



Legal Review

NATIVE AMERICAN RIGHTS FUND

United States Finally Endorses Historic United Nation's Declaration On The Rights Of Indigenous Peoples

A. Introduction

Three decades of worldwide effort by indigenous peoples resulted in an historic victory in the United Nations General Assembly on September 13, 2007, when that body adopted the Declaration on the Rights of Indigenous Peoples (Declaration) by an overwhelming majority.¹ 143 Yes, 4 No, 11 Abstaining. The four countries who voted against the Declaration were the United States, Canada, New Zealand, and Australia. One by one the dissenting countries have reversed their votes. The United States was the last country to do so, on December 16, 2010. That means that there is no country in the world that now opposes the Declaration. In addition, two of the abstaining countries have now endorsed the Declaration.²

The Declaration affirms the collective rights of Indigenous Peoples as human rights across a broad range of areas including self-determination,

"....the United States is lending its support to this declaration. The aspirations it affirms – including the respect for the institutions and rich cultures of Native peoples – are ones we must always seek to fulfill...But I want to be clear: What matters far more than words – what matters far more than any resolution or declaration – are actions to match those words." — President Barack Obama

spirituality, land rights, and rights to intellectual property; thereby providing some balance to an international rights framework based largely on individual rights. Since 1999, senior staff attorney Kim Gottschalk of the Native American Rights Fund (NARF) has worked with our client, the National Congress of American Indians (NCAI), and indigenous peoples worldwide, in the process of elaborating and supporting the Declaration.

¹Three decades is a somewhat arbitrary starting point. It refers back to a 1977 meeting at the United Nations in Geneva, Switzerland concerning discrimination against Indigenous peoples in the Americas. However, indigenous efforts in the international arena go back much further in time. In the 1920s, Deskaheh, speaker of the Council of the Iroquois Confederacy, attempted to bring a dispute with Canada before the League of Nations. The League did not address the issue, viewing it as a domestic matter between Canada and the Iroquois.

²Along with one country that indicated that its positive vote had not been registered, that brings the number of countries endorsing the Declaration to 150.

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The Declaration is not a perfect document but it contains much language and many ideas and concepts supplied by the indigenous peoples themselves, thereby establishing “...the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.” Art. 43.

B. Background to the Declaration Process

In 1977, a group of indigenous representatives met in Geneva, Switzerland for the International Non-Governmental Organization Conference on Discrimination against Indigenous Populations in the Americas, organized by the NGO Sub-Committee on Racism, Racial Discrimination, Apartheid and Colonialism. In 1982, based in part on recommendations from this Conference, the UN Working Group on Indigenous Populations was formed within the Sub-Commission on the Promotion and Protection of Human Rights, (then known as the Sub Commission on the Prevention of Discrimination and Protection of Minorities). This Working Group was composed of independent experts. In 1988, the working group chair completed a draft declaration on the rights of indigenous peoples, based largely on their input, and in 1994, the Sub-Commission adopted a Draft Declaration on the Rights of Indigenous Peoples.³

This Draft Declaration was forwarded to the Human Rights Commission. The Human Rights Commission established an intersessional Working Group on the Draft Declaration (WGDD) charged with elaborating a declaration on the rights of indigenous peoples “taking into account” the Draft approved by the Sub-Commission. The WGDD was initially authorized for ten years, and then extended for an additional year. Thus, for eleven years, nations and indigenous peoples met in Geneva, generally for two weeks a year, to elaborate a draft declaration.

By the end of the eleven year period, agreement

had been reached on numerous, but not all, provisions of the Draft Declaration. At the same time, for reasons unrelated to the draft declaration, the Human Rights Commission came under fire at the United Nations and was replaced by the Human Rights Council – events that placed the process of finishing the declaration in doubt. In the midst of this confusion, the Chair of the WGDD, Peruvian Ambassador Luis Chavez, took the provisions upon which agreement had been reached, and, drafted a compromise text for those provisions on which agreement had not yet been reached. This compromise text was based on the years of discussion that had occurred in the WGDD. He submitted the draft declaration to the Human Rights Commission which, as one of its final acts, forwarded it to the newly created Human Rights Council. The Human Rights Council met for the first time in June of 2006 and on June 29, 2006, by a vote of thirty in favor, two opposed (Canada and Russia), and twelve abstaining, approved the Declaration and forwarded it to the General Assembly for adoption.

In the General Assembly, a group of African Nations garnered sufficient votes to defer consideration of the Draft Declaration to allow time for further consultation. The African Group initially proposed numerous unacceptable amendments, which it later withdrew in favor of nine amendments with which most indigenous peoples could live. As noted, this process culminated on September 13, 2007, when the Declaration was adopted overwhelmingly by the General Assembly of the United Nations.

C. United States Endorsement Of The Declaration

On December 16, 2010, President Obama “announce[d] that the United States is lending its support to this declaration. The aspirations it affirms – including the respect for the institutions and rich cultures of Native peoples – are

³ See discussion in S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW*, (2d ed. 2004) p. 57.

“The United States argues that it is doing its part in protecting Indian land rights by supporting Indian tribes in these cases. That is ironic since the cases represent major losses in the court system, demonstrating the inadequacy of our law when measured against the Declaration.”

ones we must always seek to fulfill...But I want to be clear: What matters far more than words – what matters far more than any resolution or declaration – are actions to match those words.” This announcement was greeted by a standing ovation by the roomful of tribal leaders assembled for second annual White House Tribal Nations Conference in Washington, D.C.

Indigenous peoples had urged the United States to endorse the Declaration unconditionally. Unfortunately, the United States issued a lengthy explanation of its interpretation of key elements of the Declaration – an interpretation at odds with that of most indigenous peoples. <http://www.state.gov/documents/organization/153223.pdf> The areas in which explanations were given correspond with those matters which the prior Administration identified as causing them to vote against the Declaration in 2007. http://www.archive.usun.state.gov/press_releases/20070913_204.html

While it is unfortunate that the United States felt compelled to issue a lengthy explanation of its vote, nevertheless, the endorsement is of great importance. By implication, the Obama endorsement approves without condition those areas for which no explanation was provided and the Declaration will take on a life of its own, with its meaning developing in context over the years – very likely in ways that go beyond the interpretations given by the United States. With strategic use of the Declaration, indigenous



peoples can help guide its development in the right direction.

This article provides a brief overview of explanations given by the United States in connection with its endorsement of the Declaration and makes some preliminary observations on those objections. It closes with a brief discussion of possible uses of the Declaration in the future.

1. Overview of United States' Explanation of Its Endorsement

a. Binding Nature of the Declaration

The United States' explanation states: “The United States supports the Declaration, which – while not legally binding or a statement of current international law – has both moral and political force....[I]t expresses aspirations of the United States, aspirations that this country seeks to achieve within the structure of the U.S. Constitution, laws, and international obligations, while also seeking , where appropriate, to

improve our laws and policies.”⁴ Compare this statement with the following question and answer from the frequently asked questions section at the United Nations Permanent Forum on Indigenous Issues website:

Is the Declaration legally binding?

UN Declarations... represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles. The Declaration, however, is widely viewed as not creating new rights. Rather, it provides a detailing or interpretation of the human rights enshrined in other international human rights instruments of universal resonance – as these apply to indigenous peoples and indigenous individuals.

http://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf

The position of the United States that no part of the Declaration is expressive of international law is clearly overstated, and that is likely to be proved out in the course of time. In the meantime, there is nothing to prevent courts from using the Declaration to help reach decisions in matters involving indigenous peoples. The Supreme Court has looked to international standards as “evolving standards of decency that mark the progress of a maturing society...” and thus relevant to consider in making decisions of great import. *Graham v. Florida*, 130 S. Ct. 2011, 2020 (2010). It will require careful consideration by attorneys as to when and how to use the Declaration in court proceedings, but important building blocks can be laid if one court relies on it to reach a decision, then another and another.



⁴This is an attempt by the United States to lay the ground for later use of a doctrine known as the “persistent objector” doctrine to prevent the development of customary international law. It has been questioned whether this doctrine ever had validity, and even if at one time it did have validity, whether it still does. In a United Nations with 192 members, can a handful of countries prevent a principle from becoming customary international law? See e.g. ANTONIO CASSESE, *INTERNATIONAL LAW* (2d ed. 2005) p. 162. In this context it is worth noting that the Declaration has already been cited by the Supreme Court of Belize in a decision upholding land rights of the Mayan villages of Conejo and Santa Cruz. The court referred to Art. 26 of the Declaration, dealing with land rights as “reflecting ... the growing consensus and the general principles of international law on indigenous people and their lands and resources.” Par. 131. The full text of the Supreme Court ruling can be found at http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf.

b. Collective Rights as Human Rights

The Declaration acknowledges collective human rights, and thereby provides a corrective to the western human rights framework, which is heavily weighted toward individual human rights.⁵ Indigenous peoples have typically not been at the table when international rights documents such as the Universal Declaration of Human Rights (UDHR) have been elaborated. As a result, their collective human rights have not been adequately taken into account.⁶ Indigenous peoples therefore were adamant that the Declaration focus on their collective human rights. In this they were successful, as the document recognizes a broad range of collective human rights.⁷

The explanation of its vote indicates that the United States does not share the view that collective rights of indigenous peoples are human rights. “Moreover, the United States is committed to serving as a model in the international community in promoting and protecting the collective rights of indigenous peoples as well as the human rights of all individuals ...indigenous individuals are entitled without discrimination to all human rights recognized in international law, and ... indigenous peoples possess certain additional, collective rights. The United States reads all of the provisions of the Declaration in light of this understanding of human rights and collective rights.”⁸

The US statement is inconsistent with the Declaration itself. The Declaration states in Article 1: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the

United Nations, the Universal Declaration of Human Rights and international human rights law.” The explanation is not even in harmony with the law of the United States. Normally only a right of equal or greater value can override another right and US law has recognized that the collective rights of tribes can override individual human rights. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)(collective interest of tribes in membership of their children overrides the right of parents to, in all cases, place a child with the adoptive parents it chooses or to proceed in whatever court they desire.)

c. Specific Rights

i. Self-Determination

Self determination is at the heart of the Declaration and is the one group right that all countries acknowledge as a human right. Without this right, the Declaration would have been unacceptable to indigenous peoples. Therefore, it is upsetting that the United States has interpreted the right to self-determination by indigenous peoples in a restrictive manner. “The United States is therefore pleased to support the Declaration’s call to promote the development of a new and distinct international concept of self-determination specific to indigenous peoples....a concept that is different from the existing right to self-determination in international law... For the United States, the Declaration’s concept of self-determination is consistent with the United States’ existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance.”

⁵For a discussion of the differences in thinking underlying notions of individual and collective rights, and the necessity for protection of indigenous collective human rights, see, Robert N. Clinton, *The Rights of Indigenous Peoples as Collective Group Rights*, 32 ARIZ. L. REV. 739 (1990).

⁶As to the western bias in international human rights in general, see, Richard Falk, *Think Again: Human Rights*, FOREIGN POLICY, (March/April 2004).

⁷See e.g. Art. 3 (self-determination); Art. 8 (right to freedom from assimilation or destruction of their culture); Art. 10 (right to remain on their lands); Arts. 11 and 12 (right to their maintain their cultures, customs, traditions, etc.); Art. 23 (right to traditional medicines); Art. 31 (right to their cultural heritage, traditional knowledge, etc.); Art. 37 (right to respect for their treaties, agreements and other constructive arrangements).

⁸Some other countries agree with the United States. The United Kingdom explained that they were voting for the document with the understanding that the only collective human right in the document is the right to self-determination. According to the UK, other collective rights recognized in the Declaration are not human rights, since, in their view, human rights belong to all people and many of the rights in the Declaration pertain only to indigenous peoples. (Oral statement on September 13, 2007).

This position will not withstand analysis.

Two international covenants, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, provide in their common Articles 1 that: “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁹ Article 3 of the Declaration tracks this language precisely – substituting “Indigenous peoples” for “All peoples.” The use of the same language is evidence of an intent to describe the same right. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995). Furthermore, the general rule is that if language is broad enough to encompass a situation not contemplated, it covers the situation absent proof it would have been excluded had it been contemplated. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980)(patent language broad enough to cover living life forms even though not contemplated at the time the legislation passed). Not only is there no proof that the right to self-determination of indigenous peoples would have been diminished had it been contemplated, there is “legislative history” here to the contrary. Attempts were made by some countries for years to add limiting language to the self-determination provision and those attempts failed.

Moreover, additional language in the UN Declaration confirms that Article 3 falls within the scope of the international right. The preamble provides as follows in two separate paragraphs:

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely

pursue their economic, social and cultural development.

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law.

These paragraphs combine with Article 2 to make the matter clear:

Article 2 – Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

In addition, the Human Rights Council, in its Resolution 5/1 of June 18, 2007 adopted the “United Nations Human Rights Council: Institution – Building” text which under its “Framework for the programme of work” in item 3 enumerates “Rights of peoples...”, thus viewing these rights as falling under the rubric of human rights.

These considerations indicate that the self-determination right in Article 3 of the Declaration is the same as that in international law generally.

ii. Lands, territories and natural resources

The Declaration has broad provisions concerning rights to lands, territories and natural resources. Article 25 starts with the right of indigenous peoples to “maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources.” Article 26.1 provides that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” Article 26.2 refers to the right to “own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they

⁹ See General Assembly Resolution 2200 (XXI) of 16 December 16, 1966.



have otherwise acquired.” Article 27 requires the establishment of a system to “recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources...” Article 28.1 provides for redress for lands “which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” Compensation is to take the form of “lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.” Article 28.2.

As to these provisions of the Declaration, the United States’ explanation states that, “...the United States intends to continue to work so that *the laws and mechanisms it has put in place* to recognize existing, and accommodate the acquisition of additional, land territory, and natural resource rights under U.S. law function properly and to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest... The United States will interpret the redress provisions of the Declaration to be *consistent with the existing system* for legal redress in the United States, while working to

ensure that appropriate redress is in fact provided under U.S. law.” pp 6-8 (emphasis supplied). The United States makes this statement even though: under US law, aboriginal title is not recognized as compensable; *Tee-Hit-Ton v. United States*, 348 U.S. 272 (1955); under US law, long standing Executive Order Reservations are not recognized as compensable even though only Congress can change their boundaries; *Karuk Tribe v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000) cert. den. 121 S.Ct. 1402 (2001); under U.S. law, it is becoming difficult, if not impossible, for tribes to get redress for loss of their aboriginal territory based on the passage of time. *Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010). In addition, land cannot be taken into trust for Indian tribes not recognized or under federal jurisdiction in 1934. *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). The United States argues that it is doing its part in protecting Indian land rights by supporting Indian tribes in these cases. That is ironic since the cases represent major losses in the court system, demonstrating the inadequacy of our law when measured against the Declaration.

iii. Free, Prior and Informed Consent

Article 19 of the Declaration provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.” The explanation of the US vote once again waters this down. “In this regard, the United States recognizes the significance of the Declaration’s provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, *but not necessarily the agreement* of those leaders, before the actions addressed in those consultations are

taken... The United States intends to consult and cooperate in good faith with federally recognized tribes and, as applicable, Native Hawaiians, on policies that *directly and substantially affect them*, and to improve our cooperation and consultation processes, *in accordance with federal law* and President Obama's call for better implementation of Executive Order 13175." (emphasis supplied) p. 5. Article 19 refers to efforts to obtain free, prior and informed consent of indigenous peoples for measures that "may affect" while the US explanation refers to "meaningful consultation" only in matters which "directly and substantially affect them", a substantially modified standard. In addition, the concept of "meaningful consultation" is a far cry from "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own indigenous institutions *in order to obtain their free, prior and informed consent...*" Finally the reference to "in accordance with federal law" defeats the very purpose of international standard setting. If all countries continue applying their own internal law, nothing has been accomplished.

d. Conclusion

Though the United States' explanation of its vote is disappointing, the Declaration can still be used strategically at all levels of government from local to international. As pointed out, the Supreme Court has recently looked to international standards for guidance. There are numerous areas where the Declaration can be used in litigation. For example, the fact that 150 Nations recognize the right of self-determination completely undermines that version of the plenary power doctrine which describes congressional power over tribes as virtually unlimited. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("...Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes

otherwise possess.") Likewise, such worldwide recognition is totally inconsistent with the Supreme Court opinion in *Washington v. Confederated Bands and Tribes of the Yakima Indian Reservation*, 439 U.S. 463 (1979) which refused to recognize the right of the tribe to self-government as a fundamental right for purposes of equal protection analysis. The US statement acknowledges that the Declaration identifies areas where the US needs to improve its laws and policies. Those areas to which the US has appended explanations are certainly areas calling for such improvement. Thus, the Declaration can be used as a roadmap to the reform of federal Indian law. It can be used in negotiations with federal agencies and in the development and implementation of regulations. The Declaration already has been used on the ground at the local level to convince a board of education of the right of indigenous students to receive language instruction from native speakers not formally certified by the State and in using free, prior and informed consent in negotiating with mining companies.¹⁰ Article 42 of the Declaration can be used to demand an enhanced status in UN processes, not as non-governmental organizations - ngos. That is precisely what tribes are not. Additionally, the unanimity which now exists in the international community lays the foundation for the further development of customary international law, US protestations to the contrary notwithstanding. There is virtually no end to the uses to which the Declaration can be put, as long as indigenous peoples use it wisely.

The Declaration on the Rights of Indigenous Peoples is an historic milestone in the long struggle by indigenous peoples for due recognition in the world. The United States' endorsement is important because of the leadership role the country plays in the world. Indigenous peoples must keep the United States' feet to the fire in ensuring, as President Obama stated, that actions match the words of the Declaration. 🌸

¹⁰Oral communication from Andrea Carmen, International Indian Treaty Council.

CASE UPDATES

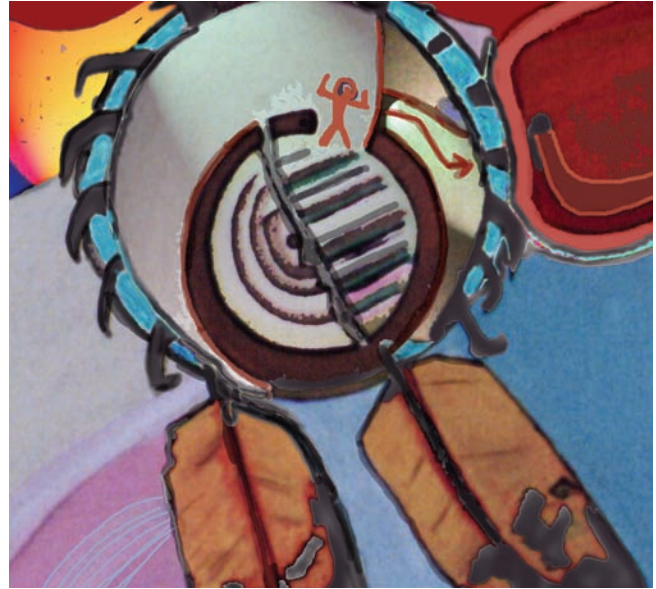
State high court empowers tribes' child custody decisions

On March 4, 2011, the Alaska Supreme Court issued a broad affirmation of inherent tribal authority. In *State of Alaska v. Tanana*, the Court ruled that tribal courts have authority to initiate and adjudicate children's cases without going through state courts.

The case was brought in 2004 on behalf of the Villages of Tanana, Nulato, Akiak, Kalskag, Lower Kalskag and Kenaitze along with Theresa and Dan Schwietert. The case was brought after Governor Murkowski's administration, on the advice of former Attorney General Greg Renkes, abruptly stopped recognizing tribal court decrees in cases that did not originate in state court. Renkes argued that only state courts could initiate children's cases and if they chose, transfer those cases to tribal courts. He also instructed state employees to stop recognizing or enforcing tribal court decrees. The case was brought to overturn Renkes' opinion and to force the State, its agencies and officials to formally recognize valid tribal court decrees without regard to any state court involvement.

State services frequently do not reach village Alaska. Tribal courts must therefore handle most cases involving the welfare of village children. State recognition of those tribal court proceedings is therefore critical to assure that proceedings which occur in tribal court are then respected by other state agencies. Otherwise, adoptive parents may not be able to participate in state funded assistance programs, secure substitute birth certificates necessary to travel out of state, to enroll children in school, or to secure medical care.

The Schwieterts faced just such a dilemma. After adopting a special needs child in Tanana tribal court, they had difficulty accessing health care. They were also frustrated in their plans to travel out of state when they were told that they could not acquire a substitute birth certificate



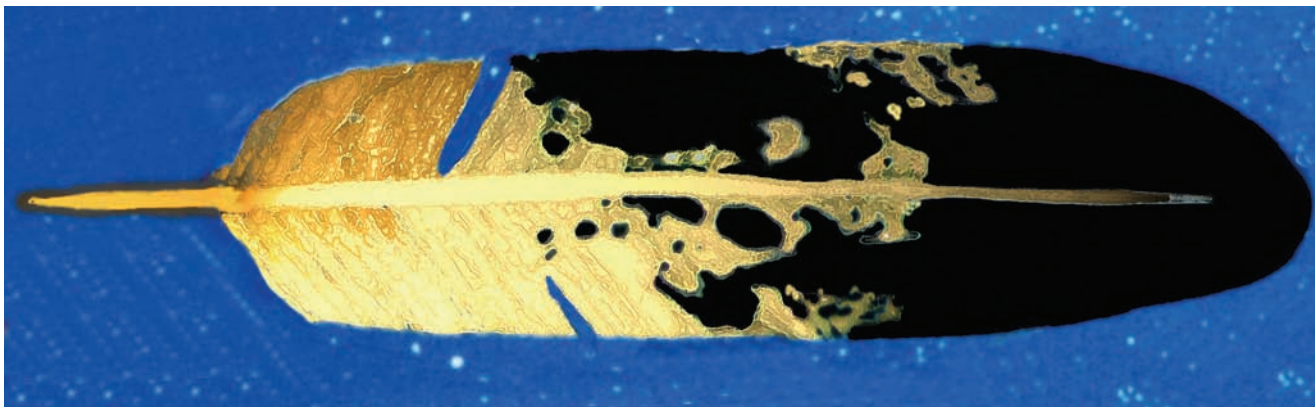
for their adoptive child since the child had been adopted in a tribal rather than state court proceeding.

NARF attorney Heather Kendall Miller called on Governor Parnell and Attorney General Burns to rescind the Renkes Opinion and instead take this opportunity to work with tribes and tribal courts to ensure the protection of all children, no matter which court their case is in. She sounded on a positive note: "now that the Court has reaffirmed tribal authority in this area I look forward to working with Attorney General Burns to better coordinate tribal and state services in village Alaska."

NARF receives ACLU honor

On January 22, 2011, the Alaska Office of the Native American Rights Fund was named one of the 40 Heroes of Constitutional Rights by the American Civil Liberties Union of Alaska. In celebration of its 40th anniversary, the Alaska office of the ACLU honored the 40 people and organizations that it considered to be heroes of constitutional rights. NARF was honored for its long history of commitment to upholding the rights of Alaska Native people as described in the following excerpt from the event program:





“The Alaska Office is responsible for many of the major subsistence decisions in Alaska in the past 25 years, such as the milestone Katie John case. . . The Alaska Office has also prioritized the protection of tribal sovereignty and has successfully litigated numerous cases affirming the governmental status of Alaska Tribes as possessing inherent authority over their members.”

The ACLU also noted that it has partnered with the NARF Alaska Office in two critical cases upholding the rights of indigenous people to use their Native languages:

“The first case successfully challenged the ‘English Only’ law that required individuals to speak only English when engaged in government business, such as at the DMV or in court. In the second case, NARF and the ACLU of Alaska sued the State of Alaska for violation of the Voting Rights Act by failing to provide language assistance to thousands of Alaska’s Yup’ik-speaking voters. Following a preliminary injunction, a comprehensive agreement was reached which includes translation and interpretation assistance for all Yup’ik speaking voters throughout the registration and voting process.”

NARF is honored to be named one of the ACLU’s 40 Heroes. For more information on the Alaska Office or its recent court victories please go to www.narf.org.

Tribal Supreme Court Project Update

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 the Native American Rights Fund. The Project was formed in 2001 in response to a series of U.S. Supreme Court cases that negatively affected tribal sovereignty. The purpose of the Project 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 the Project in our effort to coordinate resources, develop strategy and prepare briefs, especially at the time of the petition for a writ of certiorari, prior to the Supreme Court accepting a case for review.

At present, two important Indian trust cases are pending on the merits before the Court. First, the Tribal Supreme Court Project finalized the preparation of amicus briefs in support of the Tribe in *United States v. Jicarilla Apache Nation* which was argued before the Court on April 20, 2011. In this case, the United States is challenging the Federal Circuit’s ruling that the federal government “cannot deny an Indian tribe’s request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern the management of an Indian trust.” Second, the Project continues to wait for the Court to issue its decision in *United States v. Tohono O’odham Nation* which was argued on November 1, 2010. The delay in issuing an opinion may indicate a lack of consensus on the Court regarding the broad rule requested by the United States which would preclude any Indian tribe from bringing

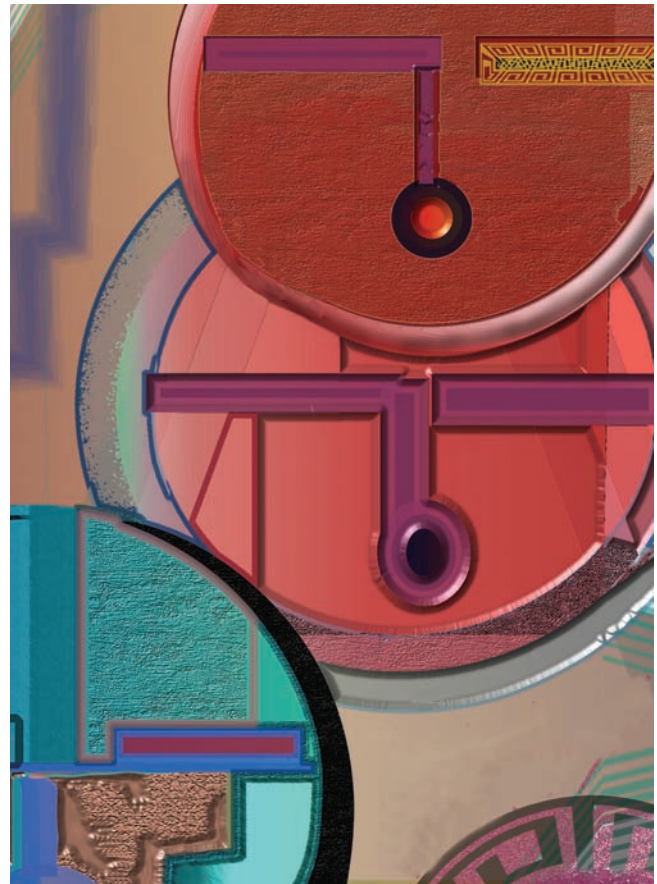
money damages claims in the Court of Federal Claims if they have filed a “related” tribal trust mismanagement case in another court even though it seeks different (e.g. equitable and injunctive) relief.

The Court has called for the views of the Solicitor General in three other Indian law cases: *Osage Nation v. Irby* (reservation disestablishment); *Brown (formerly Schwarzenegger) v. Rincon Band* (IGRA “revenue” sharing); and *Miccosukee Tribe v. Kraus-Anderson* (enforcement of tribal court judgments). More than likely, the Solicitor General will not file his briefs until after the Court’s April 2011 oral argument session, but the petitions will likely be considered in conference before the Court adjourns for its summer recess at the end of June 2011.

Cases Recently Decided By The Supreme Court

Madison County V. Oneida Nation Of New York (No. 10-72) – On January 10, 2011, the Court issued an order vacating and remanding the case to the U.S. Court of Appeals for the Second Circuit. In a per curiam opinion, the Court stated:

We granted certiorari on the questions “whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes” and “whether the ancient Oneida reservation in New York was disestablished or diminished.” Counsel for respondent Oneida Indian Nation advised the Court through a letter on November 30, 2010, that the Nation had, on November 29, 2010, passed a tribal declaration and ordinance waiving “its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States.” Petitioners Madison and Oneida Counties responded in a December 1, 2010 letter, questioning the validity, scope, and permanence of that waiver; the Nation addressed those concerns in a December 2, 2010 letter.



We vacate the judgment and remand the case to the United States Court of Appeals for the Second Circuit. That court should address, in the first instance, whether to revisit its ruling on sovereign immunity in light of this new factual development, and—if necessary—proceed to address other questions in the case consistent with its sovereign immunity ruling. [Citations omitted].

This ruling is a victory for the Oneida Indian Nation and for all of Indian country. In *Madison County*, the Second Circuit had held that the Oneida Indian Nation is immune from suit, but in a terse concurring opinion written by Judge Cabranes, two of the three judges on the panel made clear that although they were bound by Supreme Court precedent upholding tribal sovereign immunity, the decision “defies common sense” and “is so anomalous that it calls out for the Supreme Court to revisit *Kiowa and Potawatomi*.” For the present, the Court will not be revisiting its well-settled precedent.



Petitions For Writ Of Certiorari Granted

Currently, a writ of certiorari has been granted in two Indian law cases: *United States V. Jicarilla Apache Nation* (No. 10-382) – On January 7, 2011, the Court granted review of a decision by the U.S. Court of Appeals for the Federal Circuit which held that the federal government “cannot deny an Indian tribe’s request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern the management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing interest in those communications.” The Federal Circuit adopted the fiduciary exception to the attorney-client privilege in tribal trust cases which permits a beneficiary to discover information relating to fiduciary matters (including trust management). Oral argument was heard on April 20, 2011.

United States V. Tohono O’odham Nation (No. 09-846) – On November 1, 2010, the U.S. Supreme Court heard oral argument in *United States v. Tohono O’odham Nation*, a case in which the U.S. Court of Appeals for the Federal Circuit found that 28 U.S.C. § 1500 does not preclude jurisdiction in the Court of Federal Claims when a Indian tribe has also filed an action in Federal District Court seeking different relief (e.g. money damages versus historical accounting).

The question presented for the Court’s review is: Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government’s alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

During oral argument, the Justices appeared to struggle with the positions of both parties and the practical implications resulting from a ruling for either side. In particular, the Court appeared hesitant to adopt the broad rule sought by the United States—a rule precluding jurisdiction in the Court of Federal Claims in which a “related” case is pending in another court even if it seeks different relief. A number of Indian tribes have filed identical claims for breach of fiduciary duties in both the Court of Federal Claims and the Federal District Court seeking separate relief. Unlike prior Indian law cases, the Justices did not appear as hostile to the tribal position. Four amicus briefs in support of the Tohono O’odham Nation were filed by the U.S. Chamber of Commerce, the National Association of Home Builders, the Colorado River Indian Tribes and National Congress of American Indians, and the Osage Nation. Justice Kagan is recused in this case.❀

National Indian Law Library

Justice Through Knowledge!

The National Indian Law Library (NILL) is the only law library in the United States devoted to Indian law. The library serves both NARF and members of the public. Since it was started as a NARF project in 1972, 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; legal pleadings from major Indian cases; and often hard to find reports and historical legal information. In addition to making its catalog and extensive collection available to the public, NILL provides reference and research assistance relating to Indian law and tribal law and its professional staff answers over 2,000 questions each year. In addition, the Library has created and maintains a huge web site that provides access to thousands of full-text sources to help the researcher.

The National Indian Law Library is currently undergoing a new push to increase the tribal law content available at NILL and online through its Tribal Law Gateway. NILL's Access to Tribal Law Project (ATLP) currently has over 230 tribes participating by providing tribal codes, constitutions and other tribal legal materials for NILL's collection. In an effort to foster increased communications between tribes and the library, NILL recently surveyed over ninety tribal judges, tribal leaders, law librarians, students, tribal members and other practitioners of Indian Law on the importance of having access to tribal law materials. The last few months also saw the creation of the Access to Tribal Law Project Support Committee, composed of leaders in Indian law from across the



nation. The Support Committee oversees the Project's goal of providing reliable access to current tribal law, assists in recruiting new tribes to join the ATLP and encourages participating tribes to provide updates.

NILL has recently debuted two new, helpful features on its website to assist researchers searching for tribal law materials: a sleeker, consolidated version of the library's Tribal Law Gateway (www.narf.org/nill/triballaw/index.htm) and the Access to Tribal Law Project Homepage (www.narf.org/nill/atlp.htm). The Gateway now hosts the code and constitution of each tribe in one, easy-to-use location and is updated frequently. The ATLP Homepage provides more information about tribal law access through NILL and guides tribes through the process of getting involved with the project, step-by-step. For any tribal leaders or tribal attorneys interested in learning more about Access to Tribal Law at NILL or ready to add your tribe's code and/or constitution to our growing collection, call James Bryant at (303) 447-8760 ext. 139 or email at jbryant@narf.org. 🌟

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 have also been reduced. 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 tribal 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.

The generosity of tribes is crucial in NARF's struggle to ensure the freedoms and rights of all Native Americans. Contributions from these tribes should be an example for every Native American Tribe and organization. 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 generous support of NARF thus far for our 2011 fiscal year – October 1, 2010 to September 30, 2011:

- Bristol Bay Native Corporation
- Chickasaw Nation
- Citizen Potawatomi Nation
- Fond du Lac Band of Lake Superior Chippewa
- Iowa Tribe of Oklahoma
- Menominee Indian Tribe of Wisconsin
- Mississippi Band of Choctaw Indian
- Pauma Band of Mission Indians
- Poarch Band of Creek Indians
- Pokagon Band of Potawatomi Indians
- Saginaw Chippewa Indian Tribe of Michigan
- San Manuel Band of Mission Indians
- Shakopee Mdewakanton Sioux Community
- Stillaguamish Tribe of Indians
- Tanana Chiefs Conference
- Wildhorse Foundation
- Yoche Dehe Wintun Nation

THE NATIVE AMERICAN RIGHTS FUND

Looking back at the past forty years of the Native American Rights Fund's (NARF) existence, it is almost impossible to comprehensively document the impact that NARF has had in Indian country. Before NARF's existence, there were not many attorneys working for Indians. Most of them were handling contingency-fee cases since few tribes could afford tribal counsel. "Indian law" was neither developed, nor defined, let alone being taught in law schools.

Today, the delivery of responsible, comprehensive legal representation to Indian tribes, organizations and individuals has been institutionalized as an integral part of America's justice system. Private practitioners, tribal attorneys, legal services offices and other non-profit organizations like NARF together are providing representation to Indians, using our country's justice and legislative systems to assure that Indian rights are upheld.

Native advocates were almost invincible during the 1970's and into the 1980's, especially in the U.S. Supreme Court. Beginning in the mid-1980's, Supreme Court decisions started shifting against tribal interests. This negative shift continues today as the majority of the Supreme Court seems intent on limiting tribal sovereignty.

After the modern day tribal sovereignty movement, the field of Indian law is no longer considered an esoteric subject about ancient history. Due in part to NARF's existence – its tremendous successes in the courts as well as continued representation over the years in thousands of cases – the rights of America's Indians are now judiciously and routinely being advocated before the courts, administrative hearings, state legislatures and Congress. Officials and bureaucrats who either chose to ignore or had no information on the specific rights of America's Indians in the past are today held accountable for decisions relating to Native Americans, partly because of the rights defined and upheld in NARF's courtroom and legislative victories.

The initial goal for NARF's Indian law practitioners was to represent Native Americans in cases of major significance to a great number of Indian people. For the first time, Indian people were assured that a sustained, highly-trained Indian advocacy group was available to them to clarify treaty and constitutional rights guaranteed them – regardless of their ability to pay. NARF was directly involved as either counsel or co-counsel in practically all of the early precedent-setting cases of the 1970's.

The Native American Rights Fund has been at the forefront on advocating many of the major acts and reviews potentially affecting all Native Americans including the American Indian Religious Freedom Act, the Indian Child Welfare Act, the American Indian Policy Review Commission, the Native American Graves

Protection and Repatriation Act, the Voting Rights Act, the Indian Self-Determination Act, the Maine Indian Land Claims Settlement Act, the Religious Freedom Restoration Act and many others. NARF has also been instrumental in assisting vital new Indian organizations including the American Indian Higher Education Consortium, the Tribal Education Departments National Assembly, the Council on Energy Resource Tribes, the National Tribal Environmental Council and the Native Hawaiian Legal Corporation.

As an Indian-controlled organization, NARF's leadership has provided as many opportunities as possible to develop young Indian law graduates and students in the area of Indian law. An average of eight law interns and/or clerks are employed annually by NARF, most of them being Native American.

NARF's existence would not be possible without the efforts of the thousands of individuals who have offered their knowledge, courage and vision to help guide NARF on its quest. Of equal importance, NARF's financial contributors have graciously provided the resources to give our efforts life. Contributors such as the Ford Foundation have been with NARF since its inception. The Open Society Institute, the Bay and Paul Foundations and the Unger Foundation have also made long term funding commitments. Finally, the positive effects of NARF's work are reflected in the financial contributions by a growing number of tribal governments like the Yocha Dehe Wintun Nation, the Seminole Tribe of Florida, the Chickasaw Nation, the San Manuel Band of Mission Indians, the Muckleshoot Tribe, the Mississippi Band of Choctaw Indians and the Poarch Band of Creek Indians. United, these financial, moral, and intellectual gifts provide the framework for NARF to fulfill its goal of securing the right to self-determination to which all Native American peoples are entitled.

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 the Litigation Management Committee at NARF's main office, 1506 Broadway, Boulder, Colorado 80302. NARF's clients are expected to pay whatever 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. Ray Ramirez Editor, ramirez@narf.org.

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Tax Status: The Native American Rights Fund is a nonprofit, 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.

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

Washington, D.C. Office: Native American Rights Fund, 1514 P Street, NW (Rear) Suite D, Washington, D.C. 20005 (202-785-4166) (FAX 202-822-0068).

Alaska Office: Native American Rights Fund, 801 B Street, Suite 401, Anchorage, Alaska 99501 (907-276-0680) (FAX 907-276-2466).

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