

# NARF Legal Review

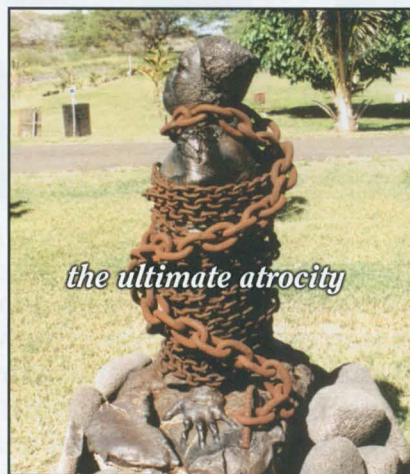
Native American Rights Fund

## Cross-cutting themes in Hawai'i – Native Hawaiian rights, perceived racial differences, and the desire to restore Hawaiian sovereignty

### Introduction

In 1993 the United States Congress enacted the Hawaiian Apology Joint Resolution, Public Law 103-150, 107 Stat. 1510 (1993), admitting that the role of the United States military in removing the Hawaiian monarch, Queen Lili'u'okalani, from power and installing the provisional government was illegal under American and international law. Prior to the overthrow Hawai'i was regarded internationally as one of the family of nations, which had concluded numerous treaties of trade, commerce and friendship with several countries including the United States. The Apology was a watershed event in American history, seen by many Hawaiian people as the first step in making reparations for the illegal overthrow. The overthrow has, for over a century, been viewed by Hawaiians as the ultimate atrocity committed against their sovereign nation, the culmination of the enormous political, social, cultural, economic and spiritual changes wrought on the Hawaiian people since the 1778 arrival of Captain Cook.

The Apology has fueled the passions of the



Hawaiian people involved in the Sovereignty Movement. The United States' admission that the overthrow was illegal, immoral and unjust, is seen as but a first step in the long process of establishing "ho'opono'ono" – the Hawaiian traditional system for "making things right."

For many years the Native American Rights Fund has been involved in the Hawaiian rights movement, commencing with our assistance in the founding of the Native Hawaiian Legal Corporation ("NHLC") more than 20 years ago. Also, since the mid-1980s, NARF has co-counseled with NHLC and private counsel in representing the Pele Defense Fund ("PDF") in efforts to prevent large-scale geothermal development in the Wao Kele 'O Puna rain-forest on the Big Island, 27,000 acres of which are owned by the Campbell Estate, one of the largest land-holding estates in Hawai'i.

PDF and others were ultimately successful in turning away large-scale geothermal development on the Big Island, in part because such a venture

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*"I could not turn back the time for the political change, but there is still time to save our heritage. You must remember never to cease to act because you fear you may fail. The way to lose any earthly kingdom is to be inflexible, intolerant of too many wrongs and without judgment at all. It is a razor's edge, it is the width of a blade of pili grass."*  
(Queen Lili'uokalani 1917)



has never made any sense environmentally or economically, not to mention culturally and spiritually. The Wao Kele rainforest is irreplaceable to those Hawaiians who worship the Goddess Pele, and who hunt and gather there. The efforts of PDF culminated in the August 2002 entry of a stipulated judgment and order by the state court in Hilo, Hawai'i recognizing the PDF members' rights to access, hunt, gather and worship on the Wao Kele lands – part of the bundle of "traditional and customary rights" protected, preserved and enforced under Article XII, § 7 of the Hawaii Constitution.

Because of their status as an aboriginal people, Hawaiians retain special property rights unlike any other native people in America that have been perpetuated since the creation of private property rights in Hawai'i at the time of the Mahele. The Mahele was a land division authorized by Kamehameha III in 1848 to distribute fee-simple title to private parties for the first time in the history of these islands. However, these new rights were subject to retained rights of native people to continue the traditional gathering, cultivation, and worship on those lands

that was basic to the Hawaiian culture. Each subsequent government after the overthrow of the kingdom respected and affirmed these rights until the present. The Hawai'i Supreme Court, interpreting these rights, has held that all public agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible. (2001 Report of the Hawai'i Advisory Committee to the U.S. Commission on Civil Rights (HAC))

How are the overthrow of the monarchy and the Wao Kele litigation related? The traditional and customary rights PDF and its members advanced in the Wao Kele litigation are rights recognized in Hawai'i state law that pre-date both the formation of the state in 1959, and the overthrow of the Monarchy in 1893. They are rights which have been carried forward successfully through time by the Hawaiian people, because they imbue the relationship between the Monarchy and the people, and the respect the Monarchy held for the people, and their role as caretakers of the "aina", the land, and all its bounty. In this way the rights advanced in the PDF litigation are symbolic of the larger



universe of unique rights held by the Hawaiian people as citizens of the Monarchy.

Perhaps beyond that, these rights are part of the history of what was literally stolen from the Hawaiian people by the 1893 overthrow. The Campbell Estate, and other non-Hawaiians who have opposed the PDF and other similar litigation in Hawai'i, prefer to erase any vestige of these rights, erase any vestige of obligation to ho'opono'pono or "make things right" for the overthrow. They attempt to do so under the legal rubric, some would call it a smokescreen, of "Equal Protection" and "Equal Voting Rights." And so we hear cries from the non-Hawaiian "establishment" that it is time to put aside the differences between the Hawaiian people and others who have come to the Islands since 1778; in effect, as Native Americans on the mainland understand – to accept Manifest Destiny and the "melting pot" called America. A much easier accomplishment for the colonizer than the colonized! Rather than erase these unique rights that make Hawaiians "Hawaiian," the Hawaiian people are saying, in effect: "these rights should once again be recognized as rights under OUR law, Hawaiian law, not State of Hawai'i or United States law."

### ***Rice v. Cayetano*: For Whom is "Color-blind" Justice Really "Justice"?**

Following the 1993 Apology, the second event to further sharpen, and hasten, the debate within the Sovereignty Movement occurred in the year 2000 with the Supreme Court decision in *Rice v. Cayetano*, 528 U.S. 495 (2000). In that case Harold "Freddy" Rice, a non-Hawaiian, sought to vote in a 1996 Office of Hawaiian Affairs (hereinafter "OHA") Board of Trustees election. When denied the opportunity, he filed suit against the State of Hawai'i and OHA in federal court challenging the state constitutional provisions establishing the Hawaiian-only elections. OHA is a state agency established by the state constitutional amendments of 1978 to administer a portion of the revenues from the ceded lands' trust for the benefit of Hawaiians.

Rice's primary legal theories were that the OHA voting arrangement violated the

Fourteenth and Fifteenth Amendments to the United States Constitution. The Fourteenth Amendment challenge alleged that such a race-based voting scheme amounted to a violation of constitutional equal protection guarantees. The Fifteenth Amendment claim asserted that the OHA election scheme used ancestry as proxy for race, and thereby enacted a race-based voting qualification which denied or abridged the right to vote solely on account of race.

The Hawai'i federal district court and the Ninth Circuit Court of Appeals rejected both of Rice's constitutional claims. In a 5-2-2 decision the Supreme Court reversed, rendering a decision only on the Fifteenth Amendment voting rights question. Interestingly, *Rice* marks the first time the amendment, adopted after the Civil War to protect the voting rights of African-Americans, was used to advance the voting rights of a white man. Fortunately, the Court did not reach the equal protection issue. In its discussion of the Fifteenth Amendment voting rights issue, however the Court's majority clearly signaled its monolithic preference for race-neutral laws. Had the Court reached the Fourteenth Amendment issue squarely the result would not have been favorable for Native Hawaiians.

The majority rejected the State's position that a racial classification in voting for OHA board members was nonetheless justified because of Native Hawaiians' history, including the admitted illegal overthrow. Also rejected was the State's argument that as a matter of federal law Native Hawaiians enjoy a status analogous to Indian tribes, under the precedent of *Morton v. Mancari*, 417 U.S. 535 (1974). Under *Mancari*, legislation is upheld if "tied rationally the fulfillment of Congress' unique obligation" to Native peoples. The Court reaffirmed *Morton* as applied to federally recognized Indian tribes.

The Court held that in Congress' various enactments for the benefit of Native Hawaiians over the years it had "never determined that native Hawaiians have a [political] status like that of Indians of organized tribes" or that the Congress had the authority to delegate to ▶

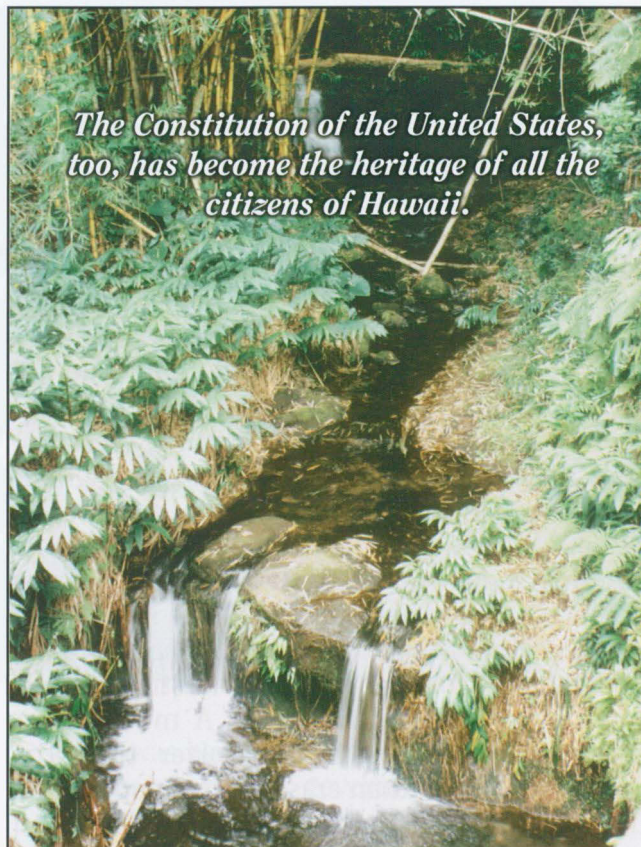
the State the “broad authority to preserve that status.” These assertions by the State, the Court said, raised “questions of considerable moment and difficulty.” “We can stay far off that difficult terrain, however . . . [because even assuming the Congress and the State have this authority] Congress may not authorize a State to create a voting scheme of this sort.”

In his closing remarks, writing for the majority, Justice Kennedy made it clear that the establishment view is that it is time for the Hawaiian people to accept their fate as members of the body politic in America:

When the culture and way of life of a people are all but engulfed by a history beyond their control, their sense of loss may extend down through generations; and their dismay may be shared by many members of the larger community. As the State of Hawaii attempts to address these realities, it must, as always, seek the political consensus that begins with a sense of shared purpose. One of the necessary beginning points is this principle: The Constitution of the United States, too, has become the heritage of all the citizens of Hawaii.

The obvious question remains – justice for whom? Is justice achieved when it is accomplished at the sacrifice of an entire culture, an entire nation? Had not Congress made it abundantly clear in the 1993 Apology that the nation’s “shared purpose,” in Justice Kennedy’s terms, was to begin a healing process for the Hawaiian people? Kennedy’s admonition to forget the past is not the proper way to begin that healing process.

Justice Stevens dissented, joined in part by Justice Ginsburg, maintaining that the Fifteenth Amendment should not govern the case’s outcome. In his view OHA’s Hawaiian-only voting requirement was legitimate, given the compelling historical, cultural and political history of the Hawaiian Islands. This history, in Stevens’ view, justified the imposition of the



State’s special responsibility to administer the public trust to benefit Hawaiian natives. This was *not* a classic Fifteenth Amendment case involving invidious discrimination or the systematic exclusion of racial minorities. Indeed, not even the majority could identify any racially invidious intent lurking behind the decision to limit the right to vote for OHA trustees to Native Hawaiians. Justice Stevens also acknowledged the deep irony of depriving Native Hawaiians of special benefits aimed at restoring their society because of a lack of native political institutions:

But as scholars have often pointed out, tribal membership cannot be seen as the decisive factor in this Court’s opinion upholding the BIA preferences in *Mancari*; the hiring preference at issue in that case not only extended to nontribal member Indians, it also required for eligibility that ethnic Native Americans possess a certain quantum of Indian blood. Indeed, the Federal Government simply has not



been limited in its special dealings with the native peoples to laws affecting tribes or tribal Indians alone. *In light of this precedent, it is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government – a possibility of which history and the actions of this Nation have deprived them.* 528 U.S. at 535. (emphasis added)

It is interesting in this regard to contrast Justice Thomas' vote with the majority in *Rice*, which rejected considerations of history, with his dissent in *Virginia v. Black*, 2003 WL 1791218 (April 7, 2003). *Black* involved a Virginia cross-burning statute stricken down by the Court as an unconstitutional violation of the First Amendment right of free expression. Thomas' dissent included a passionate recitation of the history of the Klu Klux Klan's use of cross burning as a means of intimidation. Thomas described the KKK as one of the "world's oldest and most persistent terrorist organizations." Said Thomas: "In holding [the cross burning statute] unconstitutional, the Court ignores Justice Holmes' familiar aphorism that 'a page of history is worth a volume of logic.'" 2003 WL at 27, quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). Thomas and the balance of the majority clearly ignored Holmes' wisdom in rendering the *Rice* decision.

Mahealani Kamau'u, Executive Director of the Native Hawaiian Legal Corporation, who testified in the year 2000 before the Hawai'i Advisory Committee to the United States Commission on Civil Rights on the legal implications of the *Rice* decision, eloquently laid bare the duplicity of the Court majority:

In rendering its opinion, the High Court chose to apply the law as though entirely separate from the cultural, political, and economic context within which OHA's voting process was

created. That context largely is the result of America's misdeeds and the Hawai'i electorate's desire to make amends. The Court appears to have been influenced by the increasingly dominant discourse of neo-conservatism, which has emphasized the need for strictly color-blind policies, calling for the repeal of special treatment such as affirmative action and other race-remedial policies. *Under this doctrine, implicit assumptions regarding race include beliefs that any race consciousness is discrimination, that race is biological and thus a concept devoid of historical, cultural, or social content, and that a group is either racial or it is not. And if it is racial, it cannot be characterized as political. This approach allows America to ignore its historical oppression of Native Hawaiians when meting out justice in its courts of law.* (emphasis added)

#### **The Aftermath of *Rice v. Cayetano*: More "Color-Blind Justice" to Follow?**

The *Rice* decision, while not technically deciding the equal protection issue, sent signals to opponents of state Hawaiian programs that it was open season on what some see as "race-based special benefits." Over the past three years a flurry of litigation has ensued. For instance, in July 2000, in *Arakaki v. State of Hawai'i*, several Hawai'i residents sued the State of Hawai'i in federal district court alleging that OHA infringed upon their Fourteenth and Fifteenth Amendment rights by refusing to issue an OHA Board of Trustees nomination form to an individual named Kenneth Conklin, on the basis that he is not "Hawaiian." (In addition, the plaintiffs contended that OHA's existence and the state laws under which it operates are invalid, important questions not reached by the Supreme Court in *Rice*.)

In September 2000 the district court in *Arakaki* held that the Supreme Court's ruling in *Rice* compelled the conclusion that the

Constitution also prohibits racial discrimination in the selection of who may run for the OHA Board of Trustees. In early January of 2003 the *Arakaki* decision was affirmed on appeal by the United States Court of Appeals for the Ninth Circuit. In other words, after *Rice* it is unconstitutional for the Office of Hawaiian Affairs to limit its Board of Trustees to Native Hawaiians. Otherwise qualified non-Native Hawaiians must be permitted to run for office and, if elected, serve as OHA Trustees.

The determination in the *Rice* case that the definition of "Hawaiians" is racial in nature will likely continue to threaten state and federal benefits for Hawaiians beyond the invalidation of the OHA voting and Board of Trustees membership issues. Hawaiian benefit programs will now be subject to attack by non-Hawaiians asserting the application of the "strict scrutiny" standard, which requires the government to show that a law which allows the preference for Native Hawaiians is narrowly tailored to achieve a compelling governmental interest. Prior to *Rice*, the courts in Hawai'i addressing equal protection challenges to these programs applied the *Mancari* reasoning and evaluated the program's constitutionality under the less stringent "rational relation" test applicable to Indian tribes. The outcome in each of these earlier court decisions and new challenges to any of the programs effectuating Hawai'i's trust obligations to Native Hawaiians are placed in doubt after the *Rice* decision. As Mahealani Kamau'u, testified to the Hawai'i Advisory Committee of the U.S. Commission on Civil Rights: "Native Hawaiian programs would have difficulty meeting this strict scrutiny test in the best of times, but the High Court's recent inclination to turn a blind eye to the larger context – the historic, cultural, social, and political oppression suffered by Native Hawaiians for over a century at the hands of America – portends disaster."

The *Rice* and *Arakaki* decisions were only the opening shots as many in the Native Hawaiian community and its supporters have feared. In October 2000, two additional lawsuits – *Carroll*

*v. Nakatani* and *Barrett v. State* – were filed in the federal district court in Hawai'i challenging Native Hawaiian programs. *Carroll* involved a challenge to OHA's income and revenue streams, while *Barrett* made a broader challenge to the constitutionality of OHA, the Department of Hawaiian Home Lands ("DHHL"), and Native Hawaiian land access and gathering rights recognized in Hawai'i statutory (H.R.S. § 1-1) and constitutional (Art. XII, § 7) provisions. (Interestingly, the *Barrett* action challenging Native gathering rights comes on the heels of a string of consistent Hawai'i Supreme Court affirmations of the traditional and customary rights of Hawaiians under Article XII, § 7, including a 1992 decision involving NARF's client the Pele Defense Fund.) The *Carroll* and *Barrett* cases were subsequently consolidated, and were dismissed in July of 2001 for lack of "standing." Neither complainant could meet legal standing requirements because neither could establish that they would be able to benefit from the Hawaiian benefit programs being challenged. See *Carroll v. Nakatani*, 188 F. Supp. 2d 1219 (D. Haw. 2001); and *Carroll v. Nakatani*, 188 F. Supp. 2d 1233 (D. Haw. 2002) Neither plaintiff appealed the dismissal for lack of standing.

But the issues have not been laid to rest there. In March of 2002, just weeks after the *Barrett-Carroll* lawsuits were dismissed for lack of standing, new non-Hawaiian plaintiffs took up the cause. Another lawsuit challenging the OHA and DHHL programs was filed – *Arakaki v. Cayetano*. On motions for a temporary restraining order and to dismiss the action for lack of standing, the federal court in Hawai'i ruled that the plaintiffs had limited standing as taxpayers to bring Fourteenth Amendment equal protection claims, but denied the restraining order. In the court's view, the plaintiffs did not establish a likelihood of success on the merits of their equal protection claims. The plaintiffs had relied on the Supreme Court decision in *Rice*, yet, fortunately, the Court in *Rice* ruled only on the voting rights issue, not equal protection. Thus, the trial court in *Arakaki* held that prior case law in Hawai'i





*The Rice decision and post-Rice litigation have brought a new sense of urgency to the Hawaiian Sovereignty Movement...*

applying the Mancari rational basis test, as opposed to the strict scrutiny test, is still good law. See *Arakaki v. Cayetano*, 198 F. Supp. 2d 1165 (D. Haw. 2002). No further developments on the merits of the plaintiffs' equal protection claims have occurred as of press time for this article.

One strong argument against the merits of these recent challenges even after *Rice* is that, in any litigation under the equal protection clause of the Fourteenth Amendment, a claimant first has the burden of demonstrating that s/he is "similarly situated" to the group allegedly receiving special treatment. The Equal Protection clause mandates similar treatment under the law only for those similarly situated. *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210, 1214 (5th Cir. 1991), citing *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). In any challenge to Hawaiian benefit programs, or the statutes or constitutional provisions under which they operate, a non-Hawaiian claimant may be hard-pressed to prove that they meet the similarly situated standard. The legal and historical experience of Hawaiian people since 1778 is vastly different than that of non-Hawaiians; this much was at least given lip service by the majority in *Rice*. Judges with the same ideological bent as the majority of the Supreme Court

in *Rice* may be predisposed to ignore these substantial legal and historical differences which would render an equal protection challenge meritless, in favor of the popular sense of color-blind justice in vogue today.

In the PDF litigation the Campbell Estate, in moving to dismiss the original action by PDF, raised a challenge to the Article XII, § 7 rights of the PDF members on the basis of Fourteenth Amendment equal protection. In its August 26, 2002 decision, however, the state court denied the motion, stating that Campbell had not presented any evidence of injury in any way related to the basis of its defense; i.e., that Art. XII, § 7, unconstitutionally discriminates between Hawaiians and non-Hawaiians. On that basis the court ruled that Campbell therefore lacked standing to litigate the issue of the alleged constitutional defect. Campbell did not appeal the decision.

#### **The "Akaka" Legislative Effort to Close the *Rice* Loophole and to Continue the Reconciliation Begun by the 1993 Apology.**

The *Rice* decision and post-*Rice* litigation have brought a new sense of urgency to the Hawaiian Sovereignty Movement, and a partially-shared sense of focus with Hawai'i's congressional delegation. The urgency and

focus have both positive and negative aspects, however. On the positive side, many Hawaiian people and organizations involved in the debate are in agreement that federal legislation is needed to close the *Rice* loophole and protect the existing state and federal Hawaiian benefit programs. That much, it is agreed, requires re-establishing a formal political relationship between the United States and the Hawaiian people. On the negative side, the looming question is whether the rush to close that loophole will eclipse prematurely the legitimate discussion under way among Hawaiian people over the numerous details required to put flesh on the framework of Hawaiian self-determination. The appropriate *form* of the restored expression of Hawaiian self-determination, however, is *rightly* still a matter of emotional, passionate and sometimes divisive debate.

Over the past decade since the Apology, two primary views within the Sovereignty Movement have emerged – one favoring restoration of complete sovereignty and independence (hereinafter “Independence”) from the United States. The argument for restoring independence is compelling. Given the United States’ admission of its illegal conduct in 1893, what other form of justice, short of complete restoration of sovereignty, will make the Nation of Hawai’i and its people “whole” again? Any legislation restoring less than complete independence can be regarded by Independence advocates as nothing but a continued legitimization of the overthrow.

Proponents of the alternative view favor a political relationship similar to the quasi-sovereign status of American Indian tribes (hereinafter “Nation within a Nation”). This view acknowledges the limitations associated with this model – Indian nations themselves acknowledge that their relationship with the United States is far from ideal – but sees it as the only politically achievable outcome.

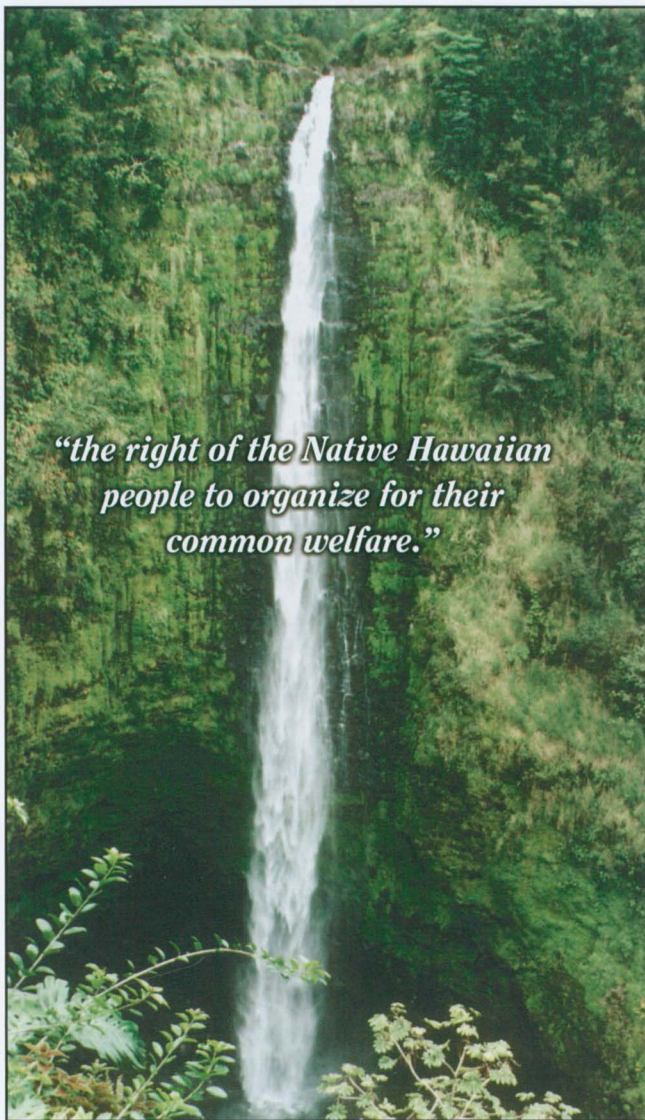
Both views represent legitimate positions, and both have obvious advantages and potential shortfalls. Any legislation which moves quickly to close the *Rice* loophole, however, should be

careful not to foreclose legitimate debate between these views – and among the Hawaiian people – over the appropriate *form* of a restored Hawaiian government. It is possible to achieve both legitimate goals.

Less than a month after the *Rice* decision came down, the Hawai’i congressional delegation began work on a bill to close the loophole exposed in *Rice* over the lack of a formal political relationship between the United States and Hawaiians. The introduction of the first “Akaka” bill in 2000 made the statement that Hawai’i’s congressional delegation strongly favored the “Nation within a Nation” model. The initial bill established a formal political relationship, one grounded in the same “trust” relationship between the United States and Indian tribes. It defined a process for establishing the Hawaiian governing entity, and for defining who is a “Native Hawaiian” eligible for membership in the new entity. Deep divisions in the Hawaiian community were brought to the surface by the initial bills. The initial legislative effort nearly succeeded but eventually failed in the waning days of the Clinton Administration.

Since then, the Hawai’i delegation has re-introduced legislation each session, similar in intent but differing somewhat in process and structure. Most recently, in 2003, identical bills were again introduced in the Senate (S. 344) and House of Representatives (H.R. 665), and initial hearings were held in the Senate Indian Affairs Committee in February 2003. The bills are much more streamlined than the initial effort of 2000. Beyond the definitions and statements of findings of United States policy and purpose, the bills create an Office for Native Hawaiian Relations within the Interior Department, an Interagency Coordinating Group, and, importantly, the general process for recognizing a Native Hawaiian governing entity. Once the people select the governing entity and elect the officers of the entity, and adopt “appropriate organic governing documents,” the Secretary of the Interior is to certify that the documents establish criteria for membership; were adopted





*“the right of the Native Hawaiian people to organize for their common welfare.”*

by a majority vote of the citizens of the entity; provide for the exercise of governmental authority; protect the core Hawaiian land base; and, provide for the entity to negotiate with federal, state and local governments.

Importantly, the current bills reflect a continuing intent to close the *Rice* loophole that has spawned the recent flurry of “equal protection litigation.” They also reflect a willingness (among the sponsors at least) to leave to the Hawaiian people the fundamental, organic decisions about how best to organize themselves, and under whose time-line, saying that it is “the right of the Native Hawaiian people to organize for their common welfare.” Leaving

these decisions to Hawaiians appears to be an effort by the delegation to strike a compromise between the disparate views of Sovereignty advocates. That is one of the most difficult tasks facing any legislative solution and is a recognition, at least implicitly, of the importance of a legislative process which through compromise produces healing and reconciliation, and not merely new injury between Hawaiian people and organizations for the sake of political expediency.

Unfortunately, the act of establishing a political entity with a formal relationship with the United States administered by the Secretary of the Interior – seen as a way of forestalling legal attacks on Hawaiian programs – can be seen as too close in form to the Indian tribal model, too unlike the status that Hawaiian people held, too much of a compromise, too great a price to pay for the loss of the Monarchy and all its resources and authority in 1893. On the other hand, proponents of the Nation within a Nation model fear the strident position of the Independence camp is risking too much, asserting the need to seize the opportunity presented now by the Hawai’i delegation’s willingness to take at least some steps to restore Hawaiian sovereignty and self-determination. Given these disparate views, what is in the long-term interests of the Hawaiian people?

The 2001 Report of the Hawai’i Advisory Committee acknowledges the critical decisions facing the Congress and the Hawaiian people:

In order to make this process truly meaningful, the federal government should engage in a dialogue with Hawaiian leaders to examine the issues surrounding as wide a variety of options for reconciliation as possible. The principles of self-determination and self-governance – which are consistent with the democratic ideals upon which our nation is founded – can only be meaningful if Native Hawaiians have the freedom to examine diverse options for exercising the sovereignty

that they have “never directly relinquished.” Accordingly, the United States should give due consideration to re-inscribing Hawai’i on the United Nations’ list of non-self-governing territories, among other possibilities.... The principle of self-determination necessarily contemplates the potential choice of forms of governance that may not be authorized by existing domestic law. Whether such a structure is politically or legally possible under the law is secondary, however, to the expression of one’s desire for self-determination. The important proposition is that those who would choose to swear their allegiance to a restored sovereign Hawaiian entity be given that choice after a full and free debate with those who might prefer some form of association with the United States (including, perhaps, the status quo). In modern history, Hawaiians have demonstrated an enviable capacity for peaceful discourse and nonviolence. The United States should respect that political maturity and allow for conditions that will give Native Hawaiians the full opportunity to express their desires for self-determination.

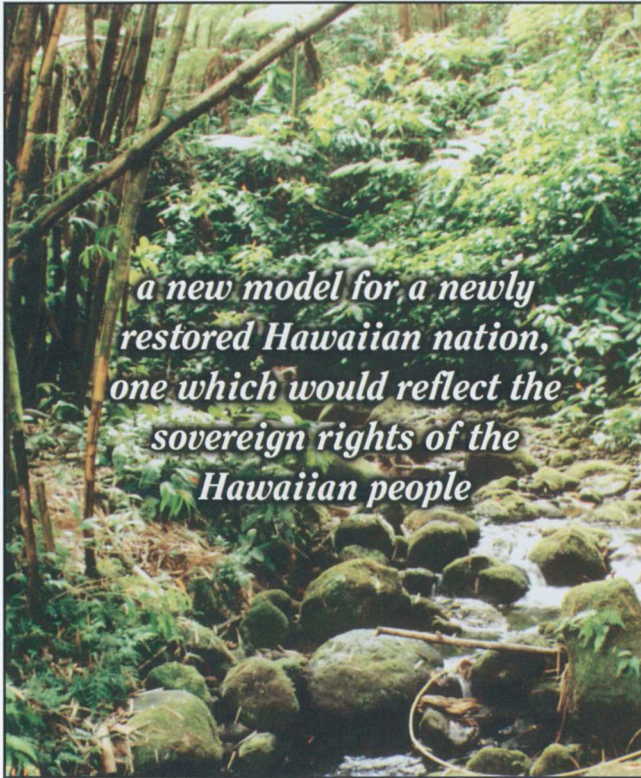
One possible approach to break the impasse might be to move forward on that issue which all factions of the Movement, and the delegation, agree – that of closing the *Rice* loophole. The idea would be to recognize the political relationship between the United States and the Hawaiian people, as the current bills do. But rather than forcing a decision on the final form of the Hawaiian government at the front end, one idea would be to convene a meeting of all sovereignty groups to select representatives for an interim or provisional governmental entity to engage the federal, state and local governments in negotiations on the substantive details to be worked out over land, resources, jurisdiction, etc. Interim or provisional governments have been used both domestically, as in the case of the restoration of the Menominee

Tribe in 1973, see 25 U.S.C. §§ 903 - 903f, and internationally.

As for defining the *process* for negotiations, an idea that warrants further examination is the process of “free association” which exists in international and domestic law for the United Nations’ Trust Territories of the Pacific Islands (“TTPI”). One commentator has made passing reference to the free association model as a possible template for future consideration in Hawai’i. His articles were written prior to the *Rice* decision and the subsequent curative legislative attempts. [See Van Dyke, John, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S. – Flag Islands*, 14 U. Haw. L. Rev. 445, 502-03 (1992), and *Self-Determination for Nonself-Governing Peoples and for Indigenous People: the Cases of Guam and Hawai’i*, 18 U. Haw. L. Rev. 623 (1996)(with Carmen Di Amore-Siah and Gerald W. Berkley-Coats).] The TTPI were placed in United States territorial status following World War II. United Nations Declaration 1541, enacted in 1960, established the free association process for entities desiring to move from territorial or colonial to self-governing status.

Beginning in the mid-1960’s, on the authority of Declaration 1541, the island territories of the Federated States of Micronesia (including Palau, Ponape, Truk, Yap and Saipan)(“FSM”) and the Republic of the Marshall Islands (“RMI”) engaged in complex negotiations over the terms of their free association compacts with the United States. [In 1975, the district of the Northern Marianas separated itself from the other TTPI districts and entered into a Covenant to Establish a Commonwealth of the Northern Marianas Islands in Political Union with the United States. Puerto Rico is also a commonwealth of the United States. Commonwealth status is also another model in existence for the Hawaiian people possibly to consider.] President Reagan formalized the compacts with the FSM and the RMI, also called the Freely Associated States (“FAS”), in 1986. [In 1995 the U.S. Congress approved a separate fifty-year Compact of Free Association with Palau.] On December 22, 1990, the U.N. Security Council passed





Resolution 683, terminating the U.N. trusteeship for the FSM and RMI. In September 1991, both nations were admitted to the United Nations. A series of negotiated amendments to the FSM and RMI compacts are presently in the works. The Departments of State, Defense and Interior have administrative responsibility over the United States' obligations under the FSM and RMI compacts.

Importantly for consideration in Hawai'i, the FSM and RMI compacts of free association demonstrate that it is possible, and there is a framework in existence, for the United States and peoples of the Pacific Islands to move toward the mutual restoration of these peoples' sovereign rights of self-government and self-determination. An examination of these compacts amply demonstrates that many if not most of the numerous issues the United States and the Hawaiian people will have to work through are represented in these compacts. The FSM and RMI compacts give the governments of those entities complete autonomy over local affairs. They are free to join regional and international organizations as independent nations. The laws

of the United States do not apply to them, but some American rules must be complied with contractually under the terms of the compact in exchange for economic and financial assistance. Both FSM and RMI compacts provide for military protection from the United States. See, e.g., [http://pidp.eastwestcenter.org/pireport/special/cofa\\_special.ht](http://pidp.eastwestcenter.org/pireport/special/cofa_special.ht) and <http://www.fm/USEmbassy/compact.htm>.

It is important to stress that the intent of this article is not to suggest that the free association model is free of flaws. And while the choices between alternatives reflected in the FSM and RMI compacts may not represent the array of final choices made by the Hawaiian people and the United States, there should be a process with integrity which makes the very act of choosing possible.

### Concluding Thoughts

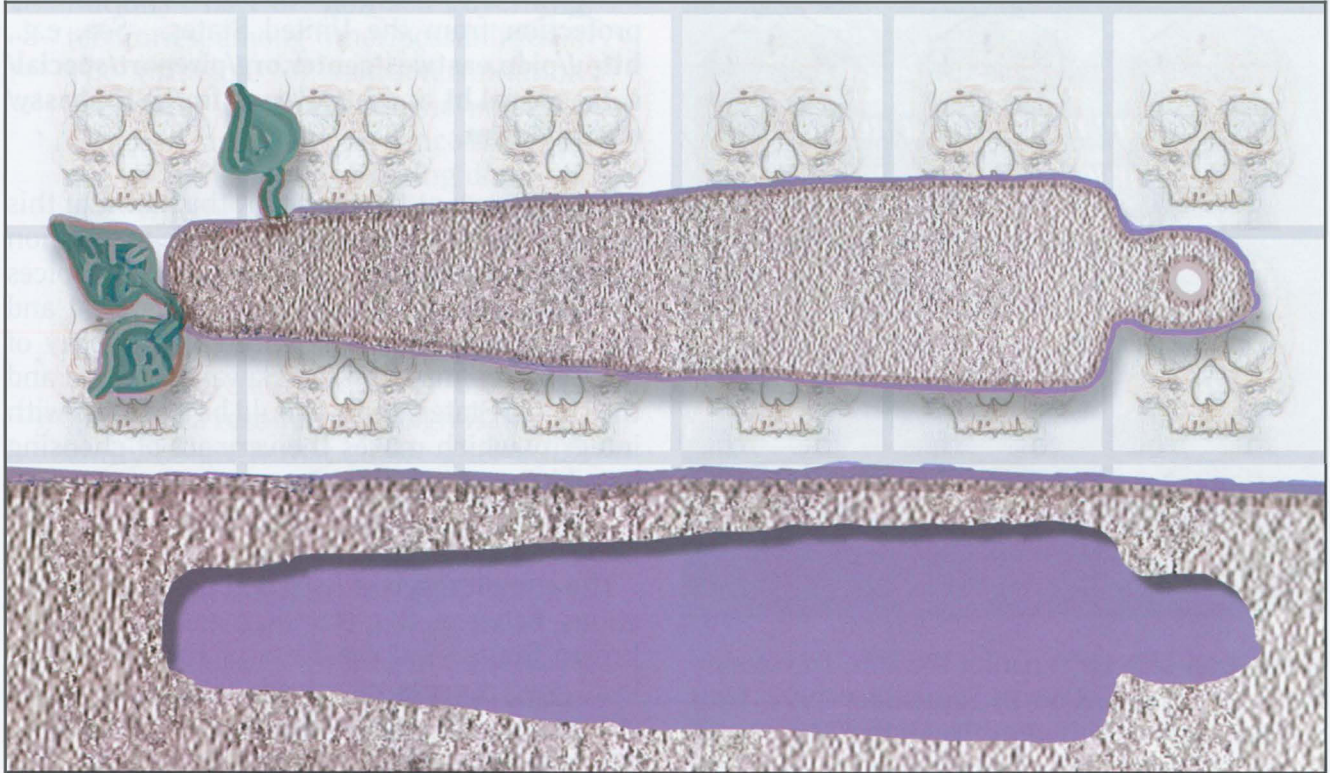
The complex web of legal and political negotiations between the Hawaiian people and the United States, and the State of Hawai'i and its local governments, over land, natural resources, citizenship, regulatory and judicial jurisdiction, will take some period of years to negotiate. The current congressional approach may continue to produce only deadlock and disagreement over the final form of the governing Hawaiian entity. Perhaps it is better to agree to set aside for now decisions on the *final* form of the governing entity, and agree to federal legislation which (1) closes the *Rice* loophole and (2) sets the process of complex negotiations in motion as soon as possible. The foundation for the process will possibly then seek a fuller measure of reconciliation, of *ho'opono'ono*, at the very outset, so that all Hawaiians can feel that they have a rightful seat at the bargaining table.

With an earnest desire and a willingness to work hard to achieve a common vision, the Hawaiian people and the United States Congress have the ability to create a new model for a newly restored Hawaiian nation, one which would reflect the sovereign rights of the Hawaiian people and yet chart a new course of mutual cooperation with the United States. ☸



## CASE UPDATES

### NARF files amicus brief in “Kennewick Man” appeal



On August 30, 2002 Magistrate Judge John Jelderks, U.S. District Court for the District of Oregon, issued a ruling that vacated the Department of Interior’s decision awarding the remains of “Kennewick Man” to the claimant Tribes for reburial. The Court ordered that the government shall not transfer the remains to the Tribal Claimants and shall allow the plaintiffs (scientists) to study the remains of “Kennewick Man.” On October 21, 2002, the Court granted a request by four Pacific Northwest Tribes to intervene in the lawsuit for purpose of bringing an appeal.

The Ninth Circuit Court of Appeals issued an order staying the District Court’s order allowing non-Indian scientists access to the remains for study pending the resolution of the appeal. NARF and the Association on American Indian Affairs filed an *amicus* brief on behalf of the Association on American Indian Affairs and the

Morning Star Institute on March 25, 2003. The brief focuses on the proper interpretation of the Native American Graves Protection and Repatriation Act (NAGPRA).

In determining whether the remains are “Native American” as defined in NAGPRA, the Court found that its interpretation of the statute as requiring a “present-day relationship” is consistent with the goals of NAGPRA and the intent of Congress. The Court found that the Secretary of Interior did not provide sufficient evidence that the remains are “Native American” under NAGPRA and that the Secretary’s findings of cultural affiliation were arbitrary and capricious.

The *amicus* brief addresses the misinterpretation of NAGPRA by the Magistrate Judge and how his interpretation would greatly limit, impede and alter the implementation of NAGPRA.



As a threshold matter, the Magistrate Judge ruled that NAGPRA does not apply to this case because the remains in question are not “Native American” within the meaning of the Act. He interpreted “Native American” (and thus the Act’s scope) as only including those remains and cultural items with a cultural relationship with a currently existing Indian tribe. His decision was based, in part, upon the fact that the definition in 25 U.S.C. 3001(9) refers to a tribe, people, and culture “that is” indigenous to the United States, but perhaps even more so upon his inability to believe that Congress could have intended to include all prehistoric grave sites within NAGPRA’s scope, referring to such a result as “odd or absurd”. The inability of the Magistrate Judge to appreciate that Congress could (and did) have the intent of including prehistoric remains within the scope of the Act is but the latest in a long history of ethnocentric court decisions in the area of Native American human remains. Under NAGPRA, the term “Native American” covers all human remains and cultural items relating to cultures indigenous to the United States, regardless of whether they relate to current day Indian tribes. That being the case, NAGPRA applies to the remains at issue here.

The application of NAGPRA precludes the Court from mandating a remedy that would permit the plaintiffs to study the human remains. *Amici* argues that the Archeological Resources Protection Act (ARPA) regulations utilized by the Court to order access for scientific study are not applicable; that the cause of action provision in NAGPRA does not give the District Court the authority to order that the plaintiffs be given access to the human remains for scientific study; and, that the Plaintiffs have no standing to raise a NAGPRA claim.

*Amici* also argue that the trial court misinterpreted NAGPRA in several other critical respects. Contrary to the Court’s opinion, the Department of Interior’s extensive consultation with Indian tribes is a proper interpretation of the law, not evidence of bias. NAGPRA is based upon the special trust relationship between Indian tribes and the Federal Government and

mandates considerable ongoing consultation with Indian tribes and people. Such “one-sided” consultation is not evidence of bias or improper *ex parte* contact; instead, it simply means that the government was complying with Congressional intent and its overall trust responsibility. The Magistrate Judge held that joint claims are permissible under NAGPRA only in very limited circumstances and that the tribes in this case could not file a joint claim. This interpretation would greatly change how NAGPRA has been implemented since its inception. Joint claims for repatriation are legitimate, and as the tribes pointed out in their brief, almost 49% of all repatriations have been to joint claimants.

Contrary to the court’s opinion, a finding that cultural affiliation exists does not require scientific certainty. The Department of the Interior regulations have accurately captured the legislative intent of the Congress, as they state that cultural affiliation must be “reasonably traced”. “A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.” “Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, and historical” evidence is all relevant. “Claimants do not have to establish cultural affiliation with scientific certainty.” (43 C.F.R. 10.14) By definition, 25 U.S.C. 3002(a)(2)(c) was intended to allow repatriations to tribes who could not meet the cultural affiliation standards for particular human remains when they are discovered on tribal aboriginal lands. Therefore, in making a claim based upon aboriginal occupancy, an Indian Claims Commission finding should suffice. *Amici* asserts that the ruling below was erroneous as a matter of law and should be vacated.

*The amici quoted then – Senate Indian Affairs Committee Chairman Daniel Inouye for the background and purpose of the NAGPRA federal*

*Indian human rights legislation and why it must be liberally construed under canons of Indian law and civil rights construction:*

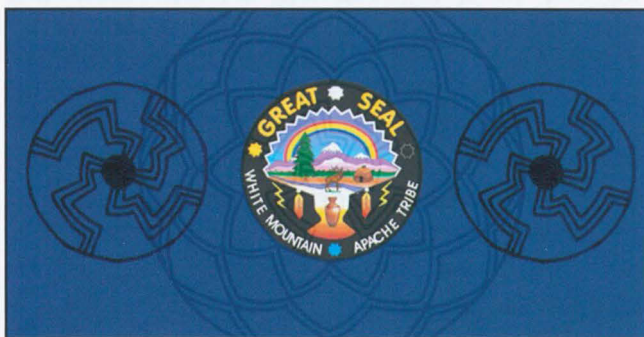
When the Army Surgeon General ordered the collection of Indian osteological remains during the second half of the 19th Century, his demands were enthusiastically met not only by Army medical personnel, but by collectors who made money from selling Indian skulls to the Army Medical Museum. The desires of Indians to bury their dead were ignored. In fact, correspondence from individuals engaged in robbing graves often speaks of the dangers these collectors faced when Indians caught them digging up burial grounds.

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.

In light of the important role that death and burial rites play in native American cultures, it is all the more offensive that the civil rights of America's first citizens have been so flagrantly violated for the past century. Even today, when supposedly great strides have been made to recognize the rights of Indians to recover the skeletal remains of their ancestors and to repossess items of sacred value or cultural patrimony, the wishes of native Americans are often ignored by the scientific community. In cases where native Americans have attempted to regain items that were inappropriately alienated from the tribe, they have often met with resistance from museums...

[T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights... For museums that have dealt honestly and in good faith with native Americans, this legislation will have little effect. For museums and institutions which have consistently ignored the requests of native Americans, this legislation will give native Americans greater ability to negotiate. ☸

## United States v. White Mountain Apache Tribe



In September 2002, NARF filed an amicus curiae brief in the United States Supreme Court on behalf of the National Congress of American Indians in support of the White Mountain Apache Tribe of Arizona.

On March 4, 2003, the Supreme Court handed down a 5-4 ruling in favor of the Tribe. Justice Souter, writing for the majority of the Court, held that the Court of Federal Claims has jurisdiction to hear the White Mountain Apache Tribe's breach of trust claim against the federal government. The Court held that a 1960 Act placing property in trust for the Tribe and investing the United States with discretionary authority to use portions of the property, created a fiduciary duty in the United States to preserve the property. The Court held that the United States would be subject to money damages where it breached its fiduciary duty to so maintain the property. ☸



## NEW BOARD MEMBER



photo credit: Bill Hess

**Vernita Katchatag Herdman** was born and raised in Unalakleet, an Inupiaq community located on the eastern shore of Alaska's Norton Sound, was elected to the Native American Rights Fund Board of Directors replacing Mike Williams who completed three terms on the Board. In 1982 Vernita began writing about hunting and fishing issues as an assistant researcher for the John Muir Institute, exploring the potential impacts of oil development in the Norton Sound area. In 1984 she became involved with the work of the Alaska Native Review Commission [ANRC], which investigated the impacts of the federal land claims settlement on Alaska's Inupiat and Yupiit peoples. Herdman served on the editorial team that provided guidance to Commissioner Thomas Berger during the writing of his report, *Village Journey*. As a program director for the Rural Alaska Community Action Program (RurAL CAP) she coordinated the work of several statewide subsistence and natural resource organizations from 1984 – 1989. Following her return to RurAL CAP in October of 1996, she coordinated a meeting of Alaska Natives to formulate a statewide position on subsistence in February 1997. In May 1998, she coordinated a statewide meeting called the Alaska Conference of Tribes in May 1998 to address tribal concerns in the wake of the controversial U.S. Supreme Court opinion in the *Venette* case. She is the principal author of the *Village Voices* special report on subsistence, published in October 1998. In her work, Herdman specializes in writing about issues related to subsistence and Indian country. In January of this year, Herdman was elected to be a member of the Board of Trustees for the Alaska Conservation Foundation. In June 2003 Herdman will serve for the third time as a member of the faculty for the Sitka Symposium, an annual writer's conference coordinated by the Island Institute.

The NARF Board of Directors and staff look forward to working with Ms. Herdman. ❄️



## NEW BOARD MEMBER

**Paul K. Ninham**, a member of the Oneida Nation in Wisconsin (Wolf Clan), was elected to the Native American Rights Fund Board of Directors replacing Ernie Stevens, Jr. who completed three terms on the Board. Paul is a Councilman for the Oneida Nation Business Committee, 2nd term Delegate to the National Congress of American Indians and an alternate to the National Indian Gaming Association. Paul recently served as Midwest Region representative on the Tribal Leaders Task Force on Trust Reform and has served as a delegate to the Inter-Tribal Monitoring Association.

Paul's special interests include native youth and the environment. Paul has over 20 years experience working with Native children. Prior to completing his B.S. degree in physical education from Arizona State University in 1983, Paul worked as Director of the Oneida Recreation Program. Paul later returned to this position in 1996 after working as Recreation Director at the Institute of American Indian Arts in Santa Fe, New Mexico and Recreation/Physical Education Director at the Indian Community School in Milwaukee, Wisconsin where he created an innovative curriculum based on Native traditional games. Paul has also worked with Native youth at several group homes in Santa Fe, New Mexico, Durango, Colorado and Oneida, Wisconsin.

As an advocate for the environment, Paul currently serves as the Oneida Nation's Authorized Official for the Natural Resources Damage Assessment (the Oneida Nation is a trustee in the effort to clean up northeastern Wisconsin's lower Fox River waterway). Paul also works with several environmental groups including the EPA's Region V Tribal Operations Committee. In recognition of his work and experience, Paul has been selected as Vice-Chairman to the Wisconsin Tribal Conservation Advisory Council and is serving a second term on the State/Tribal Relations Committee, a special Committee of the Wisconsin State Legislature. In addition to his special interests,



Councilman Ninham is a member of the Oneida Nation's negotiating support teams working on compacts related to gaming, land claims in New York State, natural resources and service agreements with local governmental jurisdictions. Two of Councilman Ninham's top priorities are the education of native youth and the preservation of language and culture.


The NARF Board of Directors and staff look forward to working with Mr. Ninham. 🍕



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## 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-third year of existence, it can be acknowledged that many of the gains achieved in Indian country over those years are directly attributable to the efforts and commitment of the present and past clients and members of NARF's Board and staff. However, no matter how many gains have been achieved, NARF is still addressing the same basic issues that caused NARF to be founded originally. Since the inception of this Nation, there has been a systematic attack on tribal rights that continues to this day. For every victory, a new challenge to tribal sovereignty arises from state and local governments, Congress, or the courts. The continuing lack of understanding, and in some cases lack of respect, for the sovereign attributes of Indian nations has made it necessary for NARF to continue fighting.

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

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

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**NARF's website awarded "Standard of Excellence" by the Web Marketing Association. Visit NARF's award winning website at [www.narf.org](http://www.narf.org)**

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

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

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