



# Legal Review

NATIVE AMERICAN RIGHTS FUND

## REDISTRICTING IN INDIAN COUNTRY WE CAN #SHAPENATIVEFUTURES



Every ten years, the United States holds a Census to determine how many people live in the United States and its territories. One thing that we do with that population information is to divide the nation

into voting districts. That process is known as redistricting. Redistricting is the redrawing of political boundaries for election districts for the US House of Representatives, state legislatures, county commissioners, city councils, school boards, and other local bodies.

Having equal numbers of voters in each of a state's voting district protects the constitutional right to have a vote that is equal to any other person's vote. Thus, under the Constitution, a state must ensure that its districts each have approximately the same number of people. By redrawing the lines every ten years, the government can make changes to district boundaries based on where people have moved or where populations have grown or shrunk. This often over-looked process is essential for protecting our civil rights and political strength. Without these periodic adjustments, the voting power of a particular community can become diluted over time.

In addition to preserving equal representation, how officials define boundaries during the redistricting process is important. The way people are grouped into districts has an immense influence on who our representatives are and what policies

they fight for. Voting districts control access to political representation. Changing district boundaries can change the political agency of the people therein. ***It is crucial that Native Americans and Alaska Natives have an equal voice in redistricting, to protect the ability of Native voters to elect candidates of their choice and protect their political power.*** The Native American Rights Fund is providing education and resources to make sure that Native communities are prepared to effectively participate in the 2021 redistricting process.

### Redistricting Effects and Limitations

The United States Supreme Court started the modern era of redistricting in the 1960s. The Court's rulings during this time were intended to address issues like the rural-urban tension and racial discrimination. Prior to the Supreme Court rulings, some states across the country had not redistricted for decades. It was a way to maintain existing power structures.

During the first half of the 20th century, many states resisted redistricting, and voting districts often became markedly unequal as populations shifted from one region to another. Political

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boundaries were not redrawn and districts were increasingly unequal in size and equity. For example, one state legislator might represent 45,000 people, while another only represented 20,000. The people in the smaller district would have disproportionately more representation, making the system unfair.

The Supreme Court ended that practice by finding that the US Constitution required equal populations for state and federal legislative seats (except the US Senate seats). They required states to redistrict every ten years, after the national census was completed.

After the Court required redistricting and equal districts, partisans shifted efforts. Instead of resisting redistricting entirely, they envisioned ways to work within the Court's requirements,

but still give their interest group the most seats and political representation that they could. In order to do this, organizers ignored obvious community boundaries and instead created boundaries that moved blocks of voters between districts in a way that created an advantage for their own interest group.

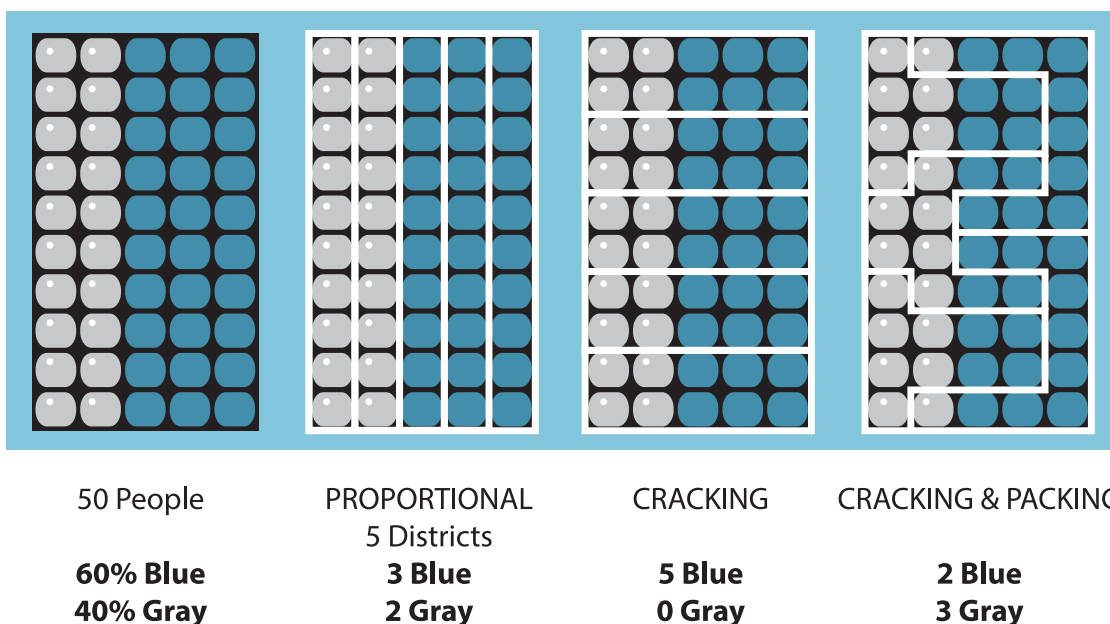
### Gerrymandering

Those undemocratic efforts paid off. It soon became clear that, even when districts have nearly equal populations, a map can still limit a certain group's political power. This abuse of redistricting is called gerrymandering. Often it is used to exclude communities from political power completely.

District lines often dilute votes in two ways. First, district lines can "crack" minority voters into

# GERRYMANDERING

How District Boundaries Can Affect Representation



Adapted from Steven Nass (CC BY-SA 4.0)

many districts, where they are a small percentage of the population in each. This leaves them unable to elect their representative of choice, despite having enough votes to do so if they were grouped together in a district. In the image on the previous page, gray voters have been cracked in the third map, leaving them without control of any districts, even though they represent forty percent of the population. In the alternative, a map might “pack” minority voters into one district, when they would have more political power if they were spread out in multiple districts. In the fourth map, most of the blue voters have been packed into two districts. The rest of the blue voters have been cracked up in the other districts. This leaves the blue voters with forty percent of the districts, even though they are sixty percent of the population.

When voters are unfairly “packed” or “cracked,” even turning out every eligible voter may not be enough to win an election. This is why redistricting is so important.

In order to prevent racial gerrymandering, it is necessary for Native Americans to advocate for their communities in the redistricting process. This is our chance to create a fair system that will stay in place for the next ten years.

### Taking Action

Many redistricting officials may not be aware of Native communities, their natural boundaries, and their political issues, so it is important for Native community members to participate, raise awareness, and explain why they should be considered. Each state has different rules about who is responsible for drawing new lines. In many states, the state legislature draws lines for congressional districts and for state legislative districts. And at the county and local level, maps are usually drawn by county and local officials.



Although these officials get to make the final decisions, they don't make them alone. Many states have requirements for public hearings and public comment, giving tribal leaders and community advocates a chance to voice their opinions on proposed maps or even submit a proposed map of their own.

As we approach the redistricting season, NARF has developed resources for Native communities to use during the upcoming redistricting process. Those materials are available at <https://vote.narf.org/redistricting/> and include general toolkits, guides on how to organize and give testimony, and links to online tools for mapping.

**Redistricting is a powerful tool that can be used to suppress or advance Native political power. We have the ability to make a meaningful impact on how our communities are shaped for the next 10 years. Right now, we have the ability to #ShapeNativeFutures.**

More information available at <https://vote.narf.org/redistricting/>. 🌟



## CASE UPDATES

### Red Lake Nation Fisheries Win Helps Preserve Tribal Sovereignty

The Native American Rights Fund has helped to preserve the right of the Red Lake Band of Chippewa Indians to run their tribal fisheries without interference from the federal government.

On Friday, December 4, 2020, the US Circuit Court of Appeals for the Eighth Circuit released its opinion in *Scalia v. Red Lake Nation Fisheries, Inc.*, No. 19-3373, rejecting the US Department of Labor's attempt to regulate the tribal fisheries through the Occupational Safety and Health Act ("OSHA").

The case arose from a 2017 accident on the lake that prompted the Federal Occupational Safety and Health Administration to send inspectors to the Red Lake Reservation, and ultimately to issue two citations with fines totaling more than \$15,000 to the Red Lake Nation Fisheries, Inc. The Fisheries are incorporated under tribal law, wholly owned and operated by the Tribe, and employ only tribal members. The Fisheries challenged the citations, arguing that the Department of Labor had no authority to issue them to a tribal enterprise operating within the tribe's reservation. The dispute first went to an administrative law judge within the Department of Labor; that judge ruled in favor of the Tribe, relying in large part on an earlier Eighth Circuit decision holding that the Age Discrimination in Employment Act did not apply to a tribal enterprise and its tribal member employee.

The Department of Labor appealed, pointing to OSHA's broad definitions of "employer" and "commerce," and arguing that Congress intended the law to have a



very broad sweep. In addition, the Department argued, because OSHA specifically excluded both federal and state governments from the definition of "employer"—but did not exclude tribal governments—Congress intended for OSHA to apply to tribal governments. Finally, the Department argued that the Fisheries should not be considered a governmental entity, but rather a commercial entity.

But the Fisheries had the better argument. They, too, pointed to the text of OSHA, noting that Congress said it enacted the law in order to regulate foreign and interstate commerce, but said nothing about regulating Indian commerce. They pointed to more than a thousand pages of Congressional testimony, research, and drafts that said nothing about regulating tribes or tribal enterprises. They pointed to the Tribe's treaty right to fish, and argued federal regulation would interfere both with that treaty fishing right and more broadly with the Tribe's right to govern itself.

Throughout, NARF was right there at the Fisheries' side. NARF helped attorneys for the Fisheries test and refine their own arguments. In addition, NARF drafted an amicus brief on behalf of the NCAI Fund (the educational arm of the National Congress of American Indians). That brief pushed back against the Department of Labor's false governmental-vs-commercial dichotomy and more fully explored how acts of Congress must be interpreted against a backdrop of tribal sovereignty. The Fisheries also got an assist from the Shakopee Mdewakanton Sioux Community, which explained from that Tribe's own experience how the Department of Labor could achieve its goals through government-to-government cooperation, instead of coercive investigation and enforcement.

The Eighth Circuit left no question which argument it found more persuasive. The three-judge panel handed down a unanimous opinion holding that OSHA does not authorize the Federal government to regulate the Fisheries. "For a

statute of general applicability to apply to Indian self-government, this court looks for either an explicit statement of Congress or evidence of congressional intent to abrogate in the legislative history of a statute," the Court wrote (internal quotations, citation, and alteration omitted). And the Court found no such explicit statement in OSHA, and no such evidence of intent in OSHA's legislative history.

*Scalia v. Red Lake Nation Fisheries, Inc.* is an important case in an ongoing dispute in Indian country: do federal statutes of general applicability apply to Indian tribes and tribal enterprises? Several courts have held that they do, and have wrongly allowed the regulation of tribes and tribal enterprises through OSHA, the National Labor Relations Act, and other statutes that make no mention of tribes or tribal enterprises. With the win in this case, Red Lake and NARF have helped to hold the line against this creeping federal authority, and to preserve tribal sovereignty for future generations.

## Save The Date: Indian Water Rights Claims Symposium August 24-25, 2021

Since 1991, the Native American Rights Fund and the Western States Water Council (WSWC) have sponsored a biennial symposium to discuss the settlement of Indian reserved water rights claims. Due to COVID19 travel restrictions and concerns, the symposium will be hosted virtually this year on August 24-25, 2021.

Our abbreviated agenda will include presenters who have been involved in negotiated settlements representing tribal, state, local, and federal governments, interest groups, congressional staff, and others. Continuing Legal Education Credit will be available for lawyers who attend.

Find updated information about the event at <https://www.narf.org/cases/water-rights-symposium/>.



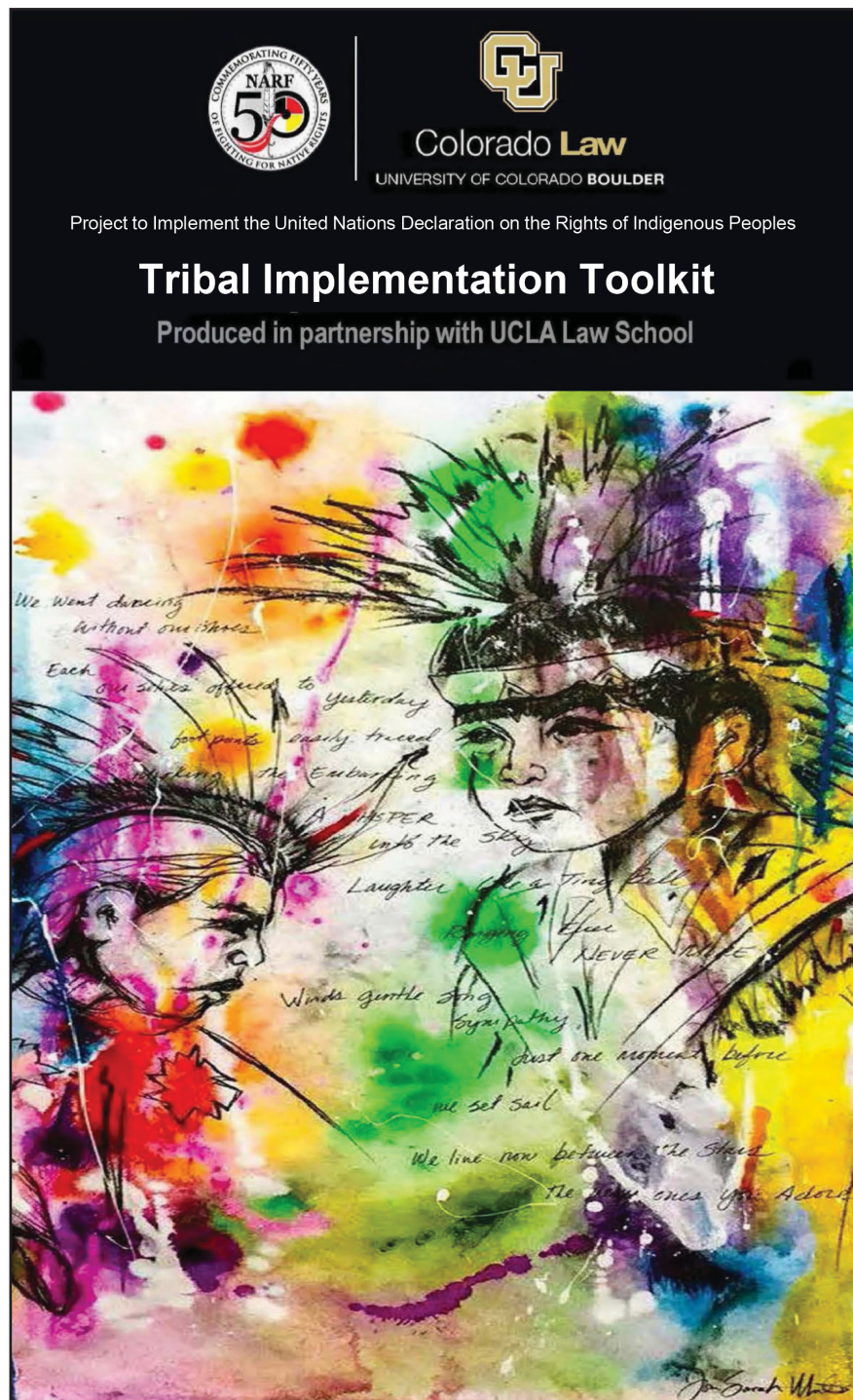


## Tribal Implementation Toolkit Now Available

The United Nations Declaration on the Rights of Indigenous Peoples represents the human rights aspirations of indigenous peoples from across the globe. It can be an important tool for tribal advocates seeking legal reform in the United States as it sets standards for the just treatment, legal rights, and relationships of indigenous peoples.

Recognizing the potential of the Declaration to promote Native American legal rights the Native American Rights Fund and the University of Colorado Law School created the Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States. The Project raises Indian Country's awareness of the Declaration and supports implementation efforts. On April 12, 2021, the Project released the Tribal Implementation Toolkit. The Toolkit (which was produced in collaboration between the Native American Rights Fund, the University of Colorado Law School, and UCLA Law's Tribal Legal Development Clinic) examines how tribes can support and implement the Declaration through tribal law-making.

Find more information at <https://un-declaration.narf.org/toolkit-launch/>.



## Tribal Supreme Court Project

The Tribal Supreme Court Project is part of the Tribal Sovereignty Protection Initiative and is staffed by the National Congress of American Indians (NCAI) and NARF. The Project was formed in 2001 in response to a series of US Supreme Court cases that negatively affected tribal sovereignty. The Project's purpose is to promote greater coordination and to improve strategy on litigation that may affect the rights of all Indian tribes. We encourage Indian tribes and their attorneys to contact us to coordinate resources, develop strategy, and prepare briefs, especially at the time of the petition for a *writ of certiorari*.

This spring, the Court heard argument in two Indian law cases. On March 23, 2021, the Court heard *Cooley v. United States* (19-1414), a case involving an Indian tribe's police authority to detain a non-Indian based on a reasonable suspicion that he has violated state or federal law. On April 19, 2021, the Court heard argument in *Alaska Native Vill. Corp. Assoc. v. Confederated Tribes of the Chehalis Reservation* (20-544) and *Mnuchin v. Confederated Tribes of the Chehalis Reservation* (20-543). These cases concern the definition of "Indian tribe" for purposes of the CARES Act. You can find copies of briefs and opinions on the cases we track at <https://sct.narf.org>.

### Petitions for a Writ of Certiorari Granted

The Court has granted review in two Indian law cases that have not been decided by the Court:

### YELLEN V. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION (20-543); ALASKA NATIVE VILLAGE CORP. ASSOC. V. CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION (20-544)

**Petitioners:** Alaska Native Corporations and the United States

**Petition Filed:** October 21 and 23, 2020

**Subject Matter:** Eligibility of Alaska Native Corporations to receive COVID-19 relief funds

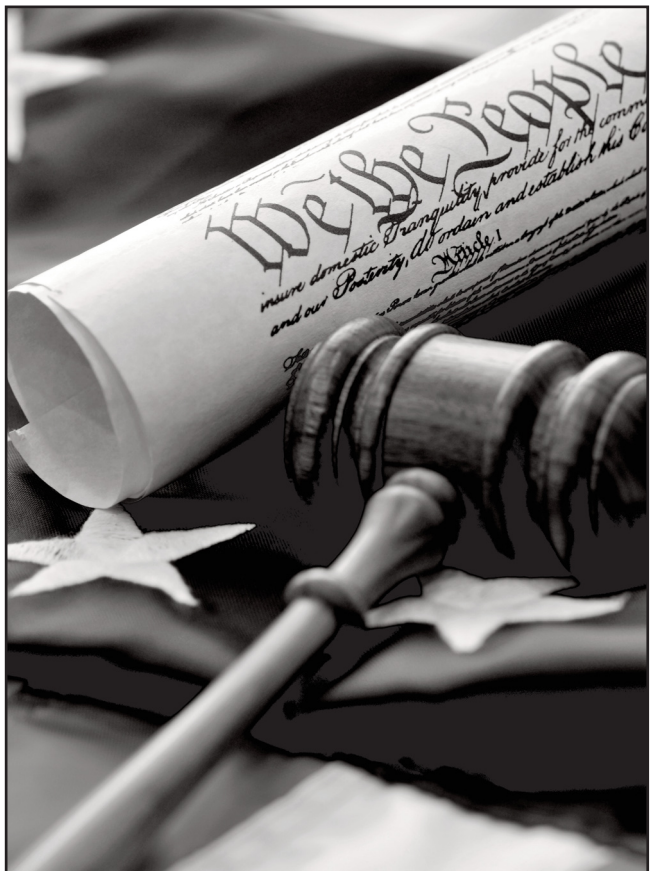
**Lower Court Decision:** The D.C. Circuit reversed the district court's judgment in favor

of the United States and several Alaska Native corporations.

**Recent Activity:** Oral argument on April 19, 2021

**Upcoming Activity:** Decision expected before Court's summer recess

Several federally-recognized Indian tribes sued the United States after the Department of the Treasury announced that Alaska Native Corporations (ANCs) would be eligible to receive funds under the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Several ANCs intervened as defendants. The district court ruled in favor of the United States and ANCs. In reversing, the D.C. Circuit held that in order to meet the definition of "Indian Tribe," the entity must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." The D.C. Circuit concluded that ANCs do not meet







this prong of the definition and, thus, are not eligible to receive CARES Act funds.

#### UNITED STATES V. COOLEY (19-1414)

**Petitioner:** United States

**Subject Matter:** Criminal Procedure; Indian Civil Rights Act

**Lower Court Decision:** The Ninth Circuit Court of Appeals held that a seizure and search of a non-Indian and his vehicle by a Tribal police officer violated the Indian Civil Rights Act and that evidence obtained was subject to the exclusionary rule.

**Recent Activity:** Oral argument heard on March 23, 2021

**Upcoming Activity:** Decision expected before Court's summer recess

A non-Indian driver was charged with federal narcotics and firearms offenses as result of evidence discovered by a Crow Tribe police officer during a safety check of the vehicle parked on the side of a state roadway crossing the reservation. During the officer's interaction with the driver, he noted indicia of impairment, saw firearms in the vehicle, and believed that some of the driver's responses to his questions were untruthful. At a certain

point, the driver's demeanor changed and the officer believed that the driver was going to use force. The officer drew his pistol and placed the driver in his police vehicle. A subsequent search of the driver's vehicle uncovered methamphetamine and additional firearms. The trial court granted the driver's motion to suppress evidence obtained by the tribal police officer. A Ninth Circuit panel held that the evidence was inadmissible in a federal court prosecution.

#### Contributions to the Tribal Supreme Court Project

NCAI and NARF welcome general contributions to the Tribal Supreme Court Project. Please send any general contributions to the NCAI Fund, attn: Kurt Sodee, 1516 P Street, NW, Washington, DC 20005. **Please contact us if you have any questions or if we can be of assistance: Derrick Beetso, NCAI General Counsel, 202-630-0318, [dbeetso@ncai.org](mailto:dbeetso@ncai.org); or Joel West Williams, NARF Senior Staff Attorney, 202-785-4166, [williams@narf.org](mailto:williams@narf.org).** 🌟



# National Indian Law Library (NILL)

New Tribal Law Digital Publishing Platform

One significant initiative of the National Indian Law Library (NILL) is its Access to Tribal Law Project. The project's mission is to provide tribal leaders, legal practitioners, and the public with convenient access to current and accurate copies of tribal law, including tribal codes and constitutions, intergovernmental agreements, and tribal court opinions. Public access to these materials enhances the power of tribal courts and strengthens tribal sovereignty. To that end, NILL recently implemented an innovative digital tool that will make it easier for tribes to share their codes and updates.

## Digital Publishing Project

Last summer, NILL—along with its project partners Open Law Library, the University of Wisconsin Law Library and the Great Lakes Indigenous Law Center—received grant funding through the Institute of Museum and Library Services for a Digital Publication of Tribal Laws Pilot Project (IMLS grant number LG-246285-OLS-20). Over the last year, the project has been developing a digital platform to publish tribal laws on library websites. The platform allows libraries to offer an online collection of tribal laws, while tribes maintain full control over the digital copies of their laws.

The project reached a milestone in April, when NILL published on its website the official laws of Stockbridge Munsee Community, Wisconsin. Much like the days when libraries held official print copies of codes on our shelves, we can now hold an official digital copy of a tribe's laws on our website while the tribe retains control over the content. Access the Stockbridge Munsee Community's laws at <https://narf.org/nill/tribes/stockbridge.html>.

Tribes interested in publishing their laws through the Open Law Platform can contact NILL at [TribalLaw@narf.org](mailto:TribalLaw@narf.org) for more information.

## The Importance of Access

The right to know the laws by which we are governed is a fundamental right. Libraries are keenly



aware of the importance of access to legal information, but few are able to pay commercial legal databases' high fees. Our hope is that this affordable digital publishing technology will allow other libraries—especially university libraries, public libraries, tribal college libraries, and tribal community libraries—to make tribal laws more accessible.

The project's ultimate goal is to increase public access to the laws of Native nations. Tribal members and leaders will benefit from ready access to their laws, which is essential for good governance and ensuring due process and equal protection. Meanwhile, broader public access to tribal law will facilitate inter-governmental collaboration, encourage economic partnerships, and foster greater understanding of tribal sovereignty and perspectives.

## Tribal Law Projects at NILL

The Access to Tribal Law Project and the Tribal Law Gateway (<https://narf.org/nill/triballaw/index.html>) are high priorities for the National Indian Law Library. Our goal is for the Gateway to provide access to accurate tribal law information for all of the 574 federally recognized tribes, regardless of how they choose to make their laws available. You can support this work with a donation today at <http://www.narf.org/nill/donate>. 🌟

# CALL TO ACTION

It has been made abundantly clear that non-Indian philanthropy can no longer sustain NARF's work. Federal funds for specific projects have also been reduced. 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, voting rights, tribal water rights, Indian Child Welfare Act, and tribal sovereignty issues, NARF looks to the tribes to provide the 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.

We encourage other tribes and organizations 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 generous support of NARF in the 2021 fiscal year (October 1, 2020 to March 31, 2021):

Chickasaw Nation  
Jamestown S'Klallam Tribe  
Muckleshoot Indian Tribe  
Poarch Band of Creek Indians  
San Manuel Band of Mission Indians

Seminole Tribe of Florida  
Tulalip Tribes of Washington  
United Tribes of Bristol Bay  
Yocha Dehe Wintun Nation



# THE NATIVE AMERICAN RIGHTS FUND

The Native American Rights Fund (NARF) is the oldest and largest nonprofit legal organization defending and promoting the legal rights of Indian people on issues essential to their tribal sovereignty, natural resources, and human rights.

Since 1970, we have provided legal advice and representation to Native American tribes and organizations on issues of major importance. Our early work was instrumental in establishing the field of Indian law. NARF—when very few would—steadfastly took stands for Indian religious freedom and sacred places, subsistence hunting and fishing rights, as well as basic human and civil rights. We continue to take on complex, time-consuming cases that others avoid, such as government accountability, climate change, and the education of our children. We have assisted more than 300 tribal nations with critical issues that go to the heart of who we are as sovereign nations.

One of the responsibilities of NARF's first Board of Directors was to develop priorities to guide the organization in its mission to preserve and enforce the legal rights of Native Americans. The committee developed five priorities that continue to lead NARF today:

- Preserve tribal existence
- Protect tribal natural resources
- Promote Native American human rights
- Hold governments accountable to Native Americans
- Develop Indian law and educate the public about Indian rights, laws, and issues

Under the priority to ***preserve tribal existence***, NARF works to construct the foundations that empower tribes to live according to their traditions, enforce their treaty rights, insure their independence on reservations, and ***protect their sovereignty***.

An adequate land base and control over natural resources are central components of economic self-sufficiency and self-determination, and are vital to the very existence of tribes. Thus, much of NARF's work involves ***protecting tribal natural resources***.

Although basic human rights are considered a universal and inalienable entitlement, Native Americans face the ongoing threat of having their rights undermined by the United States government, states, and others who seek to limit these rights. Under the priority of ***promoting human rights***, NARF strives to enforce and strengthen laws that protect the rights of Native Americans to practice their traditional religion, use their languages, and enjoy their culture.

Contained within the unique trust relationship between the United States and Indian nations is the inherent duty for all levels of government to recognize and responsibly enforce the laws and regulations applicable to Indian peoples. Because such laws impact virtually every aspect of tribal life, NARF is committed to holding governments accountable to Native Americans.

***Developing Indian law and educating the public about Indian rights, laws, and issues*** is essential for the continued protection of Indian rights. This primarily involves establishing favorable court precedents, distributing information and law materials, encouraging and fostering Indian legal education, and forming alliances with Indian law practitioners and other Indian organizations.

Requests for legal assistance should be addressed to NARF's main office at 1506 Broadway, Boulder, CO 80302. NARF's clients are expected to pay what they can toward the costs of legal representation.

**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.

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[www.narf.org](http://www.narf.org)

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