



NARF Legal Review

Native American Rights Fund

Kickapoo Tribe in Kansas files lawsuit in federal court to end 30-year era of systematic deprivation of the Tribe's water rights

Introduction

On June 14, 2006, the Native American Rights Fund (NARF), on behalf of the Kickapoo Tribe in Kansas, filed a federal lawsuit in the U.S. District Court in Kansas City in an effort to enforce express promises made to the Tribe to build the Plum Creek Reservoir Project in the Upper Delaware and Tributaries ("Delaware" or "UDT") watershed in northeast Kansas. The Nemaha-Brown Watershed Joint Board # 7, the Natural Resources Conservation Service (NRCS) of the United States Department of Agriculture, and the State of Kansas made these promises to the Tribe over a decade ago. In the intervening years these parties have been actively developing the water resources of the watershed, resulting in the near depletion of what should be recognized as the Tribe's senior federal water rights in the drainage.

In the federal litigation the Tribe is seeking a declaration that the Tribe and its members hold the senior water rights in the Delaware water



Angie Cadue, Kickapoo Tribe in Kansas

system in Kansas, as a matter of federal and state law, and seeking declaratory and injunctive relief against the defendants to prevent the continued expenditure of state and federal funding of projects on private land in the watershed. These projects are destroying the Tribe's access to long-term and sufficiently dependable water quantities, of sufficient quality.

This action also seeks enforcement of promises made by the United States, the State of Kansas, and those named districts to provide meaningful access to water for the Kickapoo people. ▶

▶ Kickapoo Tribe in Kansas files lawsuit in federal court to end 30-year era of systematic deprivation of the Tribe's water rightspage 1

▶ CASE UPDATES
- NARF's National Indian Law Library wins national award page 7
- Voting Rights Act Reauthorization 2006 page 7

- Historic United Nations vote on indigenous rights page 8

▶ CALLING TRIBES TO ACTION!
..... page 9
▶ Indian Law Library page 10

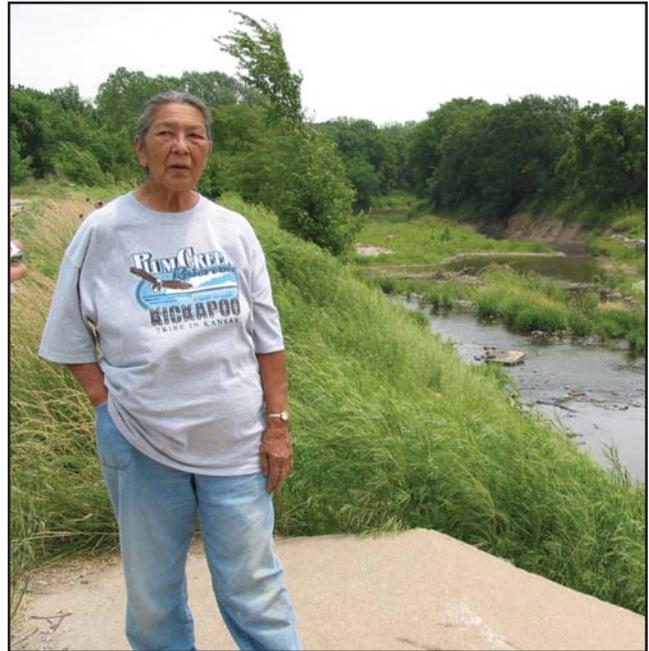
The Tribe seeks specific performance of express promises made to the Kickapoo Tribe in the 1994 UDT Agreement, executed by the parties to this lawsuit. Because of the systematic actions of the defendants, and the refusal of the Bureau of Indian Affairs to take affirmative protective action, the Tribe has been systematically deprived of the water to which it is legally entitled for more than a generation.

For far too long the Kickapoo people have waited patiently for their state and federal neighbors and partners to act honorably and in good faith. The Kickapoo people now seek to receive justice from the courts of the United States for promises repeatedly delayed, denied and broken.

The Issue

Water is life to the Kickapoo people. Since aboriginal times in the Great Lakes region the Kickapoo people have managed water to sustain life. Many traditional stories and practices of the Kickapoo people revolve around the mystery and sanctity of water. The Kickapoo Tribe has many historical, social, and religious ties to water. The selection by the Tribe of the lands which became its present reservation in Kansas was made in part due to the proximity to and abundance of water sources. Water is vital to make the Tribe’s Reservation homeland in Brown County, Kansas a liveable and economically viable place for the Tribe and its members, as well as other non-tribal members who live on the reservation and depend on the same water supply.

For over 30 years the Tribe has been seeking a way to secure a long-term, dependable source of water for its homeland and its Tribal members. It has been working *in good faith* with Nemaha Brown and its Board, and the NRCS, since 1983 – a period of 23 years – to secure the multi-purpose Plum Creek project as part of the larger UDT Watershed Agreement. In 1994, the Tribe and the defendants in the lawsuit signed a federal contract to develop 21 water storage projects in the watershed under the federal P.L. 83-566 Small Watersheds Program administered by



Angie Cadue describes the depleted and unreliable supply of water from the Delaware River.

NRCS. The Plum Creek Project was the largest, and focal point, of the entire UDT Agreement. Congress approved the project in 1998, and authorized NRCS and the parties to proceed.

The Nemaha Brown Watershed District is a party to the agreement in large part, from the Tribe’s perspective, for its authority to condemn fee lands within the Plum Creek project boundaries as well as for the 20 smaller dam projects. The Tribe does not have the authority under federal law to condemn fee lands. At no time prior to 2003, when the Nemaha Brown Board of Directors first evinced its intent not to perform its obligations under the Watershed Agreement by *indefinitely tabling the vote to condemn private lands* within the Plum Creek project boundaries, has there been any indication to the Tribe that Nemaha Brown or its Board had any change of heart concerning its obligations under the Agreement. The Tribe has been betrayed by the Nemaha Brown Board’s refusal to proceed with the promised condemnation of the lands necessary for the Plum Creek multi-use project.



As a direct consequence of the activities of the defendants, the Delaware River and its tributaries, flowing through the Kickapoo Reservation, are choked with so many dams, ponds, terraces, waterways and related impoundments that the river system currently cannot produce sufficient water quantity flows of adequate quality, to meet the homeland rights of the Kickapoo Tribe and the Kickapoo people. The Tribe's water quality treatment plant, adjacent to its tribal offices in Horton, Kansas, is presently under a federal Environmental Protection Agency notice of violation of the federal Safe Drinking Water Act of 1974, and has been *continuously* since January of 2004.

According to the EPA, the water quality on the reservation is so poor it is harmful to human health, unsuitable for human consumption, and

is in violation of the Safe Drinking Water Act of 1974. As a result the Kickapoo people are unable to safely drink, bathe or cook with tap water.

The denial of the relief requested by the Tribe, namely the denial by the NRCS to cease funding activities in the UDT watershed, and the denial by the BIA to intervene and assist the Tribe in protecting its land and water resources are, in contravention of the United States' obligations to the Tribe under federal treaty, statutory and common law.

Under Supreme Court precedent, the Tribe has a fundamental right to sufficient water from water sources flowing over and through its land reservation, to ensure a viable homeland for the Kickapoo people, for present and future purposes, including domestic, industrial, commercial, municipal, agricultural and other



cultural purposes.

The Supreme Court established in *Winters v. United States*, (1908) and re-affirmed in *Arizona v. California*, (1963) and in numerous subsequent federal and state court decisions, the Tribe and its members have reserved federal water rights, called “*Winters* rights,” sufficient to fulfill the purposes of the creation of its Reservation, first established in Kansas in 1832. The Tribe’s *Winters*’ rights and those of its members are the senior rights on the Upper Delaware River and its tributaries. Under both federal and state law, the water impoundment projects of junior users – and associated state law based water rights – cannot be approved, funded and constructed if they harm the rights of a senior right holder such as the Tribe. The Plum Creek project is crucial to ensuring the senior rights of the Tribe are not adversely affected.

The Plum Creek project has been viewed by the Tribe for over three decades as the primary

Left to right; Damon Williams, Tribal General Counsel; Amelia Holmes, Tribal Staff Attorney; Lester Randall, Tribal Vice-Chairman; Amy Bowers, NARF Law Clerk; Steve Cadue, Tribal Chairman; Bobbie Dornall, Tribal Council; Steve Moore, NARF Attorney — Filing suit at the federal courthouse.

means by which it would secure the long-term, dependable and ultimately decreed rights to water to which the Tribe and its members are entitled as a matter of federal law.

In times of natural drought such as that experienced in the Summer of 2003, the combined effect of the drought and the man-made impoundments in the UDT watershed cause the Upper Delaware River to run dry for long periods of time. A generation ago the watershed was far more reliable for meeting the Tribe’s needs, but upriver development has altered it radically.

During the drought of 2003 the Delaware River, and its upstream tributaries, were completely without flow for over sixty days due to the severe weather conditions in the Midwest and Western states, as well as the adverse effects of upstream impoundments developed by the defendants. The Tribe was forced to severely ration water and truck over 7,000,000 gallons of drinking water to the Reservation. The Tribe's commercial operations as well as individuals and families were forced to cut water consumption by almost 60%.

Sadly, these climate extremes are not new, unknown, or an unexpected part of living in northeast Kansas, where the Tribe was forcibly relocated in the 19th Century, unlike in the Tribe's original homeland in the Lower Great Lakes. Thus the Kickapoo Reservation faces off-again – on-again drought conditions resulting in a continual crisis in obtaining an adequate and reliable water source to meet the basic health and sanitary needs of the Kickapoo people.

As a direct and foreseeable consequence of the water resource development activities undertaken by the defendants, the natural drought fluctuations and resulting water shortages which have beset the Upper Delaware River and the Kickapoo Tribe have been badly exacerbated. This result could and should have been foreseen by the United States and its State partners, who collectively have a fiduciary obligation to the Kickapoo Tribe and its people to protect their land and water resources – their homeland, and who have a contractual obligation pursuant to the UDT Agreement to assist the Tribe in the development of the Plum Creek project so as not to interfere with its water rights.

The NRCS, the BIA, and the State of Kansas have known for decades of the fragile and precarious nature of the Upper Delaware and Tributaries Watershed, of the Tribe's dependence upon that watershed, and thus of the fragile and precarious nature of the Tribe's water situation. Given the trust obligation to protect the trust assets of the Tribe, it is therefore unconscionable that these entities would spend millions of dollars to develop the non-Indian

water resources in the watershed in violation of and interference with the *Winters* rights of the Tribe and its members.

The Kickapoo Tribe

The Tribe has a tragic history in the settlement of the Great Lakes and Midwest regions of what is now the United States. It has been forcibly moved at least five times by the United States, pursuant to ten treaties spanning a fifty-year period between 1809 and 1862. Those treaties generally promised the protection of the federal government of the Tribe's reservation as an exclusive homeland for the Kickapoo people. Time and again the United States failed to fulfill the promises it made to the Kickapoo Tribe and people; time and again their reservation lands were taken from them and they were moved – first from the Fox River Valley in Wisconsin to Illinois, and then to Missouri and finally to Kansas.

The Tribe has occupied its present territory in Kansas since the 1832 Treaty of Castor Hill, twenty-nine years prior to the Kansas Statehood Act of 1861. In the Treaty of 1854, the Kickapoo Tribe ceded over 600,000 acres of land to the U.S. Government, but retained approximately 150,000 acres of land within its original Reservation boundaries. In 1862, the Tribe ceded the remaining lands to the U.S. Government, except the current five (5) by six (6) mile Reservation, also within the original boundaries. These treaties and other federal laws and court decisions confer on the United States and its departments of government an express and enforceable fiduciary obligation to protect the land and natural resources of the Tribe.

The Tribe presently holds equitable title to approximately 3,800 acres, and fee title to another 600 acres of land within its Reservation boundaries. Tribal members own equitable title to another 3,100 acres of allotted land. Under federal law the underlying legal title to this land is held in trust for the Tribe and its members by the United States.

In the mid-1970s, the Tribe constructed its own water treatment and supply system with



financial assistance from the U.S. Economic Development Administration. The Tribe also established a Tribal Environmental Office supported by the U.S. Environmental Protection Agency. The Tribal water system includes a low water impoundment dam on the Delaware River, an intake and raw water pump station, water treatment plant, and distribution system. The Tribal water treatment plant was constructed in accordance with federal drinking water quality standards. The low water impoundment dam was developed merely as a temporary supply measure to serve the Tribe until a permanent upstream reservoir on Plum Creek could be developed.

The Kickapoo Water Treatment Plant currently supplies water to both Indian members and non-Indians alike who live within the Reservation boundaries. The Tribe operates its own Tribal School – grades K through 12 – and would like to supply water to this facility, but they are unable to supply the school with water from their own water supply. Several economic development opportunities for the Kickapoo people have been lost over time because the Kickapoo Tribe could not ensure that the Tribe’s water works could meet their water needs. The lack of water is restricting the economic growth and development of the Kickapoo people.

The Tribe also provides basic fire protection to all Reservation residents, both Kickapoo tribal members and non-Indians alike, under mutual aid agreements executed with neighboring jurisdictions. The Tribe’s ability to do so, however, is severely impaired by the lack of water. Reservation residents and numerous Tribal structures are in constant danger. In March of 2005, an arsonist set a large fire on Kickapoo lands, destroying 1,500 acres. Without the aid of neighboring communities, a larger land area, including homes and other structures, would likely have been destroyed due to the shortage of water.

The water hauling expenses incurred in the drought of 2003 were covered in part by the federal Bureau of Indian Affairs and Bureau of Reclamation, in recognition of their trust responsibility to provide safe drinking water to



Steve Cadue, Chairman, Kickapoo Tribe of Kansas

Indian people; indeed a cruel irony, given that the *Winters* rights of the Tribe to water are the most senior on the Upper Delaware River system. The United States has an affirmative obligation to protect the Tribe’s *Winters* rights in the UDT watershed, not to deliberately permit their depletion, and then haul water to the Tribe and its members under emergency conditions partly of its own making.

Conclusion

Through the litigation the Tribe intends to secure its water rights in the Upper Delaware River watershed, for the full range of uses to which Indian tribes are entitled to water under the *Winters* doctrine. The Tribe has stressed that litigation was a last resort, however, a necessary one in order to convince the other major players in northeast Kansas of the seriousness of its position. There may be possibilities for turning the litigation into a successful Indian water rights settlement, as has happened in other parts of the United States primarily in the west, but only time and the cooperation of the other sovereign governments and the Nemaha Brown Watershed Board and its members will tell. 🌟

CASE UPDATES

NARF's National Indian Law Library wins national award

When the Native American Rights Fund (NARF) was founded in 1970, it immediately determined that in order to promote justice for Native Americans, it needed to provide legal research assistance to the public. Without access to the right information, it would be difficult for people to understand the unique relationship between American Indian nations and the United States government. It would be difficult for people to fight for the rights of America's indigenous peoples. As a result, NARF established the National Indian Law Library (NILL) two years after its founding.

Today NILL, provides research and information support to both NARF and the public. Each year, NILL provides personal assistance to over a thousand tribal attorneys, tribal governments, students, educators, Indian law clinics and legal support centers, prisoners, the media, and others. Countless people have been helped by accessing information from the library's web site also at: <http://www.narf.org/nill/index.htm>.

Recently, the library was awarded the American Association of Law Libraries "Public Access to Government Information" award for its effort in making tribal laws and other valuable Indian law information accessible. Another renowned service of NILL which keeps gaining in popularity are the Indian Law Bulletins. (See: <http://www.narf.org/nill/bulletins/ilb.htm>) This free service makes available summaries of the most recent and important Indian law cases, news, regulatory information and articles. "Subscribers" to the Bulletins receive email alerts as soon as new information is published.

The National Indian Law Library, unlike most public libraries, does not receive funding from local or federal tax levies. It is supported almost solely by individual contributions, yet its mission is to be open to all. But NILL is especially proud to assist tribal governments. Think of NILL as *your* law library. Information professionals David Selden and Monica Martens are ready to help with your next Indian law-related research project.

Voting Rights Act Reauthorization 2006

In 2006, NARF partnered with the Leadership Conference on Civil Rights to encourage Congress to renew the Voting Rights Act (VRA) which was set to expire in 2007. As part of this effort, NARF authored a report – the first of its kind – on the impact of the VRA in Alaska. NARF was then asked to support this with Congressional testimony before the Senate Committee on the Judiciary. We are delighted that the VRA has been renewed with overwhelming support and was signed into law for another 25 years on July 27, 2006. While many people associate the VRA with the African-American population and southern states, the VRA has also had a profound impact on the voting rights of American Indians and Alaska Natives.

Two sections of the VRA critical to Indian Country were up for reauthorization: the minority language provisions and preclearance. The former,

which are found in Section 203, mandate that if more than 5% of the voting age population in a certain jurisdiction are members of a single language "minority" and have limited proficiency in English, then that jurisdiction must provide oral and written assistance in the minority language. (Jurisdictions may also find themselves subject to the minority language provisions under section 4(f)(4) of the VRA if they employed a "test or device" such as a literacy test in previous elections.) More specifically, this means that everything from registration forms to actual ballots and even the signs posted at the polling place must be in the minority language, in addition to having translators available at every poll. Section 203 essentially provides that in jurisdictions where more than 5% speak a Native language, the elections have to be conducted in English and the Native language. ►

Nationally, more than 400 jurisdictions are covered by Section 203, including most of Alaska. The other critical provision of the VRA, preclearance, provides that jurisdictions with a history of discrimination must submit all election law changes to the U.S. Department of Justice for review before that change is implemented. This prevents jurisdictions from enacting laws that would impair or interfere with the right to vote, such as forbidding the use of tribal identification cards or requiring state-issued driver licenses. These two sections form the centerpiece of the VRA.

Alaska was central to NARF's study of the impact of the VRA in Indian Country because many Alaska Natives still speak primarily their Native language. This is particularly true of Central and Siberian Yup'ik people in the western part of the State and the Inupiat people in the north and northwest. In the Yup'ik-speaking Bethel area for example, the conservative estimate for those with limited English proficiency is 21%. That means more than one-fifth of the population speaks Yup'ik instead of English. But the Yup'ik do not have to learn English to vote – the VRA requires that the

elections learn Yup'ik! Therefore, it can be said that the VRA is absolutely vital to maintaining the right to vote among non-English speaking Alaska Natives.

However, the fact that the VRA has been reauthorized with these two important provisions does not mean the end of NARF's commitment. NARF's report on the impact of the VRA in Alaska revealed that Section 203 has not been fully implemented in Alaska. Many non-English speaking Alaska Natives who are entitled to oral and written assistance receive little to no help. There are no written materials of any kind in any Native language and voters report only inconsistent oral assistance by people who they claim are not trained translators. As a result, many Alaska Natives report having voted in a way they did not intend. In general, many non-English speaking Alaska Natives, elders in particular, find voting an intimidating and confusing process and some do not vote at all because they simply do not understand. That is a tragedy. The full impact of the VRA can only be realized if it is fully implemented. NARF is committed to monitoring and encouraging compliance with this law in Alaska and around the United States.

Historic United Nations vote on indigenous rights

On June 29, 2006, in an historic vote, the new United Nations' Human Rights Council overwhelmingly approved the United Nations' Draft Declaration on the Rights of Indigenous Peoples. The vote was thirty in favor, two opposed, and 12 abstaining. The only two countries voting against the Declaration were Russia and Canada. The Declaration approved was a combination of provisions agreed upon by indigenous peoples worldwide and states, and a compromise text of those provisions upon which consensus had not been reached. This compromise text was developed by the Chair of the Working Group on the Draft Declaration. Thus, while the Declaration as approved was not a consensus document, it was endorsed by most indigenous peoples worldwide as a major step forward in a process that has been

going on since the 1970s.

The Declaration recognizes that indigenous peoples have important collective rights in a multitude of areas, including self-determination, spirituality, lands, territories, and natural resources. Indigenous peoples and most states consider these rights to be human rights just as the individual human rights recognized by western notions of human rights. The positive vote by the Human Rights Council means that the Declaration will be forwarded to the General Assembly of the United Nations for vote later this year.

NARF has participated in the process of the draft declaration for several years on behalf of its client, the National Congress of American Indians. 🌟

CALLING TRIBES TO ACTION!

It has been made abundantly clear that non-Indian philanthropy can no longer sustain NARF's work. Federal funds for specific projects are also being reduced at drastic rates. NARF is now facing severe budget shortfalls. Our ability to provide legal advocacy in a wide variety of areas such as religious freedom, the 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, 2005:

- Agua Caliente Band of Cahuilla Indians
- Barona Band of Mission Indians
- Colusa Indian Casino & Bingo
- Coquille Indian Tribe
- Cow Creek Band of Umpqua Tribe of Indians
- Denver Indian Family Resource Center
- Grand Traverse Band of Ottawa & Chippewa Indians
- Hopi Tribe
- Keweenaw Bay Indian Community
- Little Traverse Bay Band of Odawa Indians
- Mashantucket Pequot
- Mohegan Sun Casino
- Morongo Band of Mission Indians
- Native Village of Nunapitchuk (IRA)
- Oneida Tribe of Indians of Wisconsin
- Saginaw Chippewa Indian Tribe of Michigan
- Saint Regis Mohawk Tribe
- San Manuel Band of Mission Indians
- Seminole Tribe of Florida
- Shakopee Mdewakantan Sioux Community
- Twenty Nine Palms Band of Mission Indians
- Viejas Band of Kumeyaay Indians
- White Mountain Apache Tribe



National Indian Law Library

Your Information Partner!

About the Library

The National Indian Law Library (NILL) located at the Native American Rights Fund in Boulder, Colorado is a national public library serving people across the United States. Over the past thirty-three years NILL has collected nearly 9,000 resource materials that relate to federal Indian and tribal law. The Library's holdings include the largest collection of tribal codes, ordinances and constitutions in the United States; legal pleadings from major American Indian cases; law review articles on Indian law topics; handbooks; conference materials; and government documents.

Library Services

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

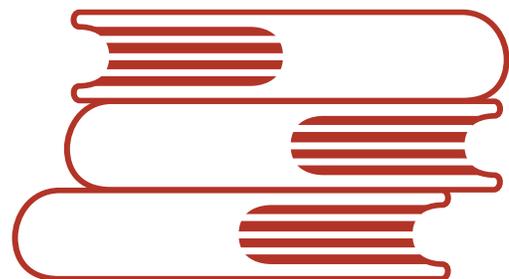
Research assistance: In addition to making its catalog and extensive collection available to the public, the National Indian Law Library provides reference and research assistance relating to Indian law and tribal law. The library offers free assistance as well as customized research for a nominal fee.

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 if you would like to subscribe to the Indian Law Bulletin service. The service is free of charge!

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



THE NATIVE AMERICAN RIGHTS FUND

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

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

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



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

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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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