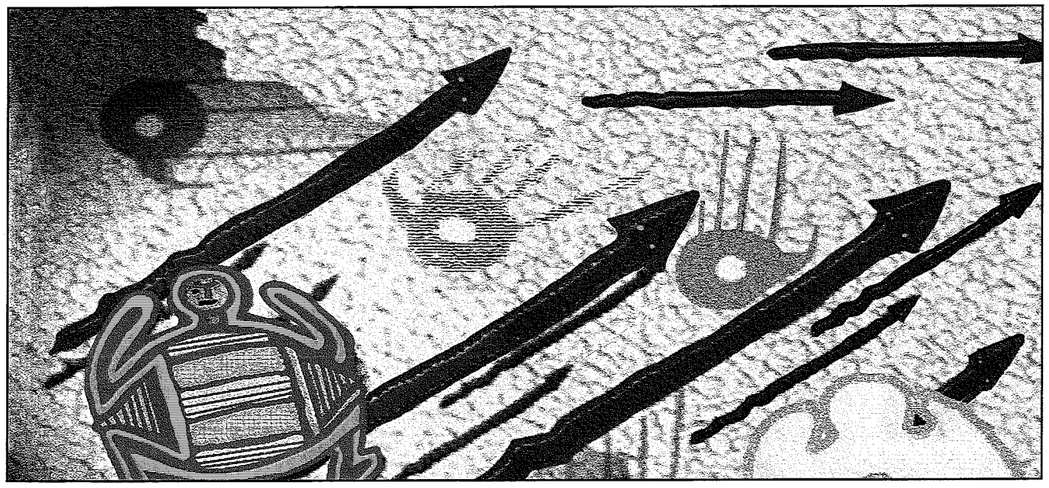
CASE UPDATES

Draft Declaration on Indigenous Peoples

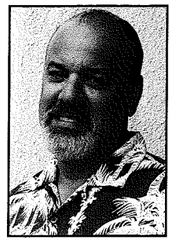
The Native American Rights Fund represents the National Congress of American Indians in both the United Nations and the Organization of American States where draft declarations on the rights of Indigenous Peoples are being elaborated. These documents seek to develop international laws and standards to protect the rights of indigenous peoples in the United States and throughout the world. Native American tribes need to be involved in these efforts, especially to lobby the United States on these issues since it is so influential in the world. While the Draft Declarations cover a broad range of rights, of central importance is solidification of the status of indigenous peoples as "Peoples" possessing group rights to lands and natural resources, as well as the right to self-determination under international law.

The U.N.Working Group on the draft declaration (WGDD) finished its eleventh session on February 3, 2006 The WGDD, a process in which U.N. members and Indigenous Peoples participated, worked on the fundamental premise that nothing is agreed until everything is agreed. With that caveat in mind, agreement was reached on 16 preambular paragraphs and 22 operative articles. The areas in which agreement was not reached include self determination, and lands, territories and natural resources. The Chair of the Working Group drafted compromise provisions on those issues and submitted an entire document to the Human Rights Commission, hoping it would approve the draft before going out of business. That did not happen. The Human Rights Commission was replaced by a new entity, the Human Rights Council (Council). It is unclear at this time how the work on the declaration will be handled by the new Council.

The OAS process continues. The seventh negotiation session was just held in March 2006. This session marked the completion of a round of negotiations on the entire document. A few provisions have been adopted, but most progress has been in the narrowing of issues to be discussed on the next reading of the document. The hope is that all disputes can be resolved and a document agreed upon during the course of the next reading. ✪



New Board Members



Kunani Nihipali, Native Hawaiian, is the Vice President and Director of the Native Hawaiian Advisory Council (dba *Ke Kia`i*), which works to protect traditional and customary practices and build economic and political Independence for Hawai'i.

He has served as a director with the *Pu`a Foundation*, which is responsible for the redress to *kanaka maoli* that resulted from the United Church of Christ apology for their complicity in the "overthrow" of the sovereign nation of Hawai`i. As an elected delegate of the *Aha Hawai'i `O`iwi* since 1999, he asserted, "It is an opportunity to have a voice in our own process to reestablish Hawai`i as a culturally rejuvenated Sovereign Nation." From 1991 to 1993, he served as the executive director for *Hui Na`auao*, a sovereignty education awareness project governed by over 40 Hawaiian organizations.

Kunani served as the Po`o (head) of *Hui Malama I Na Kupuna o Hawai'i Nei*, a group caring for the ancestors of *ka pae `aina o Hawai`i* through repatriation. *Hui Malama* members are trained in traditional cultural protocols relating to the care of *iwi kupuna* (ancestors) and *moepu* (sacred burial objects). *Hui Malama* has conducted reburial ceremonies throughout the Hawaiian island archipelago including the Northwestern islands of *Nihoa* and *Moku Manamana*. This sixteen-year-old organization is recognized by two federal laws and State law, including the National Museum of the American Indian Act and the Native American Graves Protection and Repatriation Act (NAGPRA), as having standing to repatriate *iwi kupuna* and *moepu* from U.S. institutions and have conducted extensive repatriation and reburial efforts abroad. Based on cultural training and practice, legal standing, and national and international efforts, *Hui Malama* has repatriated over 5,732 iwi kupuna and moepu from 31 institutions in the United States, Canada, Australia, Switzerland and Scotland. Kunani wrote an article on repatriation, "Bone by Bone, Stone by Stone, Rebuilding the Hawaiian Nation in the Illusion of Reality" which was published in the Spring 2002 Arizona State Law Journal on Cultural Sovereignty: Native Rights in the 21st Century held at the Arizona State University.

Kunani and artist wife Ipo, created the 'Uhane Noa Foundation and art-related programs for *Kanaka* children and adults through grants from the State of Hawai'i Departments of Hawaiian Home Lands (DHHL) and Health (DOH) in their communities and schools since 1984. He rounds out his expertise with his awareness of farming, fishing, language, video technician work, grants writing, the arts (multi-media contemporary and traditional visual and performing), restoration of cultural sites, such as *Pu`u o Mahuka* and rebuilding of contemporary burial and sacred sites for *na iwi kupuna* (ancestors) through the *Ola Na Iwi Project* (Life to the bones).

The NARF Board of Directors and staff look forward to working with Kunani Nihipali.✪

Andrew J. Bowers, Jr., Tribal Council Representative of the Seminole Tribe of Florida, was elected to the Native American Rights Fund Board of Directors in February 2006. A member of the Florida Bar Association, Mr. Bowers served as Assistant Public Defender for the 10th and 19th Judicial Circuit in Florida from 1990 until 2005. Mr. Bowers attended Haskell Institute, Broward Community College and received a Bachelor of Science degree in Criminal Justice from Nova University in Fort Lauderdale, Florida. He received his Juris Doctor Degree in 1988 from St. Thomas University School of Law in Miami, Florida. Mr. Bowers also served as the Manager of the Seminole Indian Plaza from 1978 until 1985. The NARF Board of Directors and staff look forward to working with Mr. Bowers.✪

CALLING TRIBES TO ACTION!

It has been made abundantly clear that non-Indian philanthropy can no longer sustain NARF's work. Federal funds for specific projects are also being reduced at drastic rates. NARF is now facing severe budget shortfalls. Our ability to provide legal advocacy in a wide variety of areas such as religious freedom, the Supreme Court Project, tribal recognition, human rights, the trust funds case, tribal water rights, Indian Child Welfare Act, and on Alaska sovereignty issues has been compromised. NARF is now turning to the tribes to provide this crucial funding to continue our legal advocacy on behalf of Indian Country. It is an honor to list those Tribes and Native organizations who have chosen to share their good fortunes with the Native American Rights Fund and the thousands of Indian clients we have served. The generosity of Tribes is crucial in NARF's struggle to ensure the future of all Native Americans. We encourage other Tribes to become contributors and partners with NARF in fighting for justice for our people and in keeping the vision of our ancestors alive. We thank the following tribes and Native organizations for their recent support since October 1, 2005: ✪

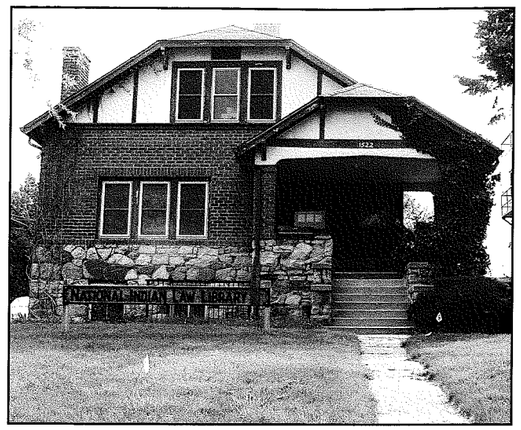
- Coeur D'Alene Tribe
- Colusa Indian Casino & Bingo
- Coquille Indian Tribe
- Denver Indian Family Resource Center
- Fort Mojave Tribe
- Grand Traverse Band of Ottawa & Chippewa Indains
- Hoonah Indian Association
- Hopi Tribe
- Keweenaw Bay Indian Community
- Little Traverse Bay Band of Odawa Indians
- Mashantucket Pequot
- Native Village of Nunapitchuk (IRA)
- Oneida Tribe of Indians of Wisconsin
- Saginaw Chippewa Indian Tribe of Michigan
- San Manuel Band of Mission Indians
- Seminole Tribe of Florida
- White Mountain Apache Tribe

National Indian Law Library

Your Information Partner!

About the Library

The National Indian Law Library (NILL) located at the Native American Rights Fund in Boulder, Colorado is a national public library serving people across the United States. Over the past thirty-three years 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 in the United States; legal pleadings from major American Indian cases; law review articles on Indian law topics; handbooks; conference materials; and government documents.



Library Services

Information access and delivery: Library users can access the searchable catalog which includes bibliographic descriptions of the library holdings by going directly to: http://www.narf.org/nill/index.htm or by accessing the catalog through the National Indian Law Library/Catalog link on the Native American Rights Fund website at www.narf.org. Once relevant materials are identified, library patrons can then choose to request copies or borrow materials through interlibrary loan for a nominal fee.

Research assistance: 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. The library offers free assistance as well as cutomized research for a nominal fee.

Keep up with changes in Indian law with NILL's Indian Law Bulletins: The Indian Law Bulletins are published by NILL in an effort keep NARF and the public informed about Indian law developments. NILL publishes timely bulletins covering new Indian law cases, U.S. regulatory action, law review articles, and news on its web site. (See: http://www.narf.org/nill/bulletins/ilb.htm) New bulletins are published on a regular basis, usually every week and older information is moved to the bulletin archive pages. When new information is published, NILL sends out brief announcements and a link to the newly revised bulletin page via e-mail. Send an e-mail to David Selden at dselden@narf.org if you would like to subscribe to the Indian Law Bulletin service. The service is free of charge!

Support the Library: The National Indian Law Library is unique in that it serves the public but is *not* supported by local or federal tax revenue. NILL is a project of the Native American Rights Fund and relies on private contributions from people like you. For information on how you can support the library or become a sponsor of a special project, please contact David Selden, the Law Librarian at 303-447-8760 or dselden@narf.org. For more information about NILL, visit: http://www.narf.org/nill/index.htm Local patrons can visit the library at 1522 Broadway, Boulder, Colorado. ✪

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-sixth 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 and educating the public about Indian rights, laws, and issues. 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 Annual Report. This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request. Ray Ramirez, Editor, ramirez@narf.org.

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

Tax Status. The Native American Rights Fund is a non-profit, 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.

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