

NARF

Review

Native American Rights Fund

\$2.2 million Awarded To Tribe In Railroad Trespass Suit

The Walker River Paiute Tribe, the Southern Pacific Transportation Company, and the United States recently settled a \$2.2 million trespass suit. In the suit, the Tribe and the United States claimed that the Southern Pacific Railroad had been in continuous trespass over Indian lands within the Tribe's reservation in Nevada since 1880 when the railroad was first constructed. NARF represented the Tribe and individual Indian land owners in their effort to settle this longstanding dispute.

The suit was filed in 1972 and raised issues unsettled at the time. In essence, the suit tested whether federal laws governing the alienation of Indian lands would be strictly enforced notwithstanding the passage of time and the expectations of non-Indians who benefited from the longstanding failure of the United States to enforce such laws. Judge Wallace of the Federal Court of Appeals for the Ninth Circuit described the competing policies at work in the lawsuit:

This case arises out of a confrontation between the "manifest destiny" of the westward movement of American civilization and the rights of the Native American Indians to their lands. It raises important issues of Indian law and requires the interpretation of a century of Indian and public land policy. *United States v. Southern Pacific Transp. Co.* 543 F.2d 676, 680 (9th Cir. 1976).

The dispute initially centered on the question of whether the Southern Pacific Transportation Company had complied with applicable federal law before building a railroad line across the Walker River Paiute Indian Reservation in western Nevada. This question was presented for resolution to the federal district court for

Nevada in 1972 when NARF filed a lawsuit on behalf of the Tribe and a group of individual Indian allottees against Southern Pacific for trespass damages and eviction of the railroad from the Reservation. In addition, NARF persuaded the United States to file the same claim in its capacity as trustee for the Tribe and allottees. The United States was reluctant to file because the Tribe had a claim pending against the government in U.S. Claims Court alleging that the government breached its trust in allowing the longstanding railroad trespass, and because the United States Department of Defense

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owned and operated a munitions depot south of the Reservation which was served by the railroad.

The Tribe and the United States claimed in the district court that Southern Pacific had been trespassing on its lands since 1880 when the railroad was first constructed because Southern Pacific had never complied with applicable federal law which strictly controlled how private parties can acquire property rights in Indian lands. Furthermore, the Tribe argued that under modern federal law, Southern Pacific could not obtain a right-of-way without the consent of the Tribe. The Tribe and the United States both asked for a judicial declaration that Southern Pacific has been in continuous trespass since 1880. In addition, the Tribe asked the court to evict the railroad; however, because of the interests of the Department of Defense in continuing rail service, the United States did not seek eviction.

The Tribe received a favorable ruling in 1976 when the Ninth Circuit Court of Appeals held that Southern Pacific had never complied with applicable federal law and thus did not have legal title to the right-of-way over the reservation. The railroad was found to have continuously trespassed on the Indian lands for over 90 years. Judge Wallace explained the Court's view of the case as presenting the Court with the task of choosing among competing policies:

Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

Having so held, the Court remanded the case to a lower district court for a determination of damages for the period for trespass and for a determination of the Indians motion to evict the railroad.

Meanwhile, Southern Pacific employed a new tactic for acquiring title to the right-of-way. It sought to obtain a right-of-way across tribal and allotted lands without obtaining the consent of the Tribe. The railroad submitted to the Secretary of the Interior an application for a railroad right-of-way along with a token amount of money which the railroad claimed to be the value of a permanent right-of-way. Importantly,

the railroad's application did not have the written consent of the Tribe attached as required by the Secretary's regulations. The Secretary declined to file the railroad's application because it lacked evidence of tribal consent. The railroad appealed the Secretary's denial to the federal district court for Nevada and argued that applicable federal law did not require tribal consent for such right-of-way.

Although the district court agreed with the railroad, the federal court of appeals for the Ninth Circuit reversed the district court and decided that Southern Pacific could not acquire a railroad right-of-way over the Tribe's lands under an 1899 statute without obtaining the Tribe's consent. (In contrast, in a separate unrelated lawsuit, a court of appeals decided that individual trust lands could be condemned. However, Southern Pacific's request to be allowed to assert its condemnation powers in this lawsuit against the lands of the individual land owners was rejected on procedural grounds.) After Southern Pacific's petition for review by the United States Supreme Court on the tribal consent issues was denied in 1983, the parties began a six-year process of negotiating a settlement of the remaining issues in the case involving damages and eviction.

Negotiations to settle the remaining claims in the case were very complex. Necessary and/or interested parties included the Tribe; Southern Pacific; individual Indian landowners; Department of Justice representing both the Indians and the United States as a defendant in the Tribe's Claims Court action; Department of the Army; Interstate Commerce Commission; various customers of the railroad; and the Nevada Public Service Commission. The many and varied interests of these parties had to be dealt with in formulating an acceptable settlement. Finally in July, 1989, representatives of the Tribe, Southern Pacific, the individual land owners, and the Department of Justice, and the Department of the Army approved a settlement composed of three agreements that provides compensation to the Tribe and Indian allottees for over 100 years of trespass and for a future right-of-way grant either to Southern Pacific or to the Army.

Under the settlement, Southern Pacific will pay the Indians \$1.2 million and the United States will pay \$1 million. A long term right-of-way is offered to the Army. However, if, by December 31, 1991, the Army is unable to obtain the funds required to purchase and rehabilitate the rail line, then Southern Pacific will acquire a one-year right-of-way during which it must either abandon the rail line or purchase a long-term right-of-way from the Indians. Meanwhile, Southern Pacific is allowed to continue to use the right-of-way until the Secretary of the Interior grants a right-of-way to Army or to Southern Pacific, or until December 31, 1991, whichever occurs first.

Under the settlement, the railroad operation will be subject to a number of safety restrictions that include track rehabilitation and maintenance. Except when national emergencies require otherwise, trains are restricted to speeds of not more than 10 mph through Schruz and to operation during daylight hours. The Tribe will have the right to connect a spur track and loading dock to the line at its own cost so long as such

facilities do not interfere with Army's use of the line. The Tribe will be entitled to a shipping contract on the most favorable terms then in effect on the line for the commodities to be shipped.

In January, 1990, the settlement approved by the parties in this case became final as did the dismissal of this almost 17 year-old case. The amounts in settlement of past damages have now been paid. Army is in the process of applying for a right-of-way over the Indian lands within the Reservation and expects to file its application and the agreed upon compensation before the end of the year.

Case Updates

Kansas Reburial Issue

The deceased ancestors of the Pawnee, Wichita and Arikara Tribes who have been on public display over the last 50 years were reburied in a tribal religious ceremony conducted on April 14, 1990. The tribal reburial ceremony marked the end of a three-year struggle to close the so-called "Salina Burial Pit" that offered tourists for a \$3.50 fee a view of the bodies contained in the burial ground that was opened to the public in 1935. The bodies are estimated to be around 600 years old. Strong tribal opposition and public outcry led to the pit's eventual closing in 1989.

The reburial effort, spearheaded by NARF as legal counsel to the three Tribes, ended in the signing of the "Treaty of Smokey Hill" which provided for the reburial of the bodies and compensation for the owners of the land. The Kansas Legislature passed necessary enabling legislation for the Treaty last Spring. The Legislature also enacted a state bill that bans unregulated public displays of human remains and protects unmarked graves from unnecessary disturbances.

Native Village of Noatak v. Hoffman

The 9th Circuit Court of Appeals, acting on the State of Alaska's petition for rehearing, reversed the district court and held that Alaska Native Villages are recognized as tribes by the United States and that Indian tribes can bring suits against states in federal court for past damages notwithstanding the Eleventh Amendment. NARF represents the Village of Noatak in the case.

Supreme Court Deals Devastating Blow to Native American Church

by Steve Moore

On Tuesday, April 17, 1990, the United States Supreme Court struck a gut wrenching blow to the religious lives of many of this country's Native Americans, in a decision which invites the return to an era of religious persecution one would hope a presumably enlightened and tolerant society such as ours had left behind. In the case of *Oregon Department of Employment v. Alfred Smith*, Justice Antonin Scalia, writing for a five member majority, and describing the First Amendment's Free Exercise Clause as little more than a "negative protection accorded to religious belief," held that a member of a religious faith may not challenge under the free exercise clause of the First Amendment to the United States Constitution a legislature's criminal enactment of otherwise general application which produces infringement on a particular religious practice. In the *Smith* case this amounted to a challenge to the constitutionality of an Oregon drug law which the Court interpreted as a general criminal prohibition on all uses of the drug peyote, considered by Indian members of the Native American Church as an essential sacrament, the physical embodiment of the Great Spirit.

The Native American Church, which claims over 250,000 members nationwide, and additional Indian practitioners in Canada and Mexico, and which can be traced back archaeologically several thousand years in North America, was not absolutely destroyed or driven underground by the Court's action. The Court did not go so far as to rule that any state or federal law exempting the religious, sacramental use of peyote was an unconstitutional establishment of religion, at the other end of the religion clauses of the First Amendment. In the Court's terms, a peyote exemption, while constitutionally *permitted*, is neither constitutionally *required* or *prohibited*. A kind of constitutional limbo-land for the Native American Church and its members.

In real terms the decision leaves the fate of the peyote religion to the whim of majoritarian legis-

latures and Congress. Eleven states currently have exemptions on the statute books protecting the religion; another twelve tie their exemption to a federal Drug Enforcement Agency regulation which rests on questionable foundation since the decision. A small handful of states, notably California and Nebraska, in which are located some of the largest Indian and Native American Church populations, have based their protection on court decisions. The others, and the federal government through Congress, have no statutory or common law protection. Indian reservation lands will provide some safe haven from possible prosecution, given the particular Public Law 280 configuration in any given state, but problems of transportation of the sacrament into Indian country through "illegal" territory will reduce peyote ceremonies to complex and dangerous liaisons.

Native American church members stripped of their rights under the Constitution are now subject to the will of the legislative branch of our state and federal governments. Not an enviable place for Indian people; as a distinct racial and religious minority Indians have always had an uphill struggle in the halls of Congress and elsewhere to have their rights recognized and respected.

The legislative branch of any government is an exceedingly unusual place for individuals to look to have their rights under the First Amendment vindicated. Courts are traditionally looked to as protectors of these rights, against majoritarian legislatures. Justice O'Connor, in a separate concurring opinion which joined the result of the majority but sharply criticized its method, reasoned that "the First Amendment was enacted precisely to protect those whose religious practices are not shared by the majority and may be viewed with hostility."

A noted scholar of Indian law and philosopher, Felix Cohen, was quoted several decades ago as saying: "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in

our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith" Cohen's words become even more prophetic after the Court's decision in *Smith*. The *Smith* decision may perhaps portend even greater persecution for other forms of Indian religious expression. Examples which come to mind include: the wearing of long hair by Indian students in public schools, and by Indian prisoners in federal and state prisons; missing school on a regular basis for cultural/religious ceremonial purposes; the taking of game by Indians out season, when not otherwise protected by treaty; burning wood to heat rocks for sweat-lodge ceremonies, when burning is otherwise outlawed by local ordinance during times of high pollution; and body piercing as part of the Sun Dance ceremony. If these forms of religious expression are otherwise prohibited by general criminal laws, the First Amendment no longer provides a basis from which to claim protection

from religious infringement. As with peyote use, reservation boundaries will provide a buffer from the application of state law, except where Public Law 280 legitimizes intrusion.

As a result of *Smith*, minority religions, in Justice Scalia's opinion, maybe at a disadvantage in the political arena. But that is, in his estimation, "an unavoidable consequence of democratic government," preferable to "a system in which each conscience is a law unto itself." Justice Scalia had to strain to defend his decision, citing the need to prevent "anarchy" in our democratic society. Indian people simply want to be left alone in our society to worship the god of their choice. Is that asking too much? The Court's decision in *Smith* strips Indians of their pride and integrity, and makes many of them criminals in the eyes of the law. Only history will judge the Court's decision in *Smith*; but for now the remote specter of anarchy may very well have been the preferred choice.

STATEMENT FROM PACIFIC NORTHWEST CHURCH LEADERS WHO SUPPORT INDIAN RELIGIOUS RIGHTS

Re: Employment Division, State of Oregon v. Al Smith, Galen Black, 88-1213

The recent U.S. Supreme Court decision regarding the sacramental use of peyote in Native American religious rites is unfortunate and deeply disappointing. We support the right of Native Americans to practice their religion as they have for centuries. We concur with Justice Harry Blackmun, who writing for the dissent, called the decision a "wholesale overturning of settled law concerning the religious clauses of our Constitution." The decision jeopardizes the fundamental right of all citizens to exercise freedom of religion free from government restraint. We will continue to work with Native Americans to help them protect their religious rights.

The Most Rev. Raymond G. Huthausen
Archbishop of Seattle
Roman Catholic Archdiocese of Seattle

The Right Rev. Vincent W. Warner, Bishop
Episcopal Diocese of Olympia

The Most Rev. Thomas Murphy, Coadjutor Archbishop
Roman Catholic Archdiocese of Seattle

The Rev. John Boonstra, Executive Minister
Washington Association of Churches

The Rev. Calvin D. McConnell, Bishop
United Methodist Church
Pacific NW Conference

The Rev. W. James Halfaker, Conference Minister
Washington-Idaho Conference
United Church of Christ

The Rev. Lowell Knutson, Bishop
NW Washington Synod
Evangelical Lutheran Church In America

The Rev. Dr. William B. Cate, President Director
Church Council of Greater Seattle

The Rev. Gaylord Hasselblad, Executive Minister
American Baptist Churches of the Northwest
*These church leaders issued an apology to Indians that was
carried in the Winter 1988 NARF Legal Review*

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THE NATIONAL INDIAN LAW LIBRARY

The National Indian Law Library (NILL) has developed a rich and unique collection of legal materials relating to Federal Indian law and the Native American. Since its founding in 1972, NILL continues to meet the needs of NARF attorneys and other practitioners of Indian law. The NILL collection consists of standard law library materials, such as law review materials, court opinions, and legal treatises, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

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Designed to provide aid on the development of essential legal tools for the protection and regulation of commercial activities on Indian reservations. This bibliography provides a listing of articles, books, memoranda, tribal codes, and other materials on Indian economic development. 2nd edition (60 pgs. Price: \$30). (NILL No. 005166)

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This 43-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available, with an update through volume 43 in progress. The index contains subject, tribal, and docket number listing. (43 volumes. Price \$820). (Index price: \$25). (Available from the Indian Law Support Center).

Prices subject to change

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A Manual for Protecting Indian Natural Resources. Designed for lawyers who represent Indian tribes or tribal members in natural resource protection matters, the focus of this manual is on the protection of fish, game, water, timber, minerals, grazing lands, and archaeological and religious sites. Part I discusses the application of federal and common law to protect Indian natural resources. Part II consists of practice pointers: questions to ask when analyzing resource protection issues; strategy considerations; and the effective use of law advocates in resource protection. (151 pgs. Price \$25).

A Manual on Tribal Regulatory Systems. Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which

NARF RESOURCES AND PUBLICATIONS

comport with federal and tribal law, this manual provides an introduction to the law of civil regulation and a checklist of general considerations in developing and implementing tribal regulatory schemes. It highlights those laws, legal principles, and unsettled issues which should be considered by tribes and their attorneys in developing civil ordinances, irrespective of the particular subject matter to be regulated. (110 pgs. Price \$25).

A Self Help Manual for Indian Economic Development. This manual is designed to help Indian tribes and organizations on approaches to economic development which can ensure participation, control, ownership, and benefits to Indians. Emphasizing the difference between tribal economic development and private business development, this manual discusses the task of developing reservation economies from the Indian perspective. It focuses on some of the major issues that need to be resolved in economic development and identifies options available to tribes. The manual begins with a general economic development perspective for Indian reservations: how to identify opportunities, and how to organize the internal tribal structure to best plan and pursue economic development of the reservation. Other chapters deal with more specific issues that relate to the development of businesses undertaken by tribal government, tribal members, and by these groups with outsiders. (Approx. 300 pgs. Price \$35).

Handbook of Federal Indian Education Laws. This handbook discusses provisions of major federal Indian education programs in terms of the legislative history, historic problems in implementation, and current issues in this radically changing field. (130 pgs. Price \$20).

1986 Update to Federal Indian Education Law Manual (\$30) Price for manual and update (\$45).

A Manual On the Indian Child Welfare Act and Law Affecting Indian Juveniles. This fifth Indian Law Support Center Manual is now available. This manual focuses on a section-by-section legal analysis of the Act, its applicability, policies, findings, interpretations, and definitions. With additional sections on post-trial matters and the legislative history, this manual comprises the most comprehensive examination of the Indian Child Welfare Act to date. (373 pgs. Price \$35).

PUBLICATIONS

ANNUAL REPORT. This is NARF's major report on its programs and activities. The Annual Report is distributed to foundations, major contributors, certain federal and state agencies, tribal clients, Native American organizations, and to others upon request.

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Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian rights. The priorities of NARF are (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.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet ever-increasing needs of impoverished Indian tribes, groups and individuals. The support needed to sustain our nationwide program requires your continued assistance. Requests for legal assistance, contributions, or other inquiries regarding NARF's services may be addressed to NARF's main office: 1506 Broadway, Boulder, Colorado 80302. Telephone (303) 447-8760.

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