

Funding Tribal Existence: The Ford Foundation's Support for the Native American Rights Fund since 1970

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In the late 1960s and early 1970s, the Ford Foundation helped establish the field of public interest law by supporting the creation of several civil-rights focused legal advocacy organizations, including the Native American Rights Fund (NARF). This essay focuses on the first 30 years of NARF's story. It explores the evolution of Ford's law program in the 1950s and 1960s, outlining the Foundation's strategy for supporting civil rights-oriented public interest law firms. It reveals how Ford's program officers were deeply involved with the planning and early support for NARF, then details several early, key strategic decisions including NARF's focus on winning "big precedent," landmark cases. It considers issues that emerged in Ford's early evaluations and looks at why Ford continued to bet on NARF's approach. Finally, this essay shows how the Ford Foundation continued to offer mentorship

and support to NARF through the 1990s as the organization struggled for financial sustainability during challenging political and budgetary times. The payoff from the Foundation's investment and its patience was substantial. Nearly 40 years after it was established, NARF helped settle one of the largest class action lawsuits in American history on behalf of Native people.

Several historians have probed the roots and development of public interest law, including early philanthropic support that created NARF and other organizations in the early 1970s. Few, however, have looked closely at the strategies and formation or the long-term outcomes of specific public interest law firms.¹ The Ford/NARF story offers lessons for anyone seeking to understand the power that philanthropic dollars and relationships can have in enabling activists and social leaders as they fight to harness established legal systems for the benefit of their communities. It demonstrates how, over the course of an exceptionally long and intimate relationship between grantor and grantee, the Ford Foundation empowered an audacious team of young American Indian lawyers to develop “the most effective national legal organization advocating for tribal sovereignty today.”²

*This essay respectfully uses the terms “Native American,” “Native,” “American Indian,” and “Indian” interchangeably. This reflects the historical usage employed in many source documents, standards of Indian law and policy, and the common usage by both Native and non-Native people in the author's home region of western South Dakota. Readers should also recognize that Alaska Native and Native Hawaiian peoples faced many of the same issues as Native American tribes. NARF has consistently supported them, and their inclusion should be implied throughout this piece.

1. See for example Burton A. Weisbrod, Joel F. Handler and Neil K. Komar, *Public Interest Law: An Economic and Institutional Analysis* (Berkeley: University of California Press, 1978); Deborah L. Rhode, “Public Interest Law: The Movement at Midlife,” *Stanford Law Review* 60, no. 6 (April 2008): 207–84; Catherine Albiston, “Democracy, Civil Society, and Public Interest Law,” *Wisconsin Law Review* 2018, no. 2 (2018): 187–214; Karen O'Connor and Lee Epstein, “A Legal Voice for the Chicano Community: The Activities of the Mexican American Legal Defense and Educational Fund, 1968–1992,” *Social Science Quarterly* 65, no. 2 (1984): 245–56; Michael A. Olivas, “From a ‘Legal Organization of Militants’ Into a ‘Law Firm for the Latino Community’: MALDEF and the Purposive Cases of Keyes, Rodriguez, and Plyler,” *Denver University Law Review* 90, no. 5 (2013): 1151–208.

2. Daniel M. Cobb, “Continuing Encounters: Historical Perspectives,” in *Beyond Red Power: American Indian Politics and Activism Since 1900*, ed. Daniel M. Cobb and Loretta Fowler (Santa Fe, NM: School for Advanced Research Press, 2007), 64.

The Ford Foundation and Public Interest Law

Before the late 1960s, many private foundations had avoided supporting civil rights litigation, largely because such programs lacked clear administrative models and came with significant legal and political risks.³ Members of Congress and officials at the Treasury Department had probed philanthropic giving in the 1950s and 1960s.⁴ As a result of these investigations, new regulations were proposed that might, for example, bar foundations from supporting legal programs. As one Ford Foundation program officer wrote, “it was recognized early that public interest law firms and their activities would be likely objects of controversy and sometimes cause angry reactions, for they are in the business of challenging the policies and practices of well-established institutions and powerful interests.”⁵

The Ford Foundation, however, was already deeply immersed in the legal system. In 1949, the board of trustees asked Ford’s staff to develop a strategy for pushing the legal system to promote equality and fairness in the United States. The Foundation made grants to the National Legal Aid Association (later, the National Legal Aid and Defender Association).⁶ From there, a Ford staffer named William Pincus began to develop the Foundation’s legal assistance program, which focused on strengthening legal aid clinics. He also encouraged law schools to promote equal access to the law and underscore the need for

3. Steven Schindler, “Case 36: Social Movements and Civil Rights Litigation, Ford Foundation 1967,” in *Casebook for the Foundation: A Great American Secret, How Private Wealth is Changing the World*, ed. Joel L. Fleishman, J. Scott Koehler, and Steven Schindler (New York: Public Affairs, 2007), 104–5.

4. Thomas A. Troyer, “The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings,” *The Exempt Organization Tax Review* 27, no. 1 (January 2000): 56–57. See also Eleanor L. Brilliant, *Private Charity and Public Inquiry: A History of the Filer and Peterson Commissions* (Bloomington: Indiana University Press, 2000), 13–15.

5. “The Public Interest Law Program: Five Years Later,” September 1975, Ford Foundation Report # 002114, Rockefeller Archive Center (hereafter “RAC”), 7.

6. Dorothy J. Samuels, “Expanding Justice: A Review of the Ford Foundation’s Legal Services Program,” January 1984, Ford Foundation Report # 012305, RAC, 2. See also Earl Johnson, Jr., *Justice and Reform: The Formative Years of the American Legal Services Program* (New Brunswick, NJ: Transaction, 1974), 21–23, 27–28.

legal services among underprivileged populations. As one historian writes, these early moves “confirmed” the Foundation’s “more activist role in pursuit of social justice.”⁷

Under the leadership of Paul Ylvisaker and others inside its Government and Law program, the Ford Foundation expanded its support for legal projects over the course of the 1960s. The “Gray Areas” program, which addressed the structural challenges that perpetuated poverty and inequality in urban centers across the nation, included support for legal aid. The Foundation gave some 200 grants to around 325 legal projects, generally focused on education; legal assistance to minorities and the poor; and for demonstration projects in court, law enforcement, and correctional systems. Ford also gave grants to the American Bar Association, the NAACP’s Legal Defense and Education Fund, and to strengthen the NLADA’s National Defender Project, among others.⁸

Although Pincus, Ylvisaker, and others helped push the Ford Foundation into the social justice arena, the Foundation increased its focus on civil rights after former Kennedy administration official McGeorge Bundy became president in 1966. Under Bundy’s leadership, Ford substantially increased its civil rights grantmaking, giving heavily to minority groups.⁹ Bundy believed that the law “must be an active, not a passive force” in the pursuit of civil rights.¹⁰ So, in the late-1960s, a team of Government and Law program officers led by Sanford M. Jaffe outlined an experimental approach that could meld its “twin interests of enhancing delivery of quality legal services and of advancing the principles of equality.”¹¹

7. Samuels, “Expanding Justice,” 4.

8 “Support for Experimental Projects of Public Interest Legal Representation by the Ford Foundation,” memorandum, July 1970, Ford Foundation Report # 010897, RAC, 1; Samuels, “Expanding Justice,” 5–7.

9. Mary McClymont and Stephen Golub, eds., *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World* (New York: The Ford Foundation, 2000), 10, 91–92. See also The Ford Foundation, “A Legacy of Social Justice,” accessed February 11, 2019, <https://www.fordfoundation.org/about/about-ford/a-legacy-of-social-justice>.

10. Samuels, “Expanding Justice,” 22.

11. *Ibid.*, 25.

Jaffe and his team defined a strategy to provide funding to legal aid organizations that would focus on broad legal issues rather than individual cases.¹² By providing startup money for issue-specific public interest law organizations, they reasoned, the Ford Foundation could resolve some of the persistent challenges that its existing law program faced. Specifically, the Foundation understood that the deluge of individual cases too often overwhelmed legal aid programs and “fail[ed] to raise issues of social equity or strike at the root causes of deprivation.”¹³

To meet this need, the Foundation gave some \$18 million to establish seven programs in the late 1960s and early 1970s. They included, among others, the Women’s Law Fund, the Mexican American Legal Defense and Education Fund, the Puerto Rican Legal Defense and Education Fund, and NARF.¹⁴

The Foundation’s approach flowed from its awareness of the risks inherent in civil rights litigation, as well as its strategic vision for advancing the field of public interest law. Jaffe and his staff understood that civil rights law was politically contentious and worked to convince the Foundation’s board that a public interest law program could be developed in a way that maximized outcomes while minimizing controversy.¹⁵

First, the Foundation commissioned a law firm in New York City, which affirmed the legality of funding civil rights litigation, especially in the context of the new Tax Reform Act of 1969, which had revamped the regulatory framework for private foundations. Next, Ford established clear eligibility parameters for public interest law firms. Grantee organizations, for example, could not pursue cases based on the potential of a large financial

12. McClymont and Golub, *Many Roads to Justice*, 92.

13. “Advocacy, Law, and the Public Interest,” The Ford Foundation, March 1970, Ford Foundation Report # 002790, RAC, 4.

14. Schindler, “Case 36: Social Movements and Civil Rights Litigation, Ford Foundation 1967,” 104.

15. See Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton, NJ: Princeton University Press, 2008), 48–49.

gain for their clients or themselves. Most importantly, however, the Foundation targeted its giving to legal organizations whose mission focused on issues that were inadequately represented in existing law and whose work would “advance a general or ‘public’ interest.”¹⁶

With these requirements in place, the Ford Foundation launched a major experiment that would drive decades of litigation and negotiation on issues ranging from minority rights to the environment, property rights, criminal justice reform, consumer protection, and more.¹⁷ Meanwhile, a generation of Native American lawyers was entering the profession and searching for ways to harness the law to strengthen Native Nations and their people.

The “First Wave” of American Indian Attorneys

The Ford Foundation’s support for public interest law arrived at a critical moment in Native American history. The African American civil rights movement won major victories in the 1950s and 1960s, inspiring members of other historically marginalized groups into action. Like the activists who defined the women’s, Chicano/a, and Asian American rights movements, American Indians organized and articulated their concerns about the systemic dispossession and forced assimilation of Native peoples, as well as civil rights abuses that flowed from centuries of oppression.

Red Power activism burst onto the scene in the late 1960s and early 1970s, when militant protesters grabbed headlines and dominated the evening news. Indian activists occupied Alcatraz Island in November 1968, ransacked the Bureau of Indian Affairs (BIA) headquarters in Washington, D.C. in 1971, and staged a months-long, armed takeover of Wounded Knee, South Dakota, in 1973. Surrounding these high-profile events were smaller

16. “Support for Experimental Projects,” 4.

17. See Rhode, “Public Interest Law.”

actions, including treaty rights protests, solidarity marches, and occasional expressions of Native advocacy by Hollywood actors and other celebrities.¹⁸

The drama of Red Power activism, however, overshadowed the contributions by earlier generations of Native organizers, attorneys, and intellectuals. They laid the framework for major legislative and judicial achievements in the latter decades of the 20th century. Prior to World War II, American Indians experienced limited access to higher education. Then, the GI Bill enabled Native veterans to pursue college, graduate, and professional training. Among this initial class of Native professionals was a small group of American Indian law students who studied in the 1950s and 1960s and went on to become the “first wave of Native attorneys.”¹⁹

Their entrée into the legal profession—as well as those of other American Indian scholars, businesspeople, and professionals—coincided with new opportunities fostered by President Lyndon Johnson’s War on Poverty. The Office of Economic Opportunity (OEO) administered numerous Community Action Programs, which Native people used to secure federal funding for projects on education, rural poverty, legal aid, and more. These programs were crucial to Native communities as they fought to reestablish long-struggling reservation economies and create jobs for urban Indians living in cities across the United States. OEO programs also provided learning opportunities that Native leaders and activists used to better understand the federal bureaucracy. With this growing knowledge and experience navigating political and bureaucratic channels, tribes were better able to secure funding and articulate

18. On Red Power activism more generally, see Paul Chaat Smith and Robert Allen Warrior, *Like A Hurricane: The Indian Movement from Alcatraz to Wounded Knee* (New York: The New Press, 1996); Joane Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1996).

19. Stacy Leeds, “Pipeline into Law School/Legal Profession,” published in “The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession,” report by the National Native American Bar Association, Tempe, AZ, 2015, 19.

their rights to sovereignty and self-determination.²⁰ The “first wave” of Native lawyers and professionals played critical roles as tribes steered through administrative obstacles within federal programs.

Creating the Native American Rights Fund

The story of NARF’s genesis is cemented in institutional lore. In 1968, a pair of young, non-Native attorneys named Robert “Bob” Pelcyger and David Getches headed to Southern California to work for California Indian Legal Services, a War on Poverty legal aid organization. Initially tasked with helping tribes in California resolve natural resources claims and persistent conflicts with states and federal agencies, Getches and Pelcyger were inundated with requests from tribes across the United States. It quickly became clear that many Native Nations faced legal challenges but lacked the resources to resolve them.²¹

A little over a year into their work in California, Getches and Pelcyger reached out to a law professor at UCLA for advice. He connected them to the Ford Foundation, and within months, the pair found themselves bumping along dusty reservation roads with Leonard Ryan, a Ford Foundation Government and Law program officer. As they toured California’s Indian Country and discussed the challenges facing tribes everywhere, the trio explored the possibility of founding a national Indian legal aid organization.²²

As Ryan and other Government and Law staffers considered folding Native issues into the Ford Foundation’s expanding public interest law portfolio, a much deeper

20. See Clara Sue Kidwell, “Terminating the Choctaws” in *Beyond Red Power*, 132–33; Daniel M. Cobb, “Talking the Language of the Larger World: Politics in Cold War (Native) America,” in *Beyond Red Power*, 168–71; Christopher K. Riggs, “American Indians, Economic Development, and Self-Determination in the 1960s,” *Pacific Historical Review* 69, no. 3 (August 2000): 431–63.

21. Susan Sanders, “Native American Rights Foundation: Our First Twenty Years,” commemorative brochure, Boulder, CO: Native American Rights Fund, 1990, 3. This document and all NARF annual reports cited here can be downloaded at <https://www.narf.org/about-us/annual-reports>.

22. *Ibid.*, 3.

philanthropic legacy lingered in the background. Private philanthropies had a troubled history in Indian Country: many charitable organizations had funded assimilationist educational and religious programs going back to the early 19th century. While supporting destructive policies and social movements, philanthropic dollars had helped perpetuate destructive stereotypes of Native people and their cultures and religions.²³ In the 1960s and 1970s, however, the growing movement for civil rights on behalf of various historically disadvantaged groups, the Ford Foundation's interest in social justice, and the development of Native activism dovetailed into an opportunity for large foundations like Ford to reset the sector's relationship with Indian Country.

Due to the timing of its creation, the Ford Foundation had avoided the negative legacies of philanthropy's footprint in Native America. It began supporting Native issues in the 1960s, giving grants to organizations like the National Congress of American Indians, American Indians United, the American Indian Historical Society, and others. In 1970, the Foundation decided to deepen its commitment to Native issues by giving California Indian Legal Services a six-month planning grant followed by \$1.2 million to launch NARF. This was the largest grant the Ford Foundation had ever given to an American Indian cause or organization.²⁴ For several years going forward, the Foundation's support for NARF would render it the leading philanthropic contributor to any Native American cause.²⁵

23. See Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* (Chapel Hill: University of North Carolina Press, 1973); Stephen Warren, "Rethinking Assimilation: American Indians and the Practice of Christianity, 1800–1861," in *Charity, Philanthropy, and Civility in American History*, ed. Lawrence H. Friedman and Mark D. McGarvie (New York: Oxford University Press, 2003), 107–27.

24. Owen Olpin, "New Tools to Vindicate Ancient Rights: An Assessment of Grants in Support of the Native American Rights Fund," October 1974, Ford Foundation Report # 003484, RAC, 1.

25. Siobhan Oppenheimer-Niclau and Ralph G. Bohrson, "The Condition of Human Beings: Foundation Programs and Native Americans in Perspective," October 1976, Ford Foundation Report # 006495, RAC, 25.

With Ford funding in hand, Getches became NARF's first executive director, Pelcyger sat on the organization's steering committee, and Ryan, in his role as program officer, continued to be the organization's champion at the Ford Foundation.²⁶ In that position, Ryan provided critical support to NARF as it defined its mission and mapped out its operations and strategy. One internal Ford document from the 1970s even called him, "a father figure" for the first generation of NARF leaders and lawyers. Ryan helped develop the original grants to California Indian Legal Services and NARF and "remained a participant, observer, and advisor in the operational stage by regularly attending Steering Committee meetings." He also helped the organization overcome challenges and select its cases, "fend[ed] off NARF critics," and encouraged other funders to support the organization.²⁷

Ryan's work was characteristic of Ford's grantmaking approach at the time, especially as it sought to help define the structure of early public interest law organizations. The Foundation not only encouraged new firms to recruit high-quality attorneys, it also encouraged grantee organizations to develop boards that understood the risks associated with case selection. The Foundation encouraged the public interest law firms it supported to develop "litigation committees" who approved cases before staff attorneys took them on. Although the Foundation steered clear of pressing firms to reject a case, program officers like Ryan were available as sounding boards. Before approving grants, the Foundation also ensured that its staff members worked with the organization to determine a set of "program priorities for case selection."²⁸

In keeping with this broader strategy, Ryan helped NARF's leaders make several early, critical strategic decisions. First, they established the organization's headquarters in a

26. Sanders, "Native American Rights Foundation: Our First Twenty Years," 3.

27. Olpin, "New Tools to Vindicate Ancient Rights," 37.

28. "Public Interest Law Program: Five Years Later," 7.

run-down fraternity house in Boulder, Colorado. They chose this location because it was close to a major airport and the resources available at the University of Colorado's law school—but was deliberately distant from any Indian reservation. Unlike existing Native American legal aid organizations, many of which focused on a specific region or set of issues, one of NARF's goals was to act and be perceived as a resource for tribes everywhere.²⁹

NARF and Ford both understood the importance of having Native people drive NARF's operations. When NARF's work began in earnest in early 1972, it had 13 staff attorneys, four of whom were American Indian. Most worked from NARF's office in Boulder, while one attorney and a handful of support staff maintained an office in Washington, D.C. Getches served as director but was already preparing to make way for the ascendance of John E. Echohawk, a young Pawnee lawyer who had been the first graduate of a University of New Mexico program aimed at recruiting and training Native attorneys. Echohawk worked with Getches at California Indian Legal Services and had been involved with NARF's planning and organization from the start.³⁰ In fact, he spent NARF's first year traveling the United States, meeting with tribes and tribal members as he sought to understand the legal needs of Native Nations.³¹

In April 1973, Echohawk became the executive director of NARF, with Getches voluntarily moving down to the position of vice-executive director. The next year, Getches was succeeded by a Mandan lawyer named Thomas W. Fredericks.³² Meanwhile, NARF had

29. Olpin, "New Tools to Vindicate Ancient Rights," 33

30. NARF Annual Report 1973, ii. See also Tom McGhee, "Native American Rights Fund in Boulder Notes 45 Years of Legal Service," *Denver Post*, November 2, 2015, accessed February 13, 2019, <https://www.denverpost.com/2015/11/02/native-american-rights-fund-in-boulder-notes-45-years-of-legal-service>.

31. Anthony D. Romero to Richard Smyser, November 14, 1995, Ford Foundation grant # 91-1368, RAC.

32. NARF Annual Report 1974, ii.

an all-Native board of directors, a dozen law clerks—nine of whom were Native—and a support staff of more than two dozen receptionists, bookkeepers, legal secretaries, and more—the majority of whom were also Native.³³ Within a few years, NARF had developed a clear policy “to phase out its white attorneys—a policy understood by everyone working there.” Staff members seemed to agree, with minimal dispute or tension, that whenever possible, non-Native lawyers should be replaced by Native attorneys as natural turnover occurred.³⁴ NARF employed a handful of non-Native staff and lawyers over the years, but Native people have dominated the organization almost since its inception.³⁵

As it made these choices, NARF also defined its mission, which early grant documents and annual reports described in broad terms. As the organization’s inaugural annual report from 1972 declared, NARF’s “primary objective . . . [was] to seek solutions to major Indian problems through the legal process.” Often, statements like this one were followed by narrative descriptions of major cases that, NARF’s leaders believed, best illustrated its approach.³⁶

In 1973, however, NARF narrowed its focus and published its “Five Priorities”—the guiding principles to which the organization still adheres today. They were: preserving “tribal existence” through treaty, cultural, religious, and jurisdictional cases; protecting “tribal resources” through land and water claims, trust responsibility, and economic development suits; supporting “human rights” for Native people everywhere, including “education, health and prison reform;” promoting “accountability for tribal, state, federal, and local governments;” and helping precipitate “Indian law development” through major legal

33. NARF Annual Report 1973, ii, 84. In annual reports, NARF’s board of directors is often referred to as the “steering committee.”

34. Olpin, “New Tools to Vindicate Ancient Rights,” 33.

35. See the staff, steering committee/board of directors, and national support committee sections of NARF annual reports.

36. NARF Annual Report 1972, v.

precedents and by spreading information about Indian law.³⁷ Although NARF would occasionally update or expand the language of these priorities, they have continued to serve as the backbone for a half-century's worth of legal advocacy work on behalf of American Indian, Alaska Native, and Native Hawaiian peoples.³⁸

Betting On the Big Precedent

In outlining its Five Priorities, NARF paved the path its work would follow. The organization also selected the vehicle it would use to travel that road: high-profile, landmark cases that promised to alter the tide of Indian law by establishing major precedents. NARF was not the only Indian legal advocacy organization. It was joined by the American Indian Law Center, DNA Legal Services, and the Native American Legal Defense and Education Fund, as well as a handful of private firms that specialized in Native issues. NARF's "big precedent" strategy set it apart from these peers, most of whom provided legal assistance to individual Native people.³⁹

Some of the earliest proponents of civil rights litigation—notably two Supreme Court Justices, Thurgood Marshall and Ruth Bader Ginsburg—preferred slow, incremental legal victories to build a body of law that would erode the foundations of an existing legal principle like "separate but equal." They were frustrated when organizations or individual plaintiffs went after large victories only to lose and set back the movement's momentum.⁴⁰ Others in the field, including several public interest firms who took a "big precedent"

37. NARF Annual Report 1973, 12.

38. See NARF, "NARF's Five Priorities," accessed February 12, 2019, <https://www.narf.org/our-work>.

39. Olpin, "New Tools to Vindicate Ancient Rights," 29.

40. See F. Michael Higginbotham and Jose F. Anderson, "Thurgood Marshall: Legal Strategist for the Civil Rights Movement," pamphlet created for the 72nd National Celebration of Afro-American History (Associated Publishers, 1997); Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Random House, 1998); Jane Sherron De Hart, *Ruth Bader Ginsburg: A Life* (New York: Alfred A. Knopf, 2018), 308.

approach to environmental issues, consumer rights, and systemic poverty cases, believed in aggressively pursuing cases that could set the tone for a generation of law.⁴¹

NARF's Five Priorities show that it agreed with the "big precedent" approach, largely because tribal rights to sovereignty—and the extent of those rights within the American legal system—had grown muddled and murky over the previous two centuries. Broken treaties and contradictory state and federal policies pertaining to everything from education funding, to criminal and civil jurisdiction, and legal determinations about what was actually covered in historic treaties had precipitated confusion. Ultimately, this uncertainty had eroded tribal authority and the rights of Native people. With others in the field already providing legal services to individual American Indians, NARF decided to go after cases that might reaffirm tribal sovereignty, and therefore, draw bright lines that would help tribes along the path to self-determination.

Case selection was the cornerstone of NARF's strategy. A Ford Foundation report detailed NARF's "fairly elaborate review mechanism." It required attorneys to argue potential cases before a full staff meeting. If their peers approved the case, it moved up to the board of directors. The directors debated the legal merits of the case, as well as broader political considerations. The board then rendered a decision about whether the attorney could pursue the matter.⁴² The Ford Foundation had developed a strong strategy for case selection among public interest law firms. NARF deployed it successfully. Overall, the Foundation found, in its first few years NARF demonstrated "a keen pragmatic judgement" when choosing cases, and had quickly found ways to weed out suits that only stood to achieve "mere abstractions" for the field of Indian law.⁴³

41. Olpin, "New Tools to Vindicate Ancient Rights," 17.

42. *Ibid.*, 20.

43. *Ibid.*, 16.

NARF's "big precedent" strategy paid off. From the 1970s forward, the organization served as either the primary counsel, supporting counsel, or as an influential submitter of amicus curiae briefs on numerous major cases and pieces of legislation. Among the highest profile of these early victories was the restoration of the Menominee Tribe of Wisconsin. The federal government had extinguished the tribe's federal trust status—the special, nation-to-nation relationship between tribes and the United States articulated in the US Constitution and reinforced in treaties and federal precedents—during the "Termination" era of the 1950s and 1960s. NARF attorneys had begun working with tribal leaders on restoration claims in 1971. Over the course of two years, NARF's attorneys helped the tribe articulate the historical and legal injustice of Termination, carefully negotiating with members of Congress to craft a restoration bill that would create a path to restoration for many terminated tribes over the next several decades. President Richard Nixon signed the Menominee Restoration Act, which restored the tribe's status and repealed Termination—a major achievement on the path towards the era of self-determination, in 1973.⁴⁴

NARF also won big in *United States v. Washington*, where its attorneys served as lead counsel during a trial over tribal hunting and fishing rights that had been protected by an 1855 treaty. A federal court affirmed the rights of several Native Nations to harvest half the fish in traditional fishing territories in Washington State in 1974. Upheld by the US Supreme Court five years later, the case set a major national precedent supporting the continuing authority of treaties negotiated between Native Nations and the US government.⁴⁵

44. Sanders, "Native American Rights Foundation: Out First Twenty Years," 9–10. On the Menominee Case and Termination more generation, see David R.M. Beck, *Struggle for Self Determination: History of the Menominee Indians Since 1854* (Lincoln: University of Nebraska Press, 2005).

45. NARF, "Native American Rights Fund: 25 Years of Justice" (Boulder, CO: NARF, 1995), 15.

In yet another example, this time from 1976, NARF submitted an amicus brief in *Fischer v. Montana*, where the US Supreme Court overturned a Montana Supreme Court decision. In *Fischer*, the Court found that tribal courts superseded state courts in on-reservation adoption cases. This case was one among many that demonstrated the need for federal legislation redefining adoption procedures for Native children (the Indian Child Welfare Act became law in 1978).⁴⁶ It also demonstrated how NARF contributed in both small and large ways to pressing Native American legal initiatives.

These cases helped put NARF on the map. They would be followed by many more achievements over the years. Capturing the essence of NARF's strategy and the fundamental goal of the Ford Foundation's public interest law program, John Echohawk noted in 1974, "in these and hundreds of pending cases, NARF is making the white man's legal system work for—not against—Native Americans."⁴⁷

Yet the successes Echohawk described were only part of a broader and more complicated history. NARF and its peer organizations did not win every time. Even when they did, their victories did not indicate that American jurisprudence had shifted in favor of Native American, Alaska Native, and Native Hawaiian claimants. Indeed, several scholars have shown how, even amid major legal and policy victories favoring tribal sovereignty and self-determination, federal courts passed down a number of devastating Indian law cases in the last decades of the 20th century.⁴⁸ According to Native legal scholar Walter R. Echo-Hawk—a cousin to NARF director John Echohawk and a long-time NARF attorney—this

46. NARF, "Native American Rights Fund: 25 Years of Justice," 23. See also Congressional Research Service, "The Indian Child Welfare Act (ICWA): A Legal Overview, September 6, 2013, R42047, 12–13, accessed February 19, 2019, <http://www.crs.gov>.

47. John E. Echohawk in NARF Annual Report 1974, 4.

48. See Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005), xxii–xxv; Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Golden, CO: Fulcrum, 2010), especially chapters 11 and 12.

was especially true during the late 1980s after William H. Rehnquist became chief justice of the U.S. Supreme Court. After that, Echo-Hawk argues, American Indians had to endure a “hostile judicial climate” brought on by a wave of conservative, Reagan-era justices led by Rehnquist, whose Court “battered” core principles of Indian law.⁴⁹

Despite this challenging legal environment, NARF’s attorneys brought hundreds of suits on behalf of tribes and individual Native people from the 1970s on. This work also helped train new generations of Native lawyers. Raymond Cross, for example, was a young Mandan/Hidatsa lawyer from North Dakota who worked for NARF in the 1970s. Once in Boulder, NARF’s leaders assigned Cross to argue on behalf of the Klamath tribe in a major case against the State of Oregon. Cross and the NARF team won in federal court, and the case, *Klamath Tribe vs. Adair* (1979) established that tribal hunting and fishing rights protected tribal authority over water rights pertaining to wildlife habitats. This was a major precedent in state/tribal jurisdiction cases.⁵⁰ Cross would later say that *Adair* “was not the kind of case you give to a twenty-nine-year-old kid.” Nevertheless, he found himself litigating major suits in federal court just a few years out of law school. Joining NARF and fighting for tribes was, as he put it, “like going from the neighborhood blacktop to the NBA in one big step.”⁵¹

Evaluating NARF

The Foundation had helped launch NARF and covered about 40 percent of its operating budget for the first few years of its existence.⁵² The other 60 percent came from dozens of individual contributors who mailed in checks along with several private family foundations

49. Echo-Hawk, *Courts of the Conqueror*, 311, 423.

50. *Ibid.*, 391–92.

51. Raymond Cross quoted in Paul VanDevelder, *Coyote Warrior: One Man, Three Tribes, and the Trial that Forged A Nation* (New York: Little, Brown, and Co., 2004), 43.

52. Olpin, “New Tools to Vindicate Ancient Rights,” 3.

who provided general support grants or subsidized NARF's work on a specific case. The Lilly Endowment subsidized NARF's Indian Legal Support Project and the Carnegie Corporation funded the creation of the National Indian Law Library, a NARF affiliate in Boulder that quickly became the leading provider of Indian legal resources in the United States. (It is unclear whether the Ford Foundation facilitated NARF's relationship with these organizations and others, but Leonard Ryan's record of advocacy on NARF's behalf suggests he may have.) Additionally, the OEO kept NARF on a retainer as a backup for federal legal aid programs.⁵³

In October 1974, a team of Ford Foundation evaluators completed an extensive review of NARF's operations, record, and reputation. After speaking with attorneys from private firms specializing in Indian law, representatives from other Indian law advocacy groups, BIA officials, and more, the evaluators gave NARF high marks for its practice and for its early and notable victories. Opposing counsel, judges, the staff at peer organizations, and BIA administrators generally agreed that NARF's lawyers conducted high-quality legal work.⁵⁴ Many in the Indian law world "strongly agree[d] that NARF contributes most by pursuing landmark cases."⁵⁵

Yet NARF's "big precedent" strategy sometimes rankled its peers. Attorneys at other Native public interest law firms critiqued NARF for "declin[ing] to serve in the trenches of legal aid," and therefore "turn[ing] away from the individual Indians who need help most."⁵⁶ Officials at the BIA and private attorneys alike criticized NARF for supporting individual "dissident Indians" in conflicts with their tribal council, a practice that "tend[ed] often to

53. NARF Annual Report 1974, 75–77; Olpin, "New Tools to Vindicate Ancient Rights," 2–3. NARF Annual Report 1973, 63, 67.

54. Olpin, "New Tools to Vindicate Ancient Rights," 27–30.

55. *Ibid.*, 15.

56. *Ibid.*

drain tribal resources and energies” while making it harder to define a broad agenda for “Indian rights.”⁵⁷ Although they respected NARF’s goals and its work, many of the professionals questioned by Ford’s evaluators found the organization’s lawyers young, heady, and “too hungry from the intellectual excitement and applause that comes only in the big arena.” Most wished NARF well, but hoped it would stop acting as though it was “the only Indian legal organization around.”⁵⁸

NARF’s ambitions also posed a conflict for the Ford Foundation. Like all of its civil rights-oriented public interest law initiatives, Ford’s grant sought to make the legal system work for the disadvantaged; in this case, tribes and Native people. Although NARF was meeting that goal, questions lingered. Should NARF be fighting for the “preservation of Indian culture and resources” or trying to promote “greater engagement of Indians in the opportunities of the dominant society?” Today, most observers would recognize those goals as deeply interrelated. In 1974, however, the Ford evaluators worried that they “frequently appear to be mutually exclusive.”⁵⁹ They also wondered whether some of NARF’s suits were “one dimensional,” meaning that, in some cases, a major symbolic victory for tribes could create unintended—and potentially deleterious—consequences for Natives and non-Natives alike.⁶⁰

The Ford Foundation weighed these insights. During their review, the evaluators had seen signs of maturation and progress among the NARF staff, noting that they were already “becoming more sensitive and thoughtful about the practical as opposed to purely legal effects of their work.” All of NARF’s “deficiencies [were] curable,” the evaluators continued,

57. Olpin, “New Tools to Vindicate Ancient Rights,” 14.

58. *Ibid.*, 15.

59. *Ibid.*, 23.

60. *Ibid.*

and “there seem[ed] to be a growing awareness at NARF of these problems and increasing efforts to do better.”⁶¹

The Foundation saw significant potential in NARF’s “big precedent” strategy, and the evaluators adamantly rejected the idea that NARF was failing to meet the needs of Native people by focusing on landmark cases rather than individual Indian advocacy work. “The important point,” the evaluators wrote, “is that the pursuit of the big precedent has served to benefit many Indians and may benefit many more.” In the end, they concluded, “NARF probably gets the best return for its investment of talent [by] committing it to the pursuit of major precedent cases.”⁶² Even though that strategy “happen[ed] to be glamorous work attractive to creative and resourceful lawyers,” they wrote, “it also yield[ed] important benefits to Indians.”⁶³ As a result, the Foundation renewed its support for NARF. By 1976, the organization had received more than \$2.8 million from the Ford Foundation.⁶⁴

Continuing Support

Over the next several decades, NARF helped litigate many major legal cases and shape major pieces of tribally-focused legislation. This work covered subjects ranging from tribal recognition and restoration cases, enforcement of the Indian Child Welfare Act, protections for tribal gaming rights, securing voting and religious rights of individual Native people, prison reform, the repatriation of ancient human remains, and more.⁶⁵

The organization’s leaders and staff attorneys quickly matured. So did NARF’s fundraising strategy. The Ford Foundation had never intended to fund its public interest law

61. Olpin, “New Tools to Vindicate Ancient Rights,” 38.

62. *Ibid.*, 16.

63. *Ibid.*, 17.

64. Oppenheimer-Niclau and Bohrson, “Condition of Human Beings,” 25.

65. For overviews of NARF’s early victories, see Sanders, “Native American Rights Foundation: Out First Twenty Years;” NARF, “Native American Rights Fund: 25 Years of Justice.”

grantees in perpetuity. Instead, it provided seed money, tested this new field, and then encouraged firms to sustain themselves from diverse sources. The Ford Foundation officially closed its public interest law program in 1980 with a series of terminal grants.⁶⁶ But the end of the public interest law program did not signal the termination of the Foundation's relationship with NARF.

In 1978, NARF established a National Support Committee—a group of prominent (and predominately Native) advocates—and continued its search for additional donors. By 1980, NARF was also receiving support from the federal government through grants from the Administration for Native Americans in the Department of Health and Human Services (DHS), the BIA, and the Legal Services Corporation (LSC). Ten private foundations also supported NARF, as did almost a dozen corporations, one Native Nation, and dozens of individual contributors.⁶⁷

With this funding, NARF had built and diversified its base by 1990. By then, the BIA, DHS, and the LSC funded 40 percent of NARF's budget, with total philanthropic contributions covering just over 27 percent. The remaining third came from individual and corporation donations and legal fees NARF collected in certain cases.⁶⁸ NARF also relied on a larger and more diverse donor pool, including six more foundations and nine more tribes than in 1980. In addition to individual gifts, seven individuals included NARF in their estate plans in 1990, more than 30 organizations provided matching gifts, over 20 provided in-kind donations, and a group of Native artists fundraised for NARF through a traveling art auction.⁶⁹

66 Dorothy J. Samuels, "Expanding Justice: A Review of the Ford Foundation's Legal Services Program," January 1984, Ford Foundation Report # 012305, RAC, 33–34.

67. NARF Annual Report 1980, 83–88.

68. NARF Annual Report 1990, 26.

69. *Ibid.*, 30–31.

Seeking to capitalize on this momentum, NARF created an endowment fund called the “21st Century Trust” in 1990. To sustain its work in perpetuity, the organization set a goal of raising \$5 million in five years.⁷⁰ The Ford Foundation, meanwhile, provided several major grants around the 20th anniversary of NARF’s creation. In 1991, the Ford Foundation gave NARF \$50,000 for a partnership with the Council of Energy Resource Tribes aimed at developing a collaborative, multi-tribal entity to help tribes understand and deal with environmental issues.⁷¹ That same year, Ford pledged a \$1 million matching grant to NARF’s endowment fund. It required a 2-to-1 match over five years.⁷²

NARF, however, struggled to meet that match. In the summer of 1996, John Echohawk wrote to Ford Foundation program officer Anthony D. Romero, explaining that NARF was unlikely to meet its 1991 endowment match, which would come due in September. Although NARF had hoped to raise \$2 million, its endowment drive had only brought in \$190,320 over the previous five years. Despite its healthy donor base, Echohawk wrote, “we had limited success acquiring new donors for the endowment,” largely because NARF lacked an “existing donor base to support this effort entirely” and because it struggled to educate new donors about Native American issues.⁷³

Echohawk proposed a solution. Over the years, NARF had amassed a healthy reserve fund of some \$2.8 million, which came mostly from a recent, large annual grant pledge from a successful gaming tribe on the East Coast. If NARF transferred a little more than \$1.8 million from those reserves to its endowment, Echohawk wrote, it could complete

70. NARF Annual Report 1990, 31.

71. Diane L. Galloway-May to John E. Echohawk, March 8, 1991, Ford Foundation grant # 91-462, RAC.

72. Lynn Walker to Franklin A. Thomas, recommendation for grant/FAP action, September 19, 1991, Ford Foundation grant # 910-1369, RAC.

73. John E. Echohawk to Anthony D. Romero, July 3, 1996, Ford Foundation grant # 0919-1368, RAC.

the required match for Ford's 1991 grant. This plan, however, posed a problem: NARF tried to keep its emergency reserves at around 25 percent of its operating budget. Transferring \$1.8 million to the endowment would place the reserve fund well below that amount. And, he added, these were treacherous times for organizations like NARF: in the two years since the so-called "Republican Revolution" of the 1994 election cycle, conservatives in Congress had slashed federal grant budgets. As of Echohawk's writing, NARF had already lost more than \$600,000 in federal funds in 1996 alone, and a \$1.7 million grant renewal in 1997 looked quite uncertain.⁷⁴

Although it would prefer not to use its reserves, Echohawk wrote, NARF would not consider asking Ford to waive its matching obligation. Nor would it seek to extend the due date for the match. Instead, Echohawk proposed that NARF place enough of its reserves into the 21st Century Trust to bring its portion of the match to \$500,000. It would then place \$1.5 million into a special, segregated cash reserve that would operate as a quasi-endowment and emergency reserve fund. With some flexibility, Echohawk argued, Ford could continue to support NARF's endowment fund and hold NARF accountable to the 1991 agreement, all without threatening the organization's emergency reserves during uncertain times.⁷⁵

Romero supported this plan.⁷⁶ He had been monitoring the endowment fundraising problems alongside Echohawk since joining the Foundation in 1992. Over the years, he had developed an abiding respect for NARF and its work. In 1996, he nominated the organization for the inaugural Conrad N. Hilton Humanitarian Prize, noting that NARF had "played a singular role in significantly alleviating the pain and suffering of Native

74. Echohawk to Romero, July 3, 1996.

75. Ibid.

76. Romero to Susan V. Berresford, July 19, 1996, Ford Foundation grant # 91-1368, RAC.

Americans.”⁷⁷ As the end of the match period loomed, he helped Echohawk talk through NARF’s options and referred him to experts who could help work out the details.⁷⁸

Shortly after receiving Echohawk’s request to modify the terms of Ford’s endowment grant, Romero requested approval from Susan Berresford, a longtime Ford staffer and executive who had recently become president of the Foundation. Romero asserted that the proposed modifications aligned with the original grant’s intent. The purpose of Ford’s 1991 grant, he said, was to help NARF obtain financial stability. Locking up cash in an endowment fund could limit investment returns and expose NARF—which was in a far better financial position—to vulnerability. “The proposed revision,” he surmised, “would allow NARF to meet the spirit and goal of the original endowment grant while not overly limiting its flexibility.”⁷⁹

In a hand-written note, Berresford expressed her agreement with the spirit of the modification. But she wanted Romero to structure the revisions so that the Foundation could “keep an eye on how the endowment is segregated and protected.” “Pressure” to use the funds, she continued, “will come and we want to be sure it remains safe.”⁸⁰

Shortly thereafter, the Ford Foundation agreed to Echohawk’s proposal and modified the terms of NARF’s endowment grant.⁸¹ To assuage Berresford’s concerns about the accessibility of the reserve funds, Echohawk drafted a letter explaining NARF’s acknowledgement of this issue and detailing the board’s plans to protect the \$1.5 million reserve. Staff could not access the funds, he wrote, and the board took decisions about using reserve funds very seriously. NARF, he said, only accessed its reserves “to meet unavoidable

77. Romero to Smyser, November 14, 1995.

78. Romero to Berresford, July 19, 1996.

79. *Ibid.*

80. Berresford to Romero, July 23, 1996, Ford Foundation grant # 91-1368, RAC.

81. “Modification of Program Action Number 910-1368,” September 27, 1991; Dollinger, Smith & Co. to NARF, independent auditor’s report, December 6, 1996, both Ford Foundation grant # 91-1368, RAC.

expenses and with due regard for the long-term financial health of the organization.” Even then, he explained, the board promised to “use all other reserves before considering the use of any of the \$1.5 million cash reserves” created by Ford’s grant modification.⁸² With that, the Ford Foundation once again demonstrated patience and flexibility that allowed NARF to continue its work.

Conclusion

In the summer of 1997—less than a year after finalizing the revisions to the 1991 grant—the Ford Foundation gave NARF another major gift: a one-time, \$1.5 million grant to support work on Native American trust fund issues.⁸³ Over the next thirteen years, these funds would help NARF and a group of private legal partners move a massive, class-action lawsuit against the U.S. government through the judicial system.⁸⁴

The case had been brought by lead plaintiff Elouise Cobell, a member of the Blackfeet Nation in Montana, who had been tracking irregularities and mismanagement of federally-held tribal trust accounts for years. The federal government had created these accounts for hundreds of thousands of Native people across the United States to track land transaction and payments extending from the Dawes Allotment Act of 1887. After documenting problems with these accounts in her own community, Cobell realized that the issue affected Native people across the United States. She presented the issue to NARF and other attorneys. Together, they filed a class action suit, which came to be known as *Cobell v. Salazar*, against the federal government in 1996.⁸⁵

82. Echohawk to Romero, August 16, 1996, Ford Foundation grant # 91-1368, RAC.

83. Elaine Kranich to John E. Echohawk, June 27, 1997, Ford Foundation grant # 97-1241, RAC.

84. NARF Annual Report 2010, 4.

85. Kristen Inbody, “Elouise Cobell Documentary ‘100 Years’ hits Mainstream Audience with Netflix, PBS Debuts,” *Great Falls Tribune*, April 26, 2018, accessed February 18, 2019,

Cobell v. Salazar, one of the largest class-action lawsuits in American history, was settled in 2009 for \$3.4 billion. Authorized by Congress, it was signed by President Barack Obama the following year. The settlement included direct restitution paid to individual Native plaintiffs and funds for tribes to repurchase fractionated parcels of allotted land. It also created the Cobell Scholarship Fund, which helps enrolled members of any federally recognized tribe obtain post-secondary education.⁸⁶

The landmark victory in *Cobell v. Salazar* came about because of the vision, tenacity, and work of Elouise Cobell and her co-plaintiffs. The Ford Foundation's continuing support for NARF also played a critical role in helping the case move forward. The *Cobell* case is indicative of Ford's commitment to Native people and to building the field of public interest law. Today, as it has since 1971, NARF continues to pair assistance from the Ford Foundation and a variety of other donors to fund and strengthen tribal existence. Their work reverberates across Indian Country.

<https://www.greatfalltribune.com/story/life/my-montana/2018/04/26/elouise-cobell-documentary-100-years-fire-belly-productions-blackfeet-melinda-janko/551981002>.

86. "About Cobell," Cobell Scholarship, accessed February 18, 2019, <https://cobellscholar.org>.