



Legal Review

NATIVE AMERICAN RIGHTS FUND

PEBBLE MINE IS STOPPED



PHOTO CREDIT: UNITED TRIBES OF BRISTOL BAY

On January 31, 2023, the Environmental Protection Agency (EPA) finalized Clean Water Section 404(c) determination that will stop the development of Pebble Mine, a proposed open pit copper, gold, and molybdenum mine at the headwaters of the pristine Bristol Bay Watershed in Alaska. This action was the culmination of decades of effort from Bristol Bay residents. Leading those efforts was NARF's client, the United Tribes of Bristol Bay (UTBB).

UTBB is a consortium of Alaska Native tribes that joined together to protect traditional Yup'ik, Dena'ina, and Alutiiq ways of life in southwest Alaska. Today, the consortium includes 15 tribes, whose members account for more than 80 percent of the region's population. The consortium acts as a unified tribal voice in efforts to protect the Bristol Bay watershed and its wild salmon.

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Bristol Bay tribes have worked for decades to protect the region and its Indigenous ways of life. In recent years, in the fight against the proposed Pebble Mine, those efforts have received wide-ranging support from a broad coalition of Alaskans. Appreciation

for Bristol Bay's beauty and resources is high. In fact, 64% of Alaskans oppose the Pebble Mine project in any form. Over the course of 10 years and seven public comment periods, the federal government received 4,097,857 comments supporting Bristol Bay protections. This widespread support is easy to understand given Bristol Bay's unique ecosystem, and its cultural and physical importance to the families and communities that live there.

"That's What We are Fighting So Hard to Protect"

Bristol Bay is known as "America's Fish Basket." It is home to the world's largest salmon fishery and produces more than half of the world's wild sockeye salmon harvest.

"This is the last great sockeye salmon fishery on the face of the planet, providing over half of the world's sockeye salmon. It's the most sacred thing we have here.... That's how blessed we are here, and that's what we are fighting so hard to protect." – Alannah Hurley, UTBB Executive Director

Stretching from Lake Iliamna to the Alaska Peninsula in southwest Alaska, Bristol Bay includes several major rivers, including the Nushagak, Kvichak, Naknek, Egegik, Igushik, Ugashik and Togiak. Those rivers are part of a unique landscape that includes wetlands, lakes, ocean coasts, tundra, and even active volcanoes.

The Bristol Bay ecosystem is incredibly diverse and abundant. The surface and subsurface waters connect to form an ecosystem that sustains all five species of North American salmon. Those fish are fundamental to the cultures, communities, and economies of the 31 federally recognized tribes in the region.

Yup'ik, Dena'ina and Alutiiq people have lived in Bristol Bay since time immemorial, and the health and sustainability of their communities is bound to the lands and waters that surround and sustain them. Life for many of the region's 7,000 year-round residents is seasonal as they hunt, gather, and fish just as their communities have done for millennia.

With annual sockeye returns of more than 50 million fish, the Bristol Bay salmon fishery not only sustains cultures and communities, but it is also the foundation of the region's economy. It has supported generations of commercial fishing families since the late 19th century. It generates more than \$2 billion in annual revenue, and it directly employs 15,000 people each year. Additionally, the Bristol Bay ecosystem sustains thousands of jobs related to sport fishing, hunting, and tourism. All told, it generates \$90 million in state taxes and licensing fees.

The Threat

In the early 2000s, the Pebble Limited Partnership began investing millions of dollars in outreach around a proposed open pit mine to extract copper, gold, and molybdenum from the Pebble mineral deposit at the headwaters of the pristine Bristol Bay watershed. The Pebble deposit is located in the seismically active highland wetlands at the top of the Nushagak and Kvichak watersheds, two of the most productive river systems in the region. Fully built, the mine would include a massive pit, a quarter-mile deep and more than a mile long. In addition, it would require a nearly 200-mile-long pipeline and a power plant large enough for a mid-sized city. It would destroy thousands of



PHOTO CREDIT: UNITED TRIBES OF BRISTOL BAY

acres of wetlands and more than 21 miles of salmon streams.

Although the mine proposed to extract materials from the Pebble deposit—the largest known mineral resource in Alaska—the deposit is low-grade and would require a high ratio of waste to commercial minerals produced. The mine was forecast to produce 10.2 billion tons of non-useable tailings, much of which would generate toxic waste. That waste would remain on the site forever as an ongoing threat to the entire watershed.

Pebble Mine also threatened the region economically. At its peak, the Pebble Mine was to provide fewer than 2,000 jobs. In contrast, the mine's impacts risked 15,000 salmon production jobs and thousands of recreation and tourism industry jobs.

In 2010, six tribes (that would later found the United Tribes of Bristol Bay) petitioned the EPA to use the Clean Water Act Section 404(c) to prohibit Pebble Limited's use of the Bristol Bay wetlands as a disposal site for the mine's toxic waste. Section 404(c) allows the EPA to restrict, prohibit, or deny the use of an area as a disposal site if it determines that the discharged materials will have unacceptable adverse effects on water resources, including fisheries.

Subsequently, the EPA performed a watershed assessment and determined, among other things, that the Pebble Mine plan would potentially leech acid drainage 100 miles downstream from the mine site. Based on those findings, in 2014, the Obama Administration announced its intent to issue Section 404(c) restrictions to limit the size of the Pebble development and protect the valuable salmon fisheries at Bristol Bay.

In response, Pebble Limited Partnership initiated three lawsuits against the federal government. One of those suits resulted in a preliminary injunction that kept the Section 404(c) process from moving

forward. Meanwhile, attorneys for the mining partnership slow-walked the litigation until the next presidential election. By March 2017, the Trump Administration had settled all Pebble Limited lawsuits, reigniting the mining project.

United Tribes of Bristol Bay members include: Togiak Traditional Council, Twin Hills Village Council, Manokotak Village Council, Curyung Tribal Council, Ekuk Village Council, Clark's Point Village Council, Aleknagik Traditional Council, Portage Creek Village Council, New Stuyahok Traditional Council, New Koliganek Village Council, Levelock Village Council, Nondalton Village Council, Pilot Point Tribal Council, Pedro Bay Village Council, and Chignik Lake

Pebble Limited then filed for a new wetlands permit with the Army Corps of Engineers. From 2017 to 2020, NARF represented several clients in the Army Corp's environmental impact statement process. It was a busy time for the tribes and organizations working to protect Bristol Bay. In 2019, the EPA also withdrew the proposed Section 404(c) determinations, sparking multiple lawsuits.

In July 2020, the Army Corps released a highly flawed final environmental impact statement. Although the report identified permanent ecological damage from the proposed mine, it underestimated potential impacts to habitat and water systems. It also recommended a transportation corridor for which Pebble Limited did not own the rights. However, an environmental impact statement is merely a guide, not the final decision for a federal permit. Later that same year, the Army Corps denied Pebble Limited's permit under the Clean Water Act 404(b) (1) guidelines, which require the identification of the least damaging alternative for disposal of dredged or fill materials.

Meanwhile, in 2021, the Ninth Circuit Court of Appeals overturned the Trump Administration's withdrawal of the original Section 404(c) determination. With that ruling, the EPA reinitiated that process. However, Section 404(c) of the Clean Water Act had been invoked only 13 times



PHOTO CREDIT: UNITED TRIBES OF BRISTOL BAY

previously, and the process is not a trivial one. After more than a year of research and consideration, the EPA published its Section 404(c) determination to the Bristol Bay headwaters, and on January 31, 2023, the Biden Administration announced final Section 404(c) action to stop the Pebble Mine. The new determination will protect 309 square miles of Bristol Bay's watershed from mining.

The Future

The Section 404(c) determination is a great step forward. However, even as the threat of Pebble Mine recedes (at least temporarily), NARF's Bristol Bay client list is growing. In addition to the 15 tribes of the UTBB, NARF now represents Commercial

Fishermen for Bristol Bay, Nondalton Tribal Council, Clarks Point Village Council, and Igiugig Village Council. In the last 10 years, NARF has represented Bristol Bay tribes and organizations in six separate litigation matters involving Pebble and other mining issues in the region.

Because this fight is not about just one mine. For decades, the extraction industry—including, but not limited to Pebble Limited Partnership—has pushed to transform Bristol Bay into a giant mining district. The Pebble Mine was intended to extract less than 15 percent of the deposit's ore.

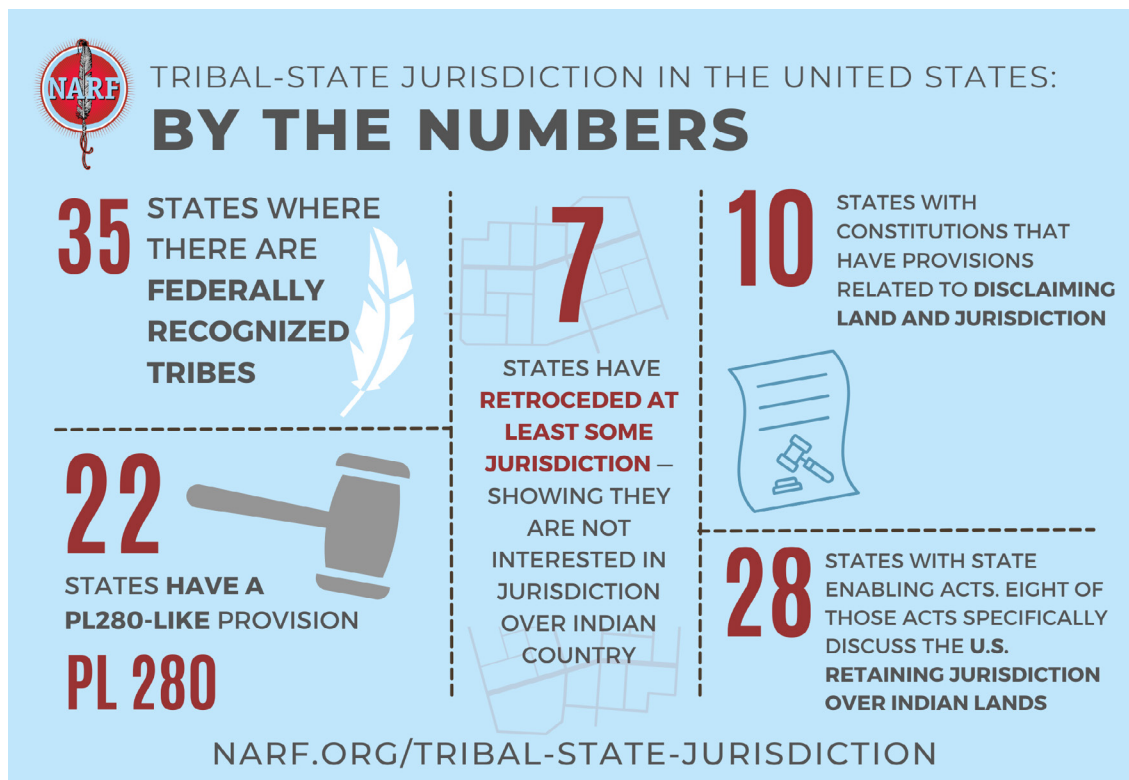
Right now, there are more than 20 active mining claims in the region. The infrastructure developed for one mine would open the door to a massive expansion of mining operations in this ecologically and culturally important region. This means more toxic waste, more habitat destruction, and more harm to the Yup'ik, Dena'ina, and Alutiuq peoples who depend on Bristol Bay.

It is not fair to the Bristol Bay people that they must withstand a never-ending onslaught of deep-pocketed industry interests. The Bristol Bay watershed must be fully protected through an act of Congress. NARF is committed to supporting Bristol Bay tribes and Alaska Native organizations as they pursue these protections for their lands, their livelihood, their cultures, and their people.

The people of Bristol Bay feel they have inherited from their ancestors the responsibility to steward and protect their lands. They know that they need healthy lands and waters for their communities and families to be healthy and sustainable. NARF is proud to stand strong with them in this fight for survival. 🍄



Case Updates



A GUIDE TO UNDERSTANDING TRIBAL-STATE JURISDICTION

On June 29, 2022, the U.S. Supreme Court overturned a long-held understanding that states do not have authority to prosecute non-Indians who commit crimes against Indians in Indian country. The decision in *Castro-Huerta v. Oklahoma*, which was reached by a narrow 5-4 vote, held that “the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.” This ruling strikes against tribal sovereignty and a tribe’s ability to protect its citizens. It could have far-reaching consequences for tribal nations, the federal government, and states.

The consequences of the Supreme Court’s decision will take time to unravel. This will require careful consideration of the impact of the decision on tribal sovereignty, as well as the practical implications for law enforcement, criminal justice, and public

safety in Indian Country. To better understand the landscape of tribal and state jurisdiction in Indian Country, we have compiled an online guide to tribal and state jurisdiction in the 35 states where there are federally recognized tribes.

For each of the states with at least one federally recognized tribe, the guide:

- cites the state’s enabling act and details any Indian jurisdiction provisions,
- links to the state’s constitution and notes any references to tribal jurisdiction, and
- describes if and how PL 280 applies to criminal jurisdiction in the state.

We hope this survey proves useful to advocates in Indian Country. Visit the guide now at <https://narf.org/tribal-state-jurisdiction/> 🏛️



VOTER REGISTRATION AT INDIAN HEALTH SERVICES

What if Native people could register to vote at any federally or tribal-run Indian Health Service facility, instead of driving in some cases over an hour to the nearest designated registration site? The lack of convenient designated voter registration sites and high cost of transportation create barriers for Native people to vote.

Learn more about how to pursue National Voting Rights Act designations in your tribal nation at <https://vote.narf.org/advocacy-actions/>. There you can find an April 2023 webinar hosted by NARF, the National Congress of American Indians, DEMOS, and Native Organizers Alliance along with flyers and fact sheets about designating Indian Health Services as voter registration facilities.

SAVE THE DATE

Indian Water Rights Claims Symposium August 8-9, 2023

Since 1991, the Native American Rights Fund and the Western States Water Council have sponsored a biennial symposium to discuss the settlement of Indian reserved water rights claims. The symposium will be hosted virtually this year on August 8-9, 2023. A number of topics will be addressed by experts and participants regarding completed and ongoing negotiated settlements.

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.

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

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 U.S. 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 tribes. We encourage 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*.

During its October 2022 Term, the U.S. Supreme Court heard oral argument in three Indian law cases. The oral arguments are summarized here, and the argument audios and transcripts are available on the Tribal Supreme Court website, <https://sct.narf.org>. Decisions are expected by the end of the Court's 2022 Term, which likely will be the end of June or early July 2023.

***Brackeen v. Haaland* (21-376)**

On November 9, 2022, the Court heard oral argument in *Brackeen v. Haaland*, 21-376 and three consolidated cases in which the State of Texas and three non-Indian couples wishing to adopt Indian children challenged the Indian Child Welfare Act (ICWA), a landmark 1978 Act of Congress intended to stop the extreme

removal, by states, of Indian children from their families and tribes. The plaintiffs asserted that ICWA is an impermissible exercise of Congress' authority to legislate regarding Indian affairs. They proposed several limits, including restricting Congress' action to "on or near reservations," requiring a direct link to tribal self-governance, and suggesting Congress' authority is limited to more traditional areas of "commerce." Justices pushed back on these suggested limits, noting that precedent consistently has described Congress' authority over Indian affairs as "plenary."

Much of the argument focused on whether ICWA deprives Indian children and non-Indian prospective parents of the "best interests of the child" standard in typical child welfare proceedings and therefore violates the Equal Protection Clause. Counsel for the United States and tribal defendants (Cherokee Nation, Oneida Nation, Morongo Band of Mission Indians, Quinault Indian Nation, and Navajo Nation) asserted that Congress's power is broad and limited only by *Morton v. Mancari*'s requirement that the action be rationally related to the fulfillment of Congress' unique obligations to Indians or by a different constitutional provision. They also emphasized that ICWA draws a political classification that survives a rational basis Equal Protection challenge, rather than a racial classification that would be subject to a higher standard. Justices asked several follow-up questions



regarding the “other Indian families” placement preference. Counsel for the tribal defendants ended by focusing on the lack of information before the Court due to the posture of the case—a facial challenge to ICWA where the individual plaintiffs lack standing—which could provide a procedural mechanism for the Court to avoid the Equal Protection issues in this case.

Arizona v. Navajo Nation (21-1484)

On March 20, 2023, the Court heard oral argument in *Arizona v. Navajo Nation*, 21-1484 and the consolidated case *United States v. Navajo Nation*. These cases address the Navajo Nation’s breach of trust claim against the United States for failure to appropriately manage the Nation’s reserved water rights in the Lower Basin of the Colorado River. Oral argument focused on whether the United States has an affirmative duty to ensure the Nation’s access to water from the Lower Basin under its two treaties with the United States. The Justices asked numerous questions regarding treaty interpretation and the scope of the fiduciary relationship between the United States and the Nation. Several Justices also asked questions regarding the jurisdictional issues in the case related to the Court’s retained jurisdiction over Colorado River water in *Arizona v. California*, 373 U.S. 546 (1963). There were also questions related to the practical implications of this case for water users in the Southwest as well as any potential remedies for the Nation.

In its argument, the United States acknowledged the Nation’s reserved water rights stemming from the relevant treaties under *Winters v. United States*, 207 U.S. 564 (1908). Counsel for the United States stated those rights are held in trust but asserted that the United States has no affirmative duty to assert or enforce those rights. Several Justices asked about the United States’ position on the Nation’s ability to vindicate its own water rights. Counsel for the Nation was questioned repeatedly regarding the textual basis for the asserted duty, as well as the scope of the duty. In response, Counsel for the Nation focused on the importance of access to the water—which the United

States controls—and having a legal remedy against the United States to ensure that access.

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin (22-227)

On April 24, 2023, the Court heard oral argument in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 22-227. The issue is whether the U.S. Bankruptcy Code abrogates a federally recognized Indian tribe’s sovereign immunity from suit. This dispute arose out of a bankruptcy case in which an individual debtor, Mr. Coughlin (Respondent), sued Lendgreen, a business which is a wholly owned subsidiary of the Lac du Flambeau Band of Lake Superior Chippewa Indians. The oral argument focused on the text of the Bankruptcy Code provisions. Many of the Justices posed hypotheticals regarding what language Congress could or should use to demonstrate clear intent to abrogate tribes’ sovereign immunity from suit. A clear statement of intent is required under the current legal standard, which is not challenged in this suit. 🍷

CONTRIBUTIONS TO THE TRIBAL SUPREME COURT PROJECT

NCAI and NARF welcome contributions to the Tribal Supreme Court Project. Please send any general contributions to:

NCAI, attn: Accounting
1516 P Street, NW
Washington, DC 20005

NARF, attn: Accounting
250 Arapahoe Ave
Boulder, CO 80302-5821

Please contact us if you have any questions or if we can be of assistance:

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303-447-8780 or mmccoy@narf.org

Ryan Seelau | NCAI Policy and Legal Director
202-276-8054 or rseelau@ncai.org



National Indian Law Library (NILL)

Indian Law Bulletins Get a Reboot



Current Awareness in Your Inbox

Each week, the National Indian Law Library (NILL) provides free updates on Indian law through the Indian Law Bulletins. Almost eight thousand patrons receive the free weekly updates by email, while others access them through the NILL website or blog. The Indian Law Bulletins are the only regularly published updates on Indian law, and they include coverage for tribal courts, federal and state courts, federal agencies, U.S. legislation, law review articles, and news. The Indian Law Bulletins can be found at <https://www.narf.org/nill/bulletins/>

Same Great Content in an Updated Format

The Indian Law Bulletins were on hiatus for the first part of 2023 to give NILL researchers an opportunity to reflect and reboot the popular resource. Long-time subscribers will notice a change to the format of several topic pages:

- U.S. legislation is now listed by chamber and date of introduction. Newly introduced legislation is highlighted at the top of the page each week.
- New law review and bar journal articles are listed each week, but previously highlighted articles

are now indexed in NILL's online catalog. Links to freely available sources are included when possible, but researchers can use the "Request" button in the catalog to track down articles that are not online.

- Topical categories for the news articles were updated to align more closely with NARF's work. Previously highlighted articles can still be found on the News Archives pages.

NARF Recognized by National Library Association

NILL was honored to receive the 2023 Public Access to Government Information Award from the American Association of Law Libraries for its Digital Publication of Tribal Laws Pilot Project.

Support the National Indian Law Library

Your contributions help ensure that the library can continue to supply unique and free access to Indian law resources and that it has the financial means necessary to pursue innovative and groundbreaking projects to serve Indian Country better. Please visit <https://www.narf.org/nill/donate> for more information on how you can support this mission. 🙏



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 2023 fiscal year (October 1, 2022 to March 31, 2023):

Chickasaw Nation
Foxwoods Resort Casino
Indian Gaming Association
Jamestown S'Klallam Tribe
Muckleshoot Tribe
San Manuel Band of Mission Indians
Seminole Tribe of Florida
Tulalip Tribes of Washington
United Tribes of Bristol Bay
Yavapai-Prescott Tribe
Yocha Dehe Wintun Nation

To join these tribes and organizations and support the fight for Native rights and tribal sovereignty, contact Don Ragona at ragona@narf.org

The Native American Rights Fund

The Native American Rights Fund (NARF) is a Native-led, nonprofit legal organization defending and promoting the legal rights of Native American people on issues essential to our tribal sovereignty, natural resource protections, and human rights.

Since 1970, we have provided legal advice and representation to Native American tribes, individuals, and organizations on high impact issues. Our early work was instrumental in establishing the field of Indian law. NARF—when very few would—steadfastly stood for religious freedoms 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, voting rights, 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.

NARF's first Board of Directors developed five priorities to guide the organization. Those 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 constructs the foundations to empower tribes to live according to their traditions, enforce their treaty

rights, ensure their independence on reservations, and protect their sovereignty.

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

In order to promote human rights, NARF strives to enforce and strengthen laws that protect the rights of Native Americans to exercise their civil rights, practice their traditional religion, use their languages, and enjoy their culture.

Contained within the unique trust relationship between the United States and tribal nations is the inherent duty for all levels of government to recognize and responsibly enforce the laws and regulations applicable to Native people. NARF will hold governments accountable to Native Americans.

For the continued protection of Indian rights, we must develop Indian law and educate the public about Indian rights, laws, and issues. This priority includes establishing favorable court precedents, distributing information and law materials, fostering relevant legal education, and forming alliances with Indian Law practitioners and other organizations.

Requests for legal assistance should be addressed to NARF's main office at 250 Arapahoe Ave, Boulder, CO, 80302. NARF's clients are expected to pay what they can toward the costs of legal representation.

NARF Legal Review is published biannually by the Native American Rights Fund. There is no charge for subscriptions, however, contributions are appreciated.

www.narf.org

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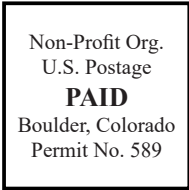
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