



# NARF Legal Review

Native American Rights Fund

## LEAVE NO TRIBE BEHIND: NARF Takes on a Class Action for Billions of Dollars of Government Mismanagement of Tribal Trust Funds

The Native American Rights Fund's (NARF's) Legal Review readers no doubt are acutely aware of *Cobell, et al. v. Kempthorne, et al.*, the lawsuit that NARF helped file more than ten years ago on behalf of hundreds of thousands of individual Indians for the mismanagement of their trust funds by the United States government. Our readers also know that the Cobell litigation continues to this day, with the federal government steadfastly refusing accountability for its gross mismanagement of individual Indian trust funds. What readers may not know is that Cobell was only the tip of the iceberg. The mismanagement by the federal government of tribal trust fund accounts far exceeds that of individual Indian trust fund accounts; so much so that U.S. Attorney General Alberto Gonzales, in his 2005 testimony to a U.S. House of Representatives Committee, estimated that the United States' potential liability for tribal trust fund mismanagement may exceed \$200 billion. To address this liability Congress established a deadline of December 31, 2006 after which tribes likely were to be precluded from challenging the mismanagement of their tribal trust funds. Therefore,



on December 28, 2006, at the direction of eleven named plaintiff tribes (recently amended to twelve tribes), NARF filed a class action lawsuit in federal district court in Washington, D.C. on behalf of potentially over two hundred and twenty-five (225) tribes, seeking full and complete accountings from the federal government for hundreds of tribal trust fund accounts worth billions of dollars. This lawsuit is named *Nez Perce Tribe, et al. v. Kempthorne, et al.*

### History of the Government's Trusteeship of Tribal Trust Funds

The federal government long ago assumed the role of trustee for tribal trust funds and ▶

- ▶ Leave No Tribe Behind .....page 1
- ▶ NARF Director testifies before Senate Committee ..page 7
- ▶ CASE UPDATES
  - Nez Perce Water Settlement to be Implemented .....page 13
  - NARF Assists the Pawnee Nation ..... page 13

- NARF Launches National Media Campaign ..page 14
- John Echohawk & NARF Honored .....page 15
- ▶ NEW Board Members .....page 16
- ▶ CALLING TRIBES TO ACTION! .....page 17
- ▶ Indian Law Library ..... page 18
- ▶ NARF ..... page 19

created the accounts at issue. The trusteeship is deeply rooted in treaties, laws and agreements. Tribal trust funds come from revenues generated by the development of tribal natural resources managed by the federal government such as timber, minerals, and oil and gas; court judgments entered against the United States for the unlawful appropriation of Indian land and property; and income from the investments by the federal government of money held in the accounts. Tribal trust funds are solely monies of tribes; they are not taxpayer dollars and they are not federal program funding. In fact, the federal government gave tribes no choice about the creation of these trust fund accounts, some of which date back to the early 1800s. “Imagine if the law in the United States required you to have no choice of where to bank your money,” states Melody McCoy, the lead NARF attorney in *Nez Perce Tribe v. Kempthorne*. “You can’t choose between Chase Bank, or Wells Fargo, or your local or state bank. You have to bank with the federal government. That’s what federal law required of tribes historically. And tribes of course followed the law.” As a result, the federal government today purports to hold about \$3 billion in approximately 1,450 trust fund accounts for over 250 tribes.

NARF Executive Director John Echohawk explains the problems created for tribes. “What if your bank never told you how much money was in your account, or how or whether your money was being invested?” Echohawk continues, “By the early 1980s, tribes increasingly were concerned that they never had gotten and could not get accountings of their trust funds. The Government Accounting Office (GAO) and the U.S. Department of the Interior’s Office of the Inspector General (OIG) issued key reports that identified major problems in the government’s management of Indian trust funds. The reports detailed records lost or never kept, systems that didn’t work or weren’t coordinated, and policies that were deficient or never even existed. As a result of these concerns and findings in 1987 Congress began ordering expressly the Department of the Interior, which is the agency



*Presentation by NARF tribal trust fund case attorneys Don Wharton and David Gover to tribal trust fund clients.*

with primary responsibility for Indian trust funds, to audit and reconcile the accounts – which never had been done – and to provide full and complete accountings of the funds to tribes and individual Indians whose money was in the accounts.”

### **The 1994 Trust Reform Act**

Congress’ attention to the problems culminated in the enactment of the American Indian Trust Fund Management Reform Act of 1994. As the Interior Department OIG explained and recognized in a December 2006 Auditor’s Report; “[t]he Act recognizes the unique trust relationship that exists between the Indian tribes, individual Indians and the United States Government. Agreements between the U.S. Government and the various Indian tribes, many of these in the form of treaties recognize the sovereignty of tribes. During the course of the Nation’s history and the U.S. Government’s evolving policies toward Indian tribes, the trust relationship has retained characteristics based upon tribal sovereignty. The United States Congress has designated the Secretary [of the Interior] as the trustee delegate with responsibility for the financial and non-financial resources held in trust on behalf of American

Indian tribes, individual Indians, and other trust funds. In carrying out the management and oversight of the Indian trust assets, the Secretary has a fiduciary responsibility to ensure monies are received from the use of Indian lands and the extraction of natural resources from Indian lands, distribute such monies collected to the appropriate beneficiaries, ensure that trust accounts are properly maintained and invested, and ensure that accurate and complete reports are provided to the trust beneficiaries in accordance with applicable law.”

The 1994 Act requires specifically the Interior Department to provide full and complete trust fund accountings to Indian account holders and Congress. The Act even created within the Interior Department a new Office of the Special Trustee (OST) for American Indians (OST) to oversee implementation of Indian trust fund management reforms. John Echohawk remembers that many tribal leaders were encouraged by the 1994 Act, and its promises, but that they also were cautious because of the history and the depth of the government’s misaccounting and mismanagement.

### The Arthur Andersen Project

The reality of the situation was about to set in. By the early 1990s, the Bureau of Indian Affairs (BIA) within the Interior Department admitted that it was incapable of complying with the mandates for full and complete historical accountings, audits, and reconciliations of Indian trust funds. The BIA hired the accounting firm of Arthur Andersen, LLP to tackle the project under a \$12 million contract. Early on, Arthur Andersen concluded that due to the level of effort and associated expenses and the potential for missing documentation, it would cost over \$280 million to reconcile the trust fund accounts of individual Indians. When the federal government did nothing more regarding the individual Indians’ trust fund accounts, the *Cobell* litigation was filed in 1996.

Arthur Andersen’s Indian trust fund work ultimately consisted of researching only tribal trust fund accounts for the limited time period



of July 1972 through September 1992. And, by the project’s end Arthur Andersen’s contract had been modified twenty-nine times – primarily to reduce the project’s scope and procedures and increase its cost to \$21 million. Arthur Andersen openly determined that insufficient records were available for even the limited time period for which it was examining tribal trust fund accounts to conduct full accountings or reconciliations of the accounts. Instead, the BIA agreed to “alternative procedures” that Arthur Andersen applied to tribal trust funds. During the Arthur Andersen project years, Congress mandated that any Indian trust fund audit and reconciliation work be certified by an independent third party. In September 1993 the BIA hired Coopers & Lybrand, CPA for the certification work. But the BIA terminated Coopers & Lybrand’s contract in November 1995 before certification could be completed.

Arthur Andersen concluded its tribal trust fund project work in 1995. In 1996 the BIA provided all tribal account holders with “Agreed-Upon Procedures Engagement Reports” of their trust fund accounts prepared by Arthur Andersen for fiscal years 1973 – 1992. Melody





*Tribal trust fund case clients meeting at NARF with attorneys and staff.*

McCoy remarks that, “Since the Arthur Andersen project, everyone – including Arthur Andersen itself, the BIA, the OST, and the GAO – has admitted that the Arthur Andersen reports are not full and complete accountings. Every couple of years – 2003, 2005, and 2007 – the OIG and the GAO tell Congress that tribal trust fund account balances are inaccurate and that the government likely is liable for this. But the government continues to try and persuade tribes, Congress, and the courts that there are “no known errors” in tribal trust fund accounts and that the Arthur Andersen reports are full and complete accountings. On this point Congress finally said “enough’s enough” and required the matter to go to court by December 31, 2006.” John Echohawk adds, “The bottom line is that despite the agency reports, twenty years of congressional mandates, and \$21 million spent on the Arthur Andersen contract, to date no tribe has gotten a full and complete accounting of its trust funds. How in the world can tribes even begin to know the extent of the harm they’ve suffered when they don’t have the most basic information about their accounts?”

### *Nez Perce Tribe v. Kempthorne is One of Over 100 Tribal Trust Cases*

Given the congressional deadline of December 31, 2006, NARF did not hesitate to file *Nez Perce Tribe v. Kempthorne*. Originally brought by eleven named plaintiff tribes: the Nez Perce Tribe (Idaho); the Mesaclero Apache Tribe (New Mexico); the Tule River Indian Tribe (California); the Hualapai Tribe (Arizona); the Yakama Nation (Washington); the Klamath Tribes (Oregon); the Yurok Tribe (California); the Cheyenne-Arapaho Tribe (Oklahoma); the Pawnee Nation (Oklahoma); the Sac and Fox Nation (Oklahoma); and, the Santee Sioux Tribe (Nebraska), on April 2, 2007 these eleven tribes were joined by a twelfth tribe, the Tlingit and Haida Indian Tribes (Alaska). The lawsuit seeks to be a class action on behalf of all tribes that have not received full and complete accountings of their trust funds, that have not filed their own

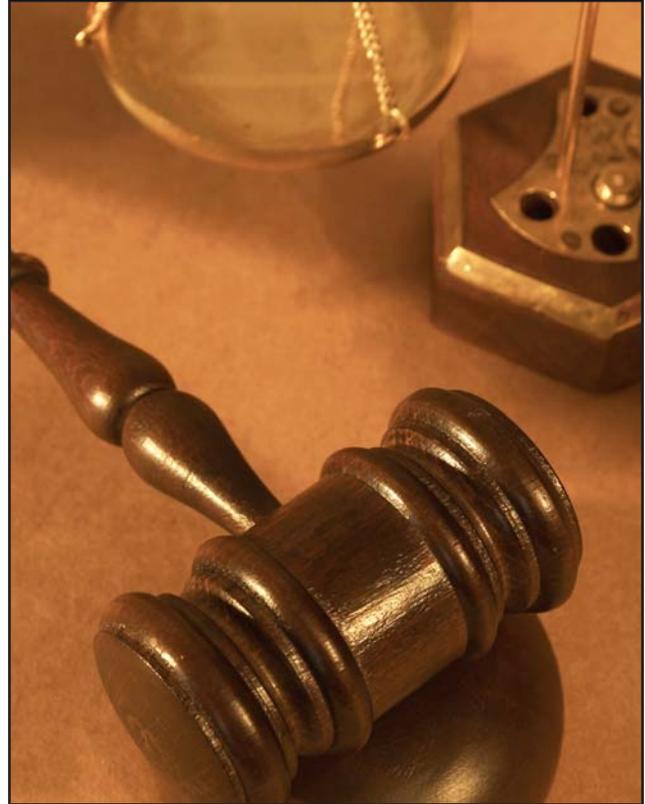
separate action for accountings, and that wish to remain in the class if a class is certified by the court.

In fact by December 31, 2006 about seventy (70) tribes had filed their own separate lawsuits against the federal government alleging tribal trust fund misaccounting and mismanagement, bringing the total number of such cases to over one hundred. But, as John Echohawk notes, “That means about two hundred and twenty-five (225) tribes either did not have the financial resources or the needed information to file their lawsuits by the deadline. NARF wants ‘No Tribe Left Behind’ in what is possibly the biggest fiscal crisis this country ever has known.” Melody McCoy agrees that, “Not since the days of the Indian Claims Commission have so many tribes filed lawsuits against the United States over the same issue – in this instance, fiduciary misaccounting and mismanagement.”

#### The Administration’s \$7 billion settlement offer

But the government does not want these issues going to court. On March 1, 2007, the Bush Administration wrote the U.S. Senate Committee on Indian Affairs that it would settle the *Cobell* case and all tribal trust claims, as well as implement needed Indian trust management reforms called for by the 1994 Act and by the courts to date in the *Cobell* litigation, for an amount of “up to \$7 billion over a ten-year period.” Despite many flaws in the Administration’s March 1, 2007 proposal, it notably marks the first time that the government ever has put a dollar figure to its Indian trust fund misaccounting and mismanagement. The Senate Committee on Indian Affairs quickly called in the Secretary of the Interior and the U.S. Attorney General to explain their proposal in more detail.

At the Senate Committee on Indian Affairs Oversight Hearing on Indian trust fund litigation on March 29, 2007, the government was unable to explain how its estimate of the government’s liability went from “as much as \$200 billion” to “up to \$7 billion.” The *Cobell* plaintiffs, NARF, and others testified that the Administration’s



proposal was essentially “a slap in the face” and “patently in bad faith.” They reminded Congress that only a few months ago, in October 2006, Congress had suggested that the Administration spend \$8 billion to resolve all Indian trust litigation pending at that time – which then was about thirty cases – and to implement the needed Indian trust management reforms. John Echohawk specifically testified that, “the Administration’s March 1, 2007 proposal remarkably makes no reference to the over 70 new tribal trust claims filed in court since the October 2006 proposal. This 200% increase in the number of lawsuits and the potential accountability and liability of the federal government should give the Administration every reason to begin good faith negotiations directly with the tribal plaintiffs to develop trust claim settlement proposals which tribes can support. The Administration’s March 1, 2007 proposal simply does not reflect a good faith effort. It blithely ignores the horrendous financial crisis that has prompted a whole-scale legal war being waged by tribes throughout the country to make



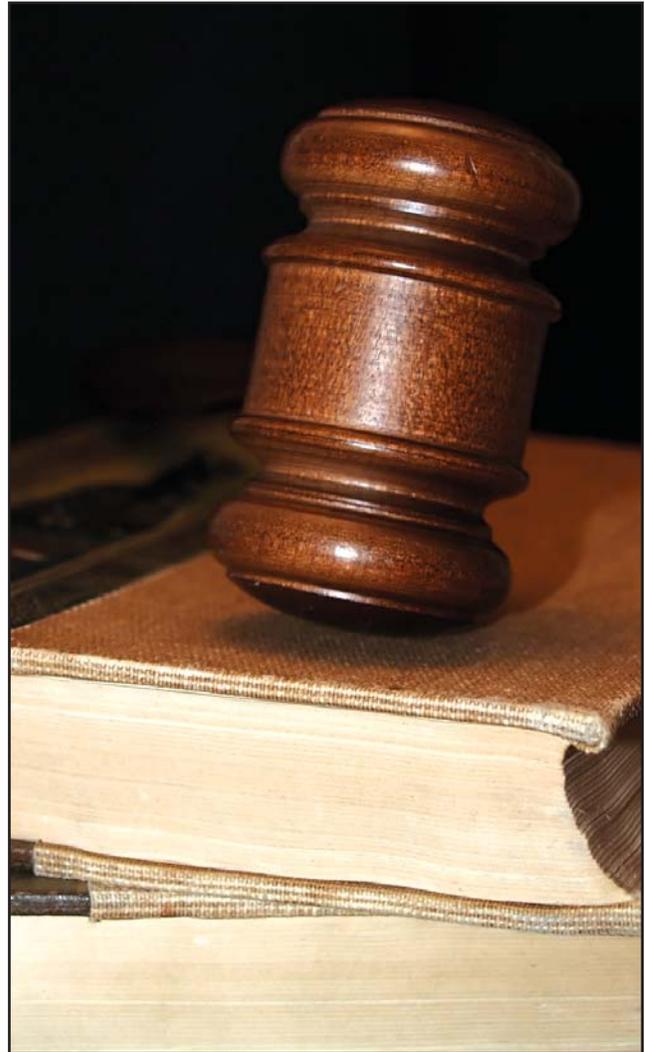
the government accountable for its basic fiduciary obligations – obligations which have been rectified honorably when breached on the same level by financial institutions responsible for holding and managing the accounts and funds of non-Indians, states, and local governments on deposit and entrusted with their care and safe-keeping.”

Of course John Echohawk was referring to the over \$125 billion authorized by Congress in the 1990s to be spent to bail out the savings and loan institutions industry from a financial scandal in which the government had no fiduciary trust obligations. And, Echohawk pointed out, Congress currently is considering a \$165 billion bail out of subprime mortgage borrowers whose homes are being foreclosed. What, if anything, Congress will do to hold the government accountable for its Indian trust fund misaccounting and mismanagement remains to be seen. As John Echohawk observed after the Senate Hearing, “I think that Congress has heard enough about the Administration’s proposal to “just say no” to including in it all of the tribal claims. I believe that we will live to fight this out in Court.”

**The Road Ahead**

Thus, NARF continues to move forward *Nez Perce Tribe v. Kempthorne*. The government’s answer to the First Amended Complaint is due May 11, 2007. The Plaintiffs have thirty days after that to move for class certification. As Melody McCoy, who has been litigating tribal trust fund claims against the government for over ten years knows, “These tribal trust claims are a real battle. NARF is grateful for the leadership of the tribes who are willing to stand up in this fight for Indian justice.”

The twelve named plaintiff tribes, members of NARF’s Board of Directors, and NARF’s tribal trust fund litigation team also have hit the road from coast to coast to explain and answer questions about *Nez Perce Tribe v. Kempthorne*. Since January 2007, they have appeared at various national, regional, and state tribal organizational meetings throughout Indian country



including those of the National Congress of American Indians, the Inter-Tribal Monitoring Association, the Affiliated Tribes of Northwest Indians, the Eight Northern Pueblos, the United Indian Nations of Oklahoma, and the Federal Bar Association’s Annual Indian Law Conference. John Echohawk reports that the response from tribes to the lawsuit has been overwhelmingly favorable. “NARF’s undertaking of this is appreciated. Tribes are anxious to see if the court will certify a class and how the court will hold the government accountable for this mess. And it is a big mess.”

For additional information regarding *Nez Perce Tribe v. Kempthorne* please visit [www.tribaltrust.com](http://www.tribaltrust.com). 🌸

# NARF Director testifies before Senate Committee



*(Testimony of NARF Executive Director before the United States Senate Committee on Indian Affairs on March 29, 2007)*

Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to offer testimony at this oversight hearing on Indian trust litigation. I am pleased to assist the Committee in understanding this litigation and in exploring the role of Congress in resolving the litigation.

The Native American Rights Fund (NARF) serves as legal counsel to the plaintiffs in the *Cobell* litigation, which involves the trust claims of individual Indians. NARF also serves as legal counsel to Indian tribes in three separate cases: 1) *Chippewa Cree Tribe of the Rocky Boy's Reservation, Little Shell Band of Chippewa Indians, Turtle Mountain Band of Chippewa Indians, and White Earth Band of Minnesota Chippewa Indians v. United States*, No. 92-675L in the U.S. Court of Federal Claims (filed Sept. 30, 1992); 2) *Chippewa Cree Tribe v. Kempthorne*, No. 02-00276- JR in the U.S. District Court for the District of Columbia (filed Feb. 11, 2002); and, 3) *Nez Perce Tribe, et al. v. Kempthorne, et al.*, No. 06-02239 in the U.S. District Court for the District of Columbia (filed Dec. 28, 2006). *Nez Perce Tribe, et al. v.*

*Kempthorne, et al.*, was filed by eleven named tribal plaintiffs as a class action on behalf of about 220 tribes that have not filed their own trust accounting lawsuits. I am here today only on behalf of NARF's trust claim client tribes; not the *Cobell* plaintiffs.

My testimony today makes three points: 1) there are now over 100 trust claim lawsuits against the United States in federal courts on behalf of over 285 federally-recognized tribes. The Committee needs to understand these tribal trust claims and the potential accountability and liability of the United States; 2) at least with respect to a legislative settlement of the trust claims of Indian tribes, the Administration's letter proposal to this Committee of March 1, 2007 is unacceptable; and, 3) at least some tribes are willing to explore legislative efforts to settle their trust claims that respect the rights, claims, and options of each tribe. I now will discuss these three points in more detail.

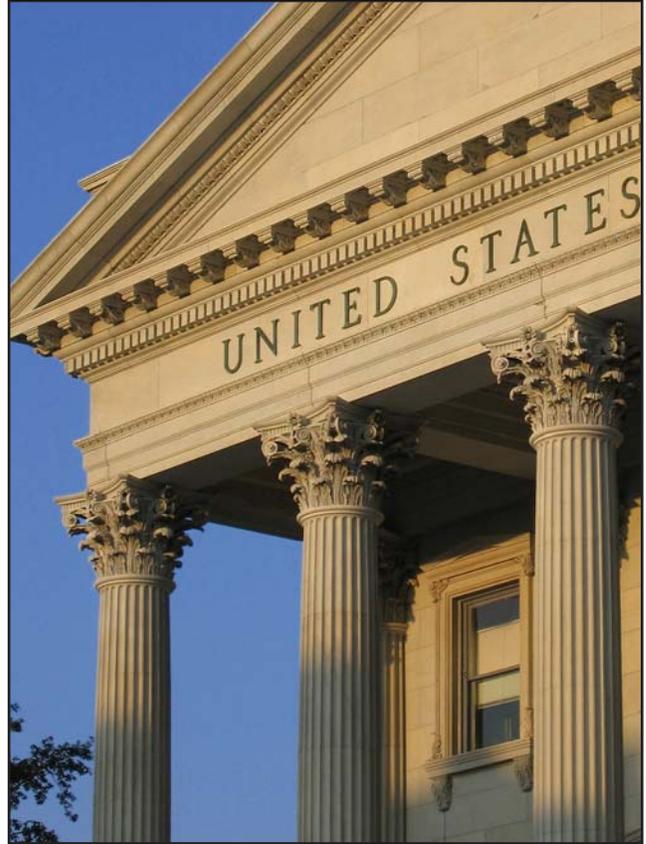
## 1. There now are pending against the government 108 tribal trust claim lawsuits

"Tribal trust accounts" and "tribal trust funds" generally include: 1) monetary payments required by treaty or in satisfaction of judgments against the United States, such as Indian

Claims Commission awards; and, 2) income or proceeds earned by tribes from land and natural resources that the government holds in trust and manages for tribes. Tribal trust accounts and trust funds also include income earned on interest earnings and investments by the government of the funds themselves. The point here is that tribal trust accounts and trust funds are not taxpayer dollars and they are not appropriated federal program funds. They are the tribes' own money secured through treaties, court cases, statutes, and other federal law. The government's misaccounting and mismanagement of tribal trust accounts and funds strikes at the very core of the federal trust responsibility to Indian tribes.

The United States unilaterally assumed fiduciary trusteeship of tribal trust accounts and funds in 1820. Since then Congress has delegated responsibility for the fiduciary trusteeship of tribal trust accounts and funds primarily to the Departments of the Interior and the Treasury. Last month the Government Accountability Office testified before the House Natural Resources Committee that the United States presently holds about \$2.9 billion in about 1,450 trust accounts for over 250 tribes. See U.S. Government Accountability Office, Testimony before the Committee on Natural Resources, House of Representatives, Department of the Interior Major Management Challenges 10, GAO-07-502T (Feb. 2007).

With respect to tribal trust accounts and funds, the United States is like a bank with a trust department. In fact historically under federal law tribes have had no choice but to bank with the United States. Tribes' economic well-being hinges upon proper fiduciary care of their monies by the government, just as private investors, states, and local governments depend on banks, savings and loan companies, and investment houses to ensure that their assets are properly accounted for and managed. Imagine the widespread outcry if banks, savings and loan companies, and investment houses that were chosen by investors were to fail to meet their fiduciary obligations. Undoubtedly



such harm would be corrected.

There are pending in federal courts against the government 108 tribal trust accounting and trust mismanagement lawsuits. Sixty-one (61) of these cases are in the U.S. Court of Federal Claims seeking money damages. Thirty-seven (37) cases are in the U.S. District Court for the District of Columbia seeking accountings and other forms of equitable relief. Another ten (10) cases seeking accountings and other forms of equitable relief are in other federal district courts. NARF has been tracking these cases. Attachment A to my testimony today shows these 108 cases. The U.S. Department of Justice also has been tracking these cases and has filed in court similar lists of "Current Tribal Trust Accounting and Trust Mismanagement Cases" as Exhibits to its Motions in the cases. Attachment B to my testimony today is one of the Justice Department's lists. The Justice Department's count is five lower than ours apparently due to some case consolidations and categorization differences.

Many tribes have been affected by the alleged federal misaccounting for and mismanagement of their trust accounts and funds. Trust claim cases have been filed on behalf of over 285 federally-recognized tribes. Sixty-nine (69) tribes have filed their own cases. Of the 69 tribes that filed their own cases, twelve (12) filed cases only in federal district courts. Twenty-two (22) tribes filed cases only in the Court of Federal Claims. Thirty-five (35) tribes filed cases in both federal district court and the Court of Federal Claims. NARF filed a case in the U.S. District Court for the District of Columbia for full and complete trust fund accountings on behalf of eleven named plaintiff tribes, *Nez Perce Tribe, et al. v. Kempthorne, et al.*, which seeks class action status on behalf of all other tribes that did not file their own cases for full and complete accountings and that do not wish to exclude themselves from the class for their own reasons.

Over seventy (70) of these 108 tribal trust claim cases are relatively new. They were filed late last year. As you know, Congress has codified the inherent obligation of the United States as the trustee for tribal trust accounts and funds to provide “full and complete accountings” to tribal beneficiaries. See *Cobell v. Norton*, 240 F.3d 1081, 1102 (D.C.Cir. 2001). For the past twenty years Congress has told the government to provide full and complete trust accountings to tribes. See, e.g., Pub. L. No. 100-202, 101 Stat. 1329 (1987); see also 25 U.S.C. Sec. 4044. NARF is extremely concerned that to date no tribe has received a full and complete accounting of its trust accounts and funds.

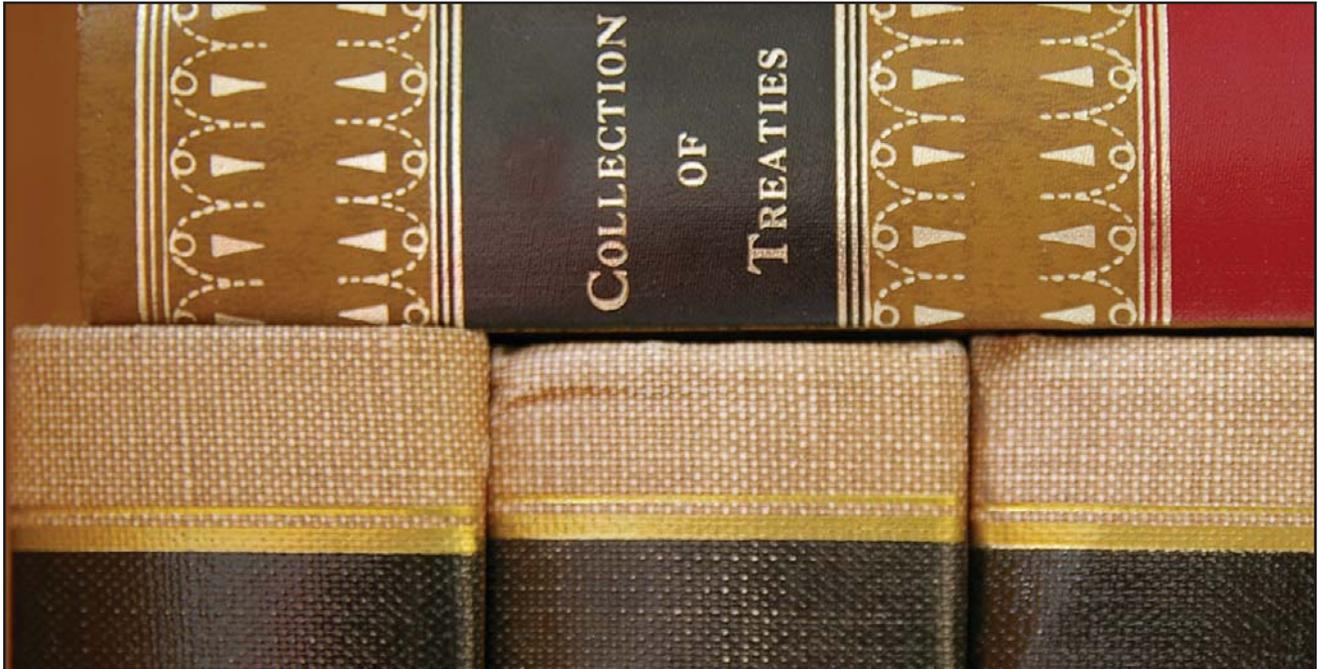
Back in the 1990s, unable to comply with these congressional mandates on its own, the Bureau of Indian Affairs (BIA) within the U.S. Department of the Interior contracted with the accounting firm of Arthur Andersen to examine transactions in tribal trust accounts for the limited time period of July 1972 through September 1992. In 1996 the BIA provided tribal account holders with Arthur Andersen “Agreed-Upon Procedures Engagement Reports” of their trust accounts for this limited time period.

Even though everyone – including Arthur Andersen itself, the BIA, the Office of the Special Trustee, and the Government Accountability Office – has admitted that the Arthur Andersen reports are not full and complete accountings, the government has tried to get tribes to agree that the Arthur Andersen reports are full and complete accountings.

More importantly, the general statute of limitations for claims against the government provides that civil actions against the government shall be barred unless filed within six years after the right of action first accrues. 28 U.S.C. Sec. 2401. In 2002, six years after the Arthur Andersen reports were sent to tribes, Congress enacted legislation to “Encourage the Negotiated Settlement of Tribal Claims, Public Law No. 107-153.” This legislation provided, among other things, that, “Notwithstanding any other provision of law, for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statute of limitations, any such report provided to or received by an Indian tribe in response to section 304 of the American Indian Trust Fund Management Report Act of 1994 (25 U.S.C. 4044) shall be deemed to have been received by the Indian tribe on December 31, 1999.” In 2005, this legislation was amended to provide that the reports shall be deemed to have been received on December 31, 2000. Pub. L. No. 109-158.

But, in the last congressional session, there was no further extension of the date in this legislation. By late last year, many tribes were concerned that their right to claim that the Arthur Andersen reports are not “full and complete accountings” sufficient to commence the running of any applicable statutory limitations period on their trust claims would be lost forever after December 31, 2006. Tribes feared that this would jeopardize their right to have the government ever provide full and complete accountings of their trust accounts and funds. The result of this predicament was a 200% increase in the number of trust claims filed by tribes against the government. As stated earlier,





now there are 108 tribal trust claim lawsuits. This is a financial crisis in Indian country and for the United States.

This financial crisis is not new. The legislation to Encourage the Negotiated Settlement of Tribal Claims merely informed the timing of the many recently-filed tribal trust claims lawsuits. Tribes have been filing such lawsuits for years. With good reason. Scores of reports – some dating back to the early 1900s – of the Government Accountability Office, the Interior Department’s Office of the Inspector General, and the Office of Management and Budget, as well as reports of this Committee and other Committees of Congress have well-documented the tremendous problems of the government’s misaccounting for and mismanagement of tribal trust accounts and funds. What is new is the phenomenal number of lawsuits. Not since the Indian Claims Commission have so many tribes filed lawsuits against the federal government about the same problem; in this instance fiduciary misaccounting and mismanagement.

The pending tribal trust claims in federal district courts seek various forms of equitable relief. They seek: 1) declarations that the government has fiduciary obligations to tribal beneficiaries; 2) declarations that the government

is in breach of its fiduciary obligations; 3) full and complete accountings of tribal trust accounts and funds; 4) restatement of or restitution to trust account and trust fund balances as if there had been no breaches of trust; and, 5) declarations of future lawful and proper fiduciary accounting for and management of tribal trust accounts and funds.

The tribal trust claims pending in the Court of Federal Claims seek determinations of liability for misaccounting and mismanagement of tribal trust accounts and funds and determinations of money damages for the misaccounting and mismanagement. Exactly two years ago this month (March 2005), when he testified before the House Subcommittee on Justice Department Appropriations, Attorney General Gonzales at that time estimated that the government’s liability for these tribal trust claims could be over \$200 billion. See Statement of Alberto R. Gonzales, Attorney General of the United States before the U.S. House of Representatives, Committee on Appropriations, Subcommittee on Science, the Departments of State, Justice and Commerce, and Related Agencies (Mar. 1, 2005).

Over the years tribes have turned to the courts for resolution of their trust claims because the

government historically and consistently has failed to perform its fiduciary trustee duties; ignored the mandates of Congress in laws like the American Indian Trust Management Reform Act of 1994; and, simply is unable or unwilling to resolve what is perhaps this nation's biggest financial crisis ever. As I will discuss next, this is still par for the course for this Administration.

## 2. The Administration's proposal of March 1, 2007 is unacceptable

NARF has reviewed carefully the Administration's proposal to settle Indian trust litigation as set forth in the letter from Secretary Kempthorne and Attorney General Gonzales to this Committee dated March 1, 2007. The March 1, 2007 proposal of the Administration is very sketchy. In many respects it is similar to a proposal that the Administration proposed to Congress five months ago (October 2006) in response to what was then Senate Bill 1439. There is, however, at least one glaring difference. The Administration's October 2006 proposal would have provided for resolution of all Indian trust litigation and other trust reform matters such as Indian land fractionation, presumably at a cost set by Congress of \$8 billion. The March 1, 2007 proposal proposes to resolve all Indian trust litigation and other trust reform matters for an "investment" of \$7 billion or less. In short, the new proposal offers to do at least much but for at least a full billion dollars less than the old proposal. Once again, we see the Administration taking a step backward.

In comparison to the Administration's parsimonious offer of up to \$7 billion to address all of its own past, present, and future Indian trust misaccounting and mismanagement, in very recent times the government expended \$125 billion to bail out the savings and loan institutions industry from a scandal in which the government had no fiduciary trust obligations. See Timothy Curry and Lynn Shibut, *The Cost of the Savings and Loan Crisis: Truth and Consequences*, FDIC Banking Review (Dec. 2000). The government's honor to vindicate its

own neglect and mishandling of Indian trust accounts and funds that it chose to manage surely rises at least to the same level as extrication from a disgrace not of its own making.

Of course the Administration's March 1, 2007 proposal also is unacceptable for the same reasons that the October 2006 proposal was unacceptable. These reasons include: 1) the proposal was developed without consultation with tribal governments; 2) the proposal seeks to resolve arbitrarily trust claims which *never have been adequately analyzed or valued* due to the government's failure to provide full and complete accountings; 3) the proposal would set unprincipled and impractical limits on federal liability for any and all tribal claims of past and present federal neglect and mismanagement of tribal trust accounts and resources, and it would preclude any future liability for such claims; and, 4) the proposal would negate thirty-five years of federal law and policy promoting Indian self-determination and adhering to federal-tribal government-to-government relations by forcing on tribes involuntary termination of the federal trust responsibility.

Another reason that the Administration's proposal is fundamentally flawed stems from its comprehensive "packaging." For several reasons, efforts to settle the *Cobell* lawsuit, which involves the trust claims of individual Indians, and efforts to settle the trust claims of tribes, should be kept separate. Congress already treats the trust accounts and resources of individual Indians and tribes separately in its many Indian trust statutes. The *Cobell* lawsuit has its own history – over a decade long now. Before and after the *Cobell* lawsuit was filed, tribes have pursued their own trust claims, and they must be allowed to continue to do so. Combining resolution of the *Cobell* claims and tribal trust claims into a single legislative settlement is unrealistic and unwise.

Moreover, the Administration's March 1, 2007 proposal remarkably makes no reference to the over 70 new tribal trust claims filed in court since the October 2006 proposal. This 200% increase in the number of lawsuits and the



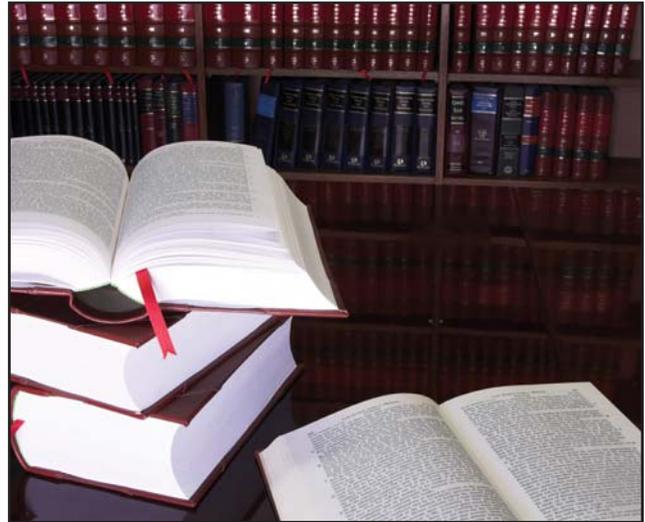
potential accountability and liability of the federal government should give the Administration every reason to begin good faith negotiations directly with the tribal plaintiffs to develop trust claim settlement proposals which tribes can support. The Administration’s March 1, 2007 proposal simply does not reflect a good faith effort. It blithely ignores the horrendous financial crisis that has prompted a whole-scale legal war being waged by tribes throughout the country to make the government accountable for its basic fiduciary obligations – obligations which have been rectified honorably when breached on the same level by financial institutions responsible for holding and managing the accounts and funds of non-Indians, states, and local governments on deposit and entrusted with their care and safe-keeping.

On behalf of its tribal trust claim clients, NARF hopes that, regardless of what the Administration does on this matter, the Senate Committee on Indian Affairs will play a responsible leadership role in acting on behalf of the United States to foster and support government-to-government and good faith settlement of tribal trust claims. I now will talk about how that can be accomplished.

**3. Exploration of Legislative Settlement Efforts that Tribes can Support**

NARF believes that NARF and many tribes and their attorneys have a wealth of experience in and expertise regarding tribal trust claims that could be valuable to the Committee. NARF strongly encourages a dialogue between the Committee and interested tribal trust claim attorneys to explore the viability of legislative measures that are constructive in facilitating resolution of these complex claims.

Just as the Administration attaches a list of “Key Facets of Acceptable Indian Trust Reform and Settlement Legislation” to its March 1, 2007 proposal, NARF believes that there may be consensus among tribal attorneys regarding at least a preliminary list of their “Key Facets of Acceptable Tribal Trust Claims Legislative Settlement.” At this time this list includes the



following:

Tribes are committed to further educating the Committee about their trust claims, which are legitimate legal claims notwithstanding attempts to label them as “unreasonable;”

Any legislative settlement effort must respect the claims, rights, and options of each tribe, including the prerogative of tribes to pursue their own claims in court, in alternative dispute resolution forums, in administrative settings, through negotiated settlements, or through other forms of claim resolution;

As long as legislative settlement provisions are voluntary for each and every tribe, at least some tribes and their attorneys are willing to work together to help the Committee determine what, if anything, can be done legislatively to resolve tribal trust claims.

NARF strongly urges the Committee to consider the above tribal Key Facets as a foundation for approaching and resolving the national tribal trust accounts and funds crisis. NARF stands ready and willing to work with the Committee and other interested tribal attorneys to develop an informal process for exploring a role for Congress in resolving the tribal trust claims crisis.

Thank you for this opportunity to submit testimony. I am available to answer questions at this time. 🌟

## CASE UPDATES

### *Nez Perce Water Settlement to be Implemented*



On May 15, 2004, the Nez Perce Tribe, the State of Idaho, and the federal Department of the Interior announced publicly that a settlement of the tribe's claims in the Snake River Basin Adjudication (SRBA) had been reached. Since 1998, the Nez Perce Tribe, the United States, the State of Idaho, and local communities and water users in Idaho had engaged in mediation as part of the SRBA to resolve the claims of the Nez Perce Tribe in the Snake River and several of its tributaries. The SRBA is the legal inventory of about 150,000 water rights in 38 of Idaho's 44 counties. The Nez Perce dispute had been the biggest outstanding dispute in the Snake River Basin.

For the Tribe, the settlement: quantified the Tribe's on-reservation consumptive use reserved water right at 50,000 acre feet a year with a priority date of 1855; established a \$50 million multiple-use water and fisheries resources trust fund; provided \$23 million for the design and construction of water supply and sewer system improvements on the reservation; transferred management authority of Kooskia National Fish Hatchery to the Tribe; and transferred a portion of Bureau of Land Management-administered land – about 12,000 acres – within the Nez Perce Reservation valued at \$7 million to the Tribe. The settlement also provided that instream flows will be established and held by the Idaho Water Resources Board for over 200 streams and rivers selected by the Tribe as critical salmon habitat; required the State of Idaho to administer two cooperative agreements under the Endangered Species Act; and established a Habitat Fund to provide funding for habitat improvement projects.

In November of 2004, the United States Congress enacted a law – PL 108-447 – approving the settlement, and authorizing the payment of the settlement funds to the Tribe. President Bush signed the law on December 8, 2004. In the Spring of 2005 both the Idaho Legislature and the Nez Perce Tribal Executive Committee enacted legislation approving the settlement agreement.

On January 9, 2007, the SRBA Court heard the Joint Motion for Entry of Consent Decree filed by the Tribe, the United States, and the State of Idaho, and on January 30, 2007 the presiding judge entered a written order approving the Consent Decree. No appeals were filed with the Idaho Supreme Court challenging the final consent decree.

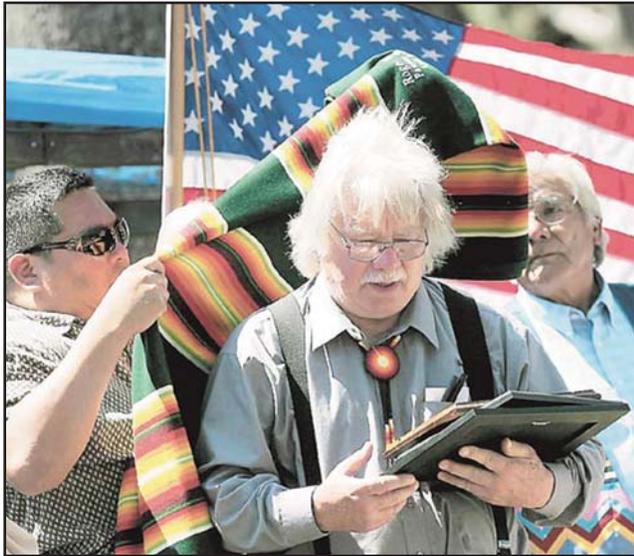
On April 27, 2007, the State and the Nez Perce Tribe certified that all of the Term Sheet conditions have been met. It is expected that the Secretary of the Interior will enter these findings in the Federal Register. Now that the three sovereigns have entered their final findings, the settlement provisions relating to the transfer of the 11,000 acres of BLM land; shared management of the Dworshak National Fish Hatchery; and management of the Kooskia National Fish Hatchery will be finally carried out.

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### *NARF Assists the Pawnee Nation in Return of 60 acres of traditional homeland by Nebraska Couple*

On April 21st, over a 100 tribal members from the Pawnee Nation of Oklahoma and their Nasharo Band Chiefs gathered at the Pawnee Nation dance-ground to honor writer Roger Welsch and his wife, Linda, for their gift of approximately 60 acres of land in Nebraska.

Welsch, a writer, stated in an interview with the Tulsa World that, "It's something we had no choice in because it had to be done," Welsch said. "These people are not guests on our land, but rather we are guests on their land," stated Welsch in reference to the fact that Nebraska once served as



part of the traditional homelands of the Pawnee prior to their removal to Oklahoma in the late 1800's.

The deed to the land, located near the Loup River and Dannebrog, Nebraska, was given to the Pawnee Nation of Oklahoma in a ceremony followed by a feast, an honor dance, and Mr. Welsch and his wife being made honorary members of the Pawnee Nation. Speeches were made by a number of tribal officials, including the President of the Pawnee Nation and the Nasharo Chiefs. Other speakers included Walter Echo-Hawk, senior staff attorney for the Native American Rights Fund (NARF). NARF currently represents the Pawnee Nation in the reburial efforts of 800 human remains in Nebraska. NARF worked with the Pawnee Nation and its Repatriation Committee to assist in the facilitation of the transfer of Mr. Welsch's land to the Pawnee Nation for use as a reburial and cultural site. Echo-Hawk also assisted the tribe in attaining an opinion from the Nebraska Attorney General last year that clarified the tribe's right to conduct reburials on private land.

In a short speech during the ceremony and honoring, Walter Echo-Hawk encouraged Pawnee Nation leadership to rename the tribe, in light of the return of the lands, to "the Pawnee Nation of Oklahoma and Nebraska."

Mr. Francis Morris, Pawnee Nation Repatriation Director, explained to a Tulsa World reporter who interviewed him at the event that, "The Loup River

was a favored site of the Pawnees," adding "It is our country." Mr. Morris went on to add that prior to the Welsch's gift of the land to the Pawnee Nation, that the tribe had no place to bury the remains of their ancestors. The tribe is currently collecting blankets, shawls, and fundraising to assist with the efforts to conduct the reburials this fall on the land.

## ***NARF Launches National Media Campaign to Mobilize Intergenerational Support***

On March 26th, 2007, attorneys and staff of the Native American Rights Fund premiered its first ever national, multi-media Public Service Ad Campaign at the opening ceremonies of the National Indian Gaming Association's annual convention and trade show in Phoenix, Arizona. The :60 and :30 second PSA's, entitled, "The Indian



Wars Never Ended,” is part of a greater campaign to generate renewed awareness and intergenerational support for NARF’s continued mission and work to defend tribal sovereignty and the rights and lifeways of Indian peoples. The campaign was also launched simultaneously online to thousands of viewers.

NARF has launched its new multi-media ad campaign with the goal of reaching out and engaging younger generations as well as to build unity across all generations and cultures to join and support the struggle to defend tribal sovereignty. “The Indian Wars Never Ended” PSA represents an intergenerational message of NARF as it establishes a modern-day message for modern-day times.

Featured in the PSA production are NARF Executive Director John Echohawk (Pawnee) and members of his legal team, as well as the award-winning Pawnee/Seminole hip-hop duo, Culture Shock Camp comprised of DJ Shock B and lyricist and PSA composer/producer, Quese IMC, as well as one of Indian Country’s hottest young artists, painter Bunky Echo-Hawk III.

NARF’s “The Indian Wars Never Ended” PSA represents an unprecedented multi-media campaign that will appear online, and on radio, TV, and in print publications in the effort to build support and unify generations and cultures around the defense of tribal sovereignty and Native rights. The campaign will run throughout the year with a number of special events, updates, and ways that can get involved and mobilize support for NARF in your own community. To view “The Indian Wars Never Ended” PSA’s and learn more about how you can take a stand and be a Modern Day Warrior for Native rights visit: [www.moderndaywarrior.org](http://www.moderndaywarrior.org).

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***John Echohawk & NARF Honored  
by National Indian Business Leaders***

John Echohawk, NARF Executive Director, was honored with the Tribal Leadership Award by the National Center for American Indian Enterprise Development (NCAIED) in Las Vegas in mid-March. Echohawk was honored at the Res2007



Conference which is the largest and longest-running business and trade fair in the United States. The event is organized annually by NCAIED. More than 2,500 Tribal and Indian business leaders and Fortune 500 Companies attended the conference this year.

John Echohawk and NARF were honored at the Res2007 Awards Banquet attended by more than 750 tribal and business leaders. David Lester (Muscogee Creek), Executive Director of the Council of Energy Resource Tribes (CERT) and NCAIED board member presented the award to Echohawk. During his award presentation speech, Lester spoke of the profound impact that Echohawk and NARF’s leadership had on tribal sovereignty and economic development success in Indian Country over the last 36 years. It was also noted by Lester that John Echohawk has also served as a board member of NCAIED for more than a decade. He has been a tireless advocate for tribal sovereignty and the opportunities it brings to tribes and Indian Country for economic self-sufficiency and the creation of sustainable tribal economies. Echohawk and NARF received a touching standing ovation from NCAIED membership and Indian and non-Indian business leaders in attendance. Five other Indian and non-Indian business and tribal leaders were also honored at the Res 2007 Awards. 🌟

## **NEW BOARD MEMBERS**

Fred Cantu, Chief of the Saginaw Chippewa Tribe of Michigan, was elected to the NARF Board of Directors to fill the vacancy left by Jaime Barrientoz who completed his three two-year terms on the Board. Tribal Chief Fred Cantu, Jr., has been serving on Tribal Council for the last three and a half years. The last year and a half being the chief and one year as the Tribal Chaplin. Chief Cantu serves along side his wife Denise, who is on the Eldership for the United Tribes for Christ which is an organization based out of Okalahoma City. Chief Cantu is also a former Saginaw Chippewa Fire Department Chief, serving for eight years, and has extensive experience in the tribal gaming operation. Chief Cantu and his wife Denise are also Elders at the Potter's House Family Worship Center and live on the reservation with their three children. The NARF Board of Directors and the NARF staff look forward to working with Chief Cantu.

Keith Anderson, Secretary/Treasurer and member of the Shakopee Mdewakanton Sioux Community in Minnesota, was elected to the NARF Board of Directors to fill the vacancy left by Karlene Hunter who completed her three two-year terms on the Board. Keith was elected to the office of Secretary/Treasurer of the Shakopee Mdewakanton Sioux Community in January 2004. Prior to serving as Secretary/Treasurer, he served on the Little Six Board of Directors as Chairman for five years and as a Board member for two years. The Little Six Inc. Board of Directors consisted of Shakopee Mdewakanton Sioux Community tribal members elected to two-year terms. The Board oversaw the management of the Shakopee Mdewakanton Sioux Community gaming enterprises, Mystic Lake Casino and Little Six Casino. Keith previously worked for Rosemount Engineering as a draftsman in aerospace instrumentation design, and also as a draftsman for Target in the area of store design and store fixture design. The NARF Board of Directors and the NARF staff look forward to working with Mr. Anderson.



# 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. Our ability 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, 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, 2006:

- 
- Little Traverse Bay Band of Odawa Indians
  - Mashantucket Pequot
  - Mille Lacs Band of Ojibwe
  - Muckleshoot Tribe
  - Oneida Tribe of Indians of Wisconsin
  - Pamunkey Indian Reservation
  - Prairie Band of Potawatomi Nation
  - San Manuel Band of Mission Indians
  - Seminole Tribe of Florida
  - Siletz Tribe
  - Southern Ute Indian Tribe
  - Viejas Band of Kumeyaay Indians



# 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](http://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.

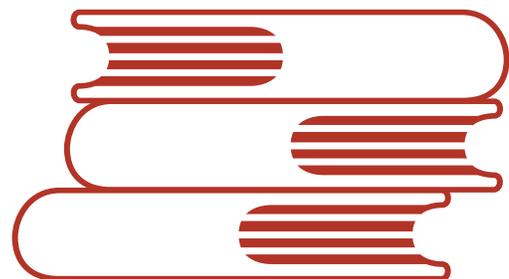
**Research assistance:** In addition to making its catalog and extensive collection available to the public, the National Indian Law Library provides reference and research assistance relating to Indian law and tribal law. The library offers free assistance as well as customized research for a nominal 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](mailto: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](mailto: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.

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**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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