NARF Review

Native American Rights Fund

Special Edition on Freedom of Religion: Today's Challenge

"Let me be a free man--free to travel, free to stop, free to work, free to follow the trade where I choose, free to choose my own teachers, free to follow the religion of my father, free to think, talk and act for myself, and I will obey every law or submit to the penalty."... Chief Joseph

Editor's Prologue: Religious freedom is a protected liberty that most Americans take for granted. However, according to the Supreme Court, no protection exists for tribal religions of Native Americans under the U.S. Constitution and laws. This lack of protection has created human rights problems in Indian country.

Bills will soon be introduced in Congress to protect Native religious freedom. One would think that passage should be a simple matter since most people appreciate the rich Native cultures and want them preserved. Who would disagree with 1978 House and Senate reports:

> **America does not need to violate the religions of her native peoples....There is room for and great value in cultural and religious diversity....We would be the poorer if these American Indian religions disappeared from the face of the Earth. H.R. Rep. No. 1308, 95th Cong., 2d Sess. 3 (1978); S. Rep. No. 709, 95th Cong., 2d Sess. 3 (1978)**

However, few people--and apparently no federal agencies--are familiar with the spiritual basis of Native culture or understand the cultural conflict which has placed vulnerable tribal religions in a wholly unprotected class today. As Natives ask Congress to protect their religious freedom, it becomes important for Americans to better understand how this human rights problem arose in a society that prides itself on protecting individual liberty.

This issue is devoted to explaining the nature of a fundamental problem in society's relationship with Native Americans since the Pilgrims landed at Plymouth Rock. What are Sacred Sites? Whey are they so important? Why won't the government protect them? What is the impact of the emerging Supreme Court Free Exercise Doctrine upon Indian Tribes, and why is it important for society to protect Native religious liberty?

SACRED LANDS AND RELIGIOUS FREEDOM

by Vine Deloria

Since time immemorial, Indian tribal Holy Men have gone into the high places, lakes, and isolated sanctuaries to pray, receive guidance from the Spirits, and train younger people in the ceremonies that constitute the spiritual life of the tribal community. In these ceremonies, medicine men represented the whole web of cosmic life in the continuing search for balance and harmony and through various rituals in which birds, animals, and plants were participants, harmony of life was achieved and maintained.

When the tribes were forcibly removed from their aboriginal homelands and forced to live on restricted smaller reservations, many of the ceremonies were prohibited by the Bureau of Indian Affairs, and the people were forced to adopt various subterfuges so that ceremonial life could continue. Some tribes conducted their most important ceremonies on national holidays and Christian feast days, explaining to curious whites that they were simply honoring George Washington and celebrating Christmas and Easter. Since many shrines and Holy Places were isolated and rural parts of the continent were not being exploited or settled, it was not difficult for small parties of people to go into the mountains or to remote lakes and buttes to conduct ceremonies without interference from non-Indians. Most Indians did not see any conflict between their old beliefs and the new religions of the white man and, consequently, a surprising number of people participated in these ancient rituals while maintaining membership in a Christian denomination.

During this century, the expanding national population and the introduction of corporate farming and more extensive mining and timber industry activities reduced the isolation of rural America. Development pressures on public and

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reservation lands made it increasingly more difficult for traditionally religious people to conduct their ceremonies and rituals. Since many of the sacred sites were on public lands, traditional religious leaders were often able to work out informal arrangements with federal agencies to allow them access to these places for religious purposes. But as personnel changed in state and federal agencies, a new generation of bureaucrats, fearful of setting precedents, began to restrict Indian access to sacred sites by establishing increasingly narrow rules and regulations for managing public lands.

In 1978, in an effort to clarify the status of traditional religious practices and practitioners, Congress passed a joint resolution entitled "The American Indian Religious Freedom Act" which declared that it was the policy of Congress to protect and preserve the inherent right of American Indians to believe, express, and practice their traditional religions. The Resolution identified the problem as one of a "lack of knowledge or the insensitive and inflexible enforcement of federal policies and regulations." Section 2 of the Resolution directed the President to have the various federal departments evaluate their policies and procedures and report back to Congress the results of this investigation and any recommendations for legislative action.

Most people assumed that the Resolution marked a clarification of federal attitudes toward traditional religions, and it began to be cited in litigation involving the construction of dams, roads, and the management of federal lands. Almost unanimously, however, the federal courts ruled that the Resolution contained nothing in it that would protect or preserve the right of Indians to practice their religion and conduct ceremonies at sacred sites on public lands. Some courts even hinted darkly that *any* recognition of the tribal practices would be tantamount to establishing a state religion, an interpretation which upon analysis was a dreadful misreading of American history and the Constitution and may have been an effort to inflame anti-Indian feelings.

In 1988 the Supreme Court decided the *Lyng v. Northwest Indian Cemetery Protective Association* case which involved access to sacred sites high up in the Chimney Rock area of the Six Rivers National Forest in northern California. The Forest Service proposed to build a six-mile paved logging road that would have opened the high country to commercial logging, destroying the isolation of the ceremonial sites of three tribes and introducing new processes of environmental degradation. The lower federal courts prohibited construction of the road on the grounds that it would have made religious ceremonial use of the area impossible. Before the Supreme Court could hear the appeal, Congress passed the California Wilderness Act, thereby making the question almost moot. The Supreme Court, nevertheless, insisted on deciding the religious issues and ruled that even the Free Exercise clause did not prevent the government from using its property any way it saw fit.

Most troubling about the Supreme Court's decision was its insistence on analyzing tribal religions within the same conceptual framework as western organized religions. Justice O'Connor observed that, "A broad range of government activities -- from social welfare programs to foreign aid to conservation projects -- will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs. Others will find the very same activity deeply offensive, and perhaps incompatible with their own search for spiritual fulfillment and with the tenets of their religion." Thus, ceremonies and rituals performed for some thousands of years were treated as if they were personal fads or matters of modern emotional personal preference based upon the erroneous assumption that belief and behavior can be separated. Justice Brennan's dissent vigorously attacked this line of reasoning but failed to gather support within the court. Most observers of the Supreme Court were simply confounded at the majority's conclusion which suggested that destroying a religion did not unduly burden it and that no constitutional protections were available to the Indians.

When informed of the meaning of this decision, most people have shown great sympathy for traditionally religious people. At the same time, they have had great difficulty understanding why it is so important that ceremonies be held, that they be conducted only at certain locations, and that they be held under conditions of extreme secrecy and privacy. These problems in understanding highlight the great gulf that exists between traditional western thinking

LEGISLATIVE CALL TO ACTION

You can help! Your personal and direct support for federal legislation to protect Native American religious freedom is needed. Send a short letter to the following members of Congress--including members of Congress from your home state--with a copy to NARF, requesting that they introduce and support such legislation.

The Honorable Daniel Inouye
United States Senate
Washington, D.C. 20510

The Honorable George Miller
United States House of Respresentatives
Washington, D.C. 20515

For further information about ways to help, contact NARF Staff Attorney Walter Echo-Hawk at 303/447-8760. Thank you.

about religion and the Indian perspective. It is the difference between individual conscience and commitment (western) and communal tradition (Indian), and these views can only be reconciled by examining them in a much broader historical and geographical context.

Justice Brennan attempted to make this difference clear when he observed that, "Although few tribal members actually made medicine at the most powerful sites, the entire tribe's welfare hinges on the success of individual practitioners." More than that, however, the "World Renewal" ceremonies conducted by the tribes were done on behalf of the earth and all forms of life. To characterize the ceremonies as if they were a matter of personal, emotional or even communal aesthetic preferences, as was done by Justice O' Connor, is to miss the point entirely. In effect, the court declares that Indians cannot pray for the planet or for other people and other forms of life in the manner required by their religion.

Two contradictory responses seem to describe the non-Indian attitudes toward traditional tribal religions: Some people want the medicine men and women to share their religious beliefs in the same manner that priests, rabbis and ministers expound publicly the tenets of their denominations; others feel that Indian ceremonials are remnants of primitive life and should be abandoned. Neither perspective understands that Indian tribes are communities in fundamental ways that other American communities and organizations are not. Tribal communities are wholly defined by family relationships, whereas non-Indian communities are defined primarily by residence or by agreement with sets of intellectual beliefs. Ceremonial and ritual knowledge is possessed by everyone in the Indian community, although only a few people may actually be chosen to perform these acts. Authorization to perform ceremonies comes from higher spiritual powers and not by certification by an institution or even by any formal organization.

The Indian community passes knowledge along over the generations as a common heritage that is enriched by the experiences of both individuals and groups of people in the ceremonies. Both the ceremony and the people's interpretation of it change as new insights are gained. By contrast the non-Indian communities establish educational institutions which examine, clarify and sometimes radically change knowledge to fit their needs. Knowledge is the possession of an exclusive group of people -- the scholars and the professionals who deeply believe that the rank and file of their communities are not intelligent enough to understand the esoteric truths of their society. Basic truths about the world are not expected to change, regardless of the experiences of any generation, and "leading authorities" are granted infallibility based on their professional status alone.

A belief in the sacredness of lands in the non-Indian context may become a preferred belief of an individual or group of non-Indian individuals based on their experiences or on intensive study of preselected evidence. But this belief becomes the subject of intense criticism and does not, except under unusual circumstances, become an operative principle in the life and behavior of the non-Indian group. The same belief, when seen in an Indian context, is an integral part of the experiences of the people -- past, present, and future. The idea does not become a bone of contention among the people, for even if someone does not have experience or belief in the sacredness of lands, he or she accords tradition the respect that it deserves. Indians who have never visited certain sacred sites nevertheless know of these places from the general community knowledge, and they feel them to be an essential part of their being.

Justice Brennan, in countering the near-demagogic statement by Justice O'Connor, that recognition of the sacredness of certain sites would allow traditional Indian religions to define the use of all public lands, suggested that the burden of proof be placed on traditional people to demonstrate why some sites are central to their practice and other sites, while invoking a sense of reverence, are not as important. This requirement is not unreasonable, but it requires a willingness on the part of non-Indians and the courts to entertain different ideas which, until the present, have not been part of their experience or understanding. The subject is considerably more complex than most people expect.

If we were to subject the topic of the sacredness of lands to a western rational analysis, fully recognizing that such an analysis is merely for our convenience in discussion and does not represent the nature of reality, we would probably find four major categories of description. Some of these categories certainly are overlapping in the sense that different individuals and groups have already sorted out their own beliefs so that they would not accept the classification of certain sites in the categories in which Indians would place them. Nevertheless, it is the principle of respect for the sacred that is important.

The first and most familiar sacred lands are those places to which we attribute a sacredness, because the location is a site where, within our own history, regardless of our group, something of great importance took place. Unfortunately, many of these places are related to instances of human violence; Gettysburg National Cemetery is a good example of this kind of sacred land. Abraham Lincoln properly noted that we cannot hallow the battlefield at Gettysburg because others, the men who fought there, had already consecrated it by giving "that last full measure of devotion." We generally hold these places sacred because there men did what we might one day be required to do -- give our lives in a cause we hold dear. Wounded Knee, South Dakota, is such a place for many Indians. The Lincoln Memorial in

Washington, D.C. might be an example of a location with a nonviolent background.

Every society needs these kinds of sacred places. They help to instill a sense of social cohesion in the people and remind them of the passage of the generations that have brought them to the present. A society that cannot remember its past and honor it is in peril of losing its soul. Indians, because of our considerably longer tenure on this continent, have many more of these kinds of sacred places than do non-Indians. Many different kinds of ceremonies can and have been held at these locations, and there is both exclusivity and inclusiveness depending upon the occasion and the ceremony. In this classification the site is all-important, but it is sanctified each time ceremonies are held and prayers offered.

A second classification of sacred lands has a deeper, more profound sense of the sacred. It can be illustrated in Old Testament stories which have become the foundation of two world religions. After the death of Moses, Joshua led the Hebrews across the River Jordan into the Holy Land. On approaching the river with the Ark of the Covenant, the waters of the Jordan "rose up" or parted and the people, led by the Ark, crossed over on "dry ground," which is to say they crossed without difficulty. After crossing, Joshua selected one man from each of the Twelve Tribes and told him to find a large stone. The twelve stones were then placed together in a monument to mark the spot where the people had camped after having crossed the river successfully. When asked about this strange behavior, Joshua replied, "That this may be a sign among you, that when your children ask their fathers in time to come, saying, 'What mean ye by these stones?' Then you shall answer them: That the waters of Jordan were cut off before the Ark of the Covenant of the Lord; when it passed over Jordan." (Joshua 4:6-7)

In comparing this sacred site with Gettysburg, we must understand a fundamental difference. Gettysburg is made sacred by the actions of men. It can be described as exquisitely dear to us, but it is not a location where we have perceived that something specifically religious has happened. In the crossing of the River Jordan, the sacred appeared in the lives of human beings; the sacred appeared in an otherwise secular situation. No matter how we might attempt to explain this event in later historical, political or economic terms, the essence of the event is that the sacred has become a part of our experience.

Some of the sites that traditional religious leaders visit are of a similar nature. Thus Buffalo Gap in the southeastern edge of the Black Hills of South Dakota marks the location where the buffalo emerged each spring to begin the ceremonial year of the Plains Indians. It may indeed be the starting point of the Great Race which determined the primacy between the two- leggeds and four-leggeds at the beginning of this world. Several mountains in New Mexico and Arizona mark places where the Pueblo, Hopi, and Navajo peoples completed their migrations, were told to settle, or were where they first established their spiritual relationships with bear, deer, eagle and the other forms of life who participate in the ceremonials. As we extend the circle geographically, we must include the Apache, Ute, Comanche, Kiowa and other tribes. East of the Mississippi, even though many places have been nearly obliterated, people still have knowledge of these sacred sites.

In the religious world of most tribes, birds, animals and plants compose the "other peoples" of creation and, depending on the ceremony, various of these peoples participate in human activities. If Jews and Christians see the action of a single deity at sacred places and in churches and synagogues, traditional Indian people see considerably more activity as the whole of creation becomes an active participant in ceremonial life. Since the relationship with the "other peoples" is so fundamental to the human community, most traditional practitioners are very reluctant to articulate the specific elements of either the ceremony or the location. And since some ceremonies involve the continued good health and prosperity of the "other peoples," discussing the nature of the ceremony would violate the integrity of these relationships. Thus when traditional people explain that these ceremonies are being held for "all our relatives," that explanation should be sufficient. It is these ceremonies in particular that are now to be prohibited under the Supreme Court's rulings.

It is not likely that non-Indians have had many of these kinds of experiences, particularly since most churches and synagogues have special rituals which are designed to denaturalize the buildings so that their services can be held there. Non-Indians have simply not been on this continent very long; their families have moved constantly about so that any kind of relationship that might have been possible for people has been forfeited. Additionally, non-Indians have engaged in senseless killings of wildlife and utter destruction of plant life, and it is unlikely that they would have understood any effort by other forms of life to communicate. But it is also a fact of human experience that some non-Indians, who have lived in rural areas of relative isolation and whose families have lived continuously in certain locations, tell stories about birds and animals not unlike the traditions of many tribes.

The third kind of sacred lands are places of overwhelming Holiness where Higher Powers, on their own initiative, have revealed themselves to human beings. Again we can use an Old Testament narrative to illustrate this kind of location. Prior to his trip to Egypt, Moses spent his time herding his father-in-law's sheep on and near Mount Horeb. One day he took the flock to the far side of the mountain, and to his amazement he saw a bush burning with fire but not being consumed. Approaching this spot with the usual curiosity of a person accustomed to the outdoor life, Moses was startled when the Lord spoke to him from the bush, warning, "Draw not hither; put off thy shoes from thy feet, *for the*

place whereon thou standest is holy ground." (Exodus 3:5, emphasis added)

This tradition tells us that there are, on this earth, some places of inherent sacredness, sites that are Holy in and of themselves. Human societies come and go on this earth and any prolonged occupation of a geographical region will produce shrines and sacred sites discerned by the occupying people. One need only to look at the shrines of present-day Europe and read the archaeology of the sites to understand that long before Catholic or Protestant churches were built in certain places, many other religions had established their shrines and temples on those spots. These Holy Places are locations where human beings have always gone to communicate and be with higher spiritual powers. This phenomenon is world-wide and all religions find that these places regenerate people and fill them with spiritual powers. In the western hemisphere these places, with some few exceptions, are known only by American Indians. Bear Butte, Blue Lake and the High Places of the *Lyng* case are all well-known locations which are sacred in and of themselves.

Among the duties which must be performed at these Holy Places are ceremonies which the people have been commanded to perform in order that the earth itself and all its forms of life might survive. Some evidence of this sacred dimension, and of other sacred places, has come through in the testimony of traditional people at various times in this century when they have explained to non-Indians, in and out of court, that they must perform certain kinds of ceremonies, at certain times and places, in order that the sun may continue to shine, the earth prosper, and the stars remain in the heavens.

Skeptical non-Indians and representatives of other religions seeking to discredit tribal religions have sometimes deliberately violated some of these Holy Places with no ill effects. They have thereupon come to believe that they have demonstrated the false nature of Indian beliefs. These violations reveal a strange non-Indian belief in a form of mechanical magic that is touchingly adolescent, a belief that an impious act would or could trigger an immediate response from the higher spiritual powers. Surely these impious acts suggest the concept of a deity who spends time recording minor transgressions as some Protestant sects have envisioned God. It would be impossible for the thoughtless acts of one species to have a drastic effect on the earth. The *cumulative* effect of continuous secularity, however, poses an entirely different kind of danger, and prophecies tell us of the impious people who would come here, defy the Creator, and bring about the massive destruction of the planet. Many traditional people believe that we are now quite near that time.

Of all the traditional ceremonies extant and actively practiced at the time of contact with non-Indians, ceremonies derived from or related to these Holy Places have the highest retention rate because of their planetary importance. Ironically, traditional people have been forced to hold these ceremonies under various forms of subterfuge and have been abused and imprisoned for doing them. Yet the ceremonies have very little to do with individual or tribal prosperity. Their underlying theme is one of gratitude expressed by human beings on behalf of all forms of life and they complete the largest possible cycle of life, ultimately representing the cosmos, in its specific realizations, becoming thankfully aware of itself.

Having used Old Testament examples to show the objective pre-sense of the Holy, we can draw additional conclusions about the nature of these Holy Places from the story of the Exodus. Moses did not make that particular location of the burning bush an object of worship for his people, although there was every reason to suppose that he could have done so. Rather he obeyed and acted on the revelation which he received there. In the absence of further information, we must conclude that this location was so holy that he could not reveal its secret to other people. If he had been told to perform ceremonies at that location during specific days or times of the year, world history would have been entirely different. In that case, the particular message received at these locations becomes a definitive Divine command which people must then follow. We have many tribal migration stories that involve this particular kind of Divine command and sacred sites which originate in the same revelation. For traditional Indian religious leaders who have been told to perform ceremonies as spiritual guardians of this continent, there is no question of obedience.

The second and third categories of sacred lands result from revelations of the Holy at certain locations. The ceremonies that belong to these sacred sites involve a process of continuous revelation and provide the people with the necessary information to enable them to maintain a balance in their relationships with the earth and other forms of life. Because there are higher spiritual powers who are in communication with human beings, there has to be a fourth category of sacred lands. Human beings must always be ready to receive new revelations at new locations. If this possibility did not exist, all deities and spirits would be dead. Consequently, we always look forward to the revelation of new, sacred places and new ceremonies. Unfortunately, some federal courts have irrationally and arbitrarily circumscribed this universal aspect of religion by insisting that traditional religious practitioners restrict their identification of sacred locations to those places that were historically visited by Indians, implying that, at least for the federal courts, God is Dead.

In denying the possibility of the continuing revelation of the sacred in our lives, federal courts, scholars and state and federal agencies refuse to accord credibility to the testimony of religious leaders, demand evidence that a ceremony or location has *always* been central to the belief and practices of the tribe, and impose exceedingly rigorous standards on

Indians who appear before them. This practice does exactly what the Supreme Court avows is not to be done -- it allows the courts to rule on the substance of religious belief and practice. In other words, courts will protect a religion if it shows every symptom of being dead but will severely restrict it if it appears to be alive.

Today a major crisis exists in Indian country because of the *Lyng* decision. As the dissent noted, there is no real protection for the practice of traditional religions within the framework of American constitutional or statutory law. Courts usually automatically dismiss Indian petitions without evidentiary hearings and at the same time insist that traditional people identify the "central belief" of the tribal religion. Presumably this demand is benign and made with the hope that by showing centrality for the site or ceremony, courts will be able to uphold some form of constitutional protection on some future occasion.

As human beings we live in time and space and receive most of our signals about proper behavior primarily from each other. Under these circumstances, both the individual and the group *must* have some kind of sanctity if we are to have a social order at all. By recognizing the sacredness of lands in the many aspects we have described, we place ourselves in a realistic context in which individuals and the groups can cultivate and enhance the experience of the sacred. Recognizing the sacredness of lands on which previous generations have lived and died is the foundation of all other sentiments. Instead of denying this aspect of our lives, we should be setting aside additional places which have transcendent meaning.

Sacred sites which higher powers have chosen for manifestation enable us to focus our concerns on the specific form of our lives. These places remind us of our unique relationship with spiritual forces and call us to fulfill our religious vocations. These kinds of experiences have shown us something of the nature of the universe by an affirmative manifestation of themselves, and this knowledge illuminates everything else that we know.

The struggle by American Indians to protect their sacred sites and to have access to them for traditional ceremonies is a movement in which all peoples should become involved. The federal agencies charged with managing public lands, who argue that to give recognition to any form of traditional tribal religion is to establish that religion, have raised a false issue. No other religion in this country speaks to the issue of the human relationship with the rest of the universe in this manner. The alternative use of land proposed by the Forest Service, the Bureau of Land Management and the National Park Service is the rapid exploitation of natural resources by a few favored private clients -- a wholly secular and destructive use of the lands.

The truly ironic aspect of modern land use is that during the past three decades, Congress has passed many laws which purport to protect certain kinds of lands and resources from the very developers who now seek to exclude Indian religious people from using public lands. The Wild and Scenic Rivers Act, the Wilderness Act, the National Environmental Protection Act, the Clean Air Act, the National Historic Preservation Act, and several other statutes all take definite steps to protect and preserve the environment in a manner more reminiscent of traditional Native American religion than that of uncontrolled capitalism or the domination of land expounded by the world religions. No real progress can be made in environmental law unless some of the insights into the sacredness of land derived from traditional tribal religions become basic attitudes of the larger society.

At present, legal remedies for Indian religious practitioners are limited to those procedures provided by various environmental and historic preservation laws which, in some circumstances, may provide an indirect means for protection of sites. The only existing law directly addressing this issue, the American Indian Religious Freedom Act of 1978, is simply a policy statement with "no teeth." While it has led to some administrative regulations and policies providing for limited additional opportunities for input, it provides no legal cause of action to aggrieved practitioners.

Examples of sacred sites currently threatened are: (1) the Medicine Wheel in Wyoming, where the Forest Service proposed (and is now reconsidering after protest) construction of a parking lot and observation platform at the site of the ancient Wheel which is sacred to many tribes in Montana, Wyoming, Oklahoma and South Dakota; (2) Badger Two Medicine in Montana, where oil drilling is proposed in a pristine area sacred to the Blackfeet and other tribes; and (3) Mt.Graham in Arizona where telescopes are proposed which would not only destroy an Apache sacred site but also cause the extinction of an endangered species of squirrel.

As a result, the Religious Freedom Coalition (Association on American Indian Affairs, Native American Rights Fund and National Congress of American Indians), as well as tribes and other Indian organizations, are seeking legislation which will provide for a legal cause of action when sacred sites may be impacted by governmental action. Proposed legislation would also provide for more extensive notice to and consultation with tribes and affected parties in such circumstances. The legislation would ensure that the principle of religious freedom (rightfully urged upon the rest of the world by the United States) truly incorporates and applies to the unique needs of Indian religions. *(Vine Deloria, Jr., is a member of the Standing Rock Sioux Tribe. As a noted author, theologian, historian and attorney he is uniquely qualified to address Native religious freedom issues.)*

LOOPHOLES IN RELIGIOUS LIBERTY: THE NEED FOR A FEDERAL LAW TO PROTECT FREEDOM OF WORSHIP FOR NATIVE PEOPLE

by Walter Echo-Hawk

"The Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities marks the rise and fall of our democratic faith."

--Felix Cohen, the Father of Federal Indian Law

INTRODUCTION

Two recent Supreme Court cases have created a crisis in religious liberty for Native Americans.[1] These cases held that the First Amendment does not protect tribal religious practices and referred the task of protecting Native worship to Congress. Stripped of any constitutional or statutory protections under American law, Indian religion has become the "miner's canary." In excluding traditional Indian worship from the First Amendment, the court has so narrowed the scope, meaning and protections of the Free Exercise Clause that it has seriously weakened religious liberty for all Americans.

This article examines the impact of the new Supreme Court doctrine--which has been described by constitutional law scholars as "the rise and fall of the Free Exercise Clause"--on Native religious freedom. Felix Cohen's words are prophetic when one views the resurgence of racism, censorship, intolerance, and the growing trend toward restricting other civil liberties during a time when American Indian worship has been excluded from constitutional protection. If our legal system cannot protect basic freedoms of even the weakest among us, does it lack sufficient vitality to protect the rest of society? As Native Americans ask Congress to protect the "miner's canary", this may test the nation's "democratic faith" and commitment to underlying values of the Bill of Rights.

Historic Suppression of Native Religion

Since Columbus' arrival almost 500 years ago, a basic feature of society's relationship with American Indians has been government insensitivity to Native religious beliefs and practices. At times government insensitivity included formal policies to suppress tribal religion and culture in order to "civilize" Indians. Even though the Pilgrims and other immigrants came to America in search of religious freedom which has been enshrined in the First Amendment by the Founding Fathers, those values were disregarded in the federal government's treatment of American Indians. That history provides a backdrop for understanding the present crisis in Native religious freedom.

In 1979, the Secretary of the Interior submitted a report to Congress that recounts the historic treatment of Native religion by the federal government.[2] One cornerstone of federal Indian policy was to convert the "savage" Indians into Christian citizens and separate them from their traditional ways of life. President Jackson's Indian removal policy was justified in the name of converting and civilizing the Indians.[3] Christian missionaries, hired as government Indian agents, were an integral part of the federal Indian policy for over one hundred years. The government placed entire reservations and Indian Nations under the administrative control of church denominations. Indian lands were conveyed to missionary groups in order to convert the Indians and separate them from their traditions.

Separation of church and state was disregarded in the government's treatment of Indians. The Secretary's report to Congress found as follows:

> *That Christianity and federal interests were often identical became an article of faith in every branch of the government and this pervasive attitude initiated the contemporary period of religious persecution of the Indian religions. It was not, to be certain, a direct attack on Indian tribal religions because of their conflict with Christianity, but an oblique attack on the Indian way of life that had as its by-product the transformation of Indians into American citizens. Had a Christian denomination or sect, or the Jewish community been subjected to the same requirements prior to receiving affirmation of their legal and political rights, the outcry would have been tremendous. 4*

By the 1890s, after tribes were placed on reservations, government treatment of their religions took a darker turn. In that decade, U.S. troops were called in to stamp out the Ghost Dance religion of the tribes who were confined on reservations. In 1890, Sioux Ghost Dance worshippers were slaughtered at Wounded Knee. In 1892, Pawnee Ghost Dance leaders were arrested in Oklahoma. And soon that religion ceased to exist as it was suppressed among other tribes. In 1892, the BIA outlawed the Sun Dance religion and banned other ceremonies which were declared "Indian offenses" and made punishable by withholding of rations or 30 days imprisonment.[5]

Formal government rules prohibiting tribal religions continued into the 1930s. In 1904, BIA Court of Indian Offenses regulations stated in very stark terms:

Fourth. The "sun dance", and all other similar dances and so-called religious ceremonies, shall be considered "Indian offenses", and any Indian found guilty of being a participant in any one or more of these offenses shall . . . be punished by withholding from him his rations for a period of not exceeding ten days; and if found guilty of any subsequent offense under this rule, shall be punished by withholding his rations for a period not less than fifteen days nor more than thirty days, or by incarceration in the agency prison for a period not exceeding thirty days.

* * * *

Sixth. The usual practices of so-called "medicine men" shall be considered "Indian offenses" . . . [punishable by confinement] in the agency guardhouse for a term not less than ten days, or until such time as he shall produce evidence satisfactory to the court, and approved by the agent, that he will forever abandon all practices styled Indian offense under this rule.[6]

Though Indians were not granted citizenship until 1924,[7] this does not justify the outright government ban on their right to worship which was in effect until 1934.[8]

Serious problems in Native religious freedom persisted into the 1970s, with numerous arrests of traditional Indians for possession of tribal sacred objects such as eagle feathers, criminal prosecutions for the religious use of peyote, denial of access to sacred sites located on federal lands and interference with religious ceremonies at sacred sites. After hearings held in 1978, Congress recognized the need to protect Indian religious freedom, including worship at sacred sites and the use and possession of sacred objects. The hearings revealed that much of the problem resulted from a simple government lack of knowledge about traditional religious practices.

To remedy the problem, Congress enacted the American Indian Religious Freedom Act of 1978 (AIRFA). *AIRFA established a federal policy to protect and preserve the traditional religions of native people, including worship at sacred sites. Though AIRFA was considered a landmark breakthrough at the time, in the intervening 13 years, tribes found that its policy has no teeth and has meant nothing to federal agencies.*

The treatment of Native worship by the Supreme Court in *Lyng* and *Smith*, analyzed below, is especially troubling when considered in the context of the above history. It is a testament to the vitality of tribal religion that it has persisted, despite a long history of government suppression that is unprecedented for any other religion in this country. But whether these unique religions can survive without any American legal protection is highly doubtful.

The Lyng Decision:
Need for Federal Sacred Sites Legislation

All world religions share a unifying dependence, in varying degrees, upon sacred sites, including the indigenous religions of American Indian tribes, Native Hawaiians and Native Alaskans. Indeed, worship at sacred sites is a basic attribute of religion itself.

However, when thinking of sacred sites, most Americans think only of well-known Middle Eastern sites familiar to the Judeo-Christian tradition such as Mecca, the Wailing Wall, Mount Sinai or Bethlehem. In the recent war against Iraq, our government and its allies took special care not to destroy sensitive religious areas. None doubt that these important Middle East religious sites are entitled to stringent legal protections for the practitioners of those faiths. Indeed, the laws of Israel do just that. Israel's Protection of Holy Places Law of 5727 (1967) (Sefer ha-Chukim, 1967) states:

1. The Holy Places shall be protected from desecration and any other violation from anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places.

2. (a) Whosoever desecrates or otherwise violates a Holy Place shall be liable to imprisonment for a term of seven years.

(b) Whosoever does anything likely to violate the freedom of access of the members of the different religions to the places sacred to them or their feelings with regard to those places shall be liable to imprisonment for a term of five years.

Unfortunately, American law and social policy overlook that our own landscape is dotted with equally important American Indian religious sites that have served as cornerstones for indigenous religions since time immemorial. As Representative Morris Udall stated on the floor of Congress in 1978:

For many tribes, the land is filled with physical sites of religious and sacred significance to them. Can we not understand that? Our religions have their Jerusalems, Mount Calvarys, Vaticans and Meccas. We hold sacred Bethlehem, Nazareth, the Mount of Olives and the Wailing Wall. Bloody wars have been fought because of these religious sites.

Traditional Native American religious sites--some of which rank among the most beautiful and breath-taking natural wonders left in America--serve a variety of important roles in tribal religion which should be readily understandable to most people. *See,* Vine Deloria, "Sacred Lands and Religious Freedom," *supra*.

When Congress passed AIRFA in 1978, there was hope that protection of Native worship at sacred sites would be incorporated into American law and social policy, since Congress recognized the need to protect such worship at that time. Since 1978, however, federal land managing agencies such as the Forest Service and the Park Service have repeatedly been allowed by the courts to destroy irreplaceable Native sacred sites. The courts have consistently been unwilling to find any protections under the First Amendment or any statute.[9] Finally, the struggle in the courts culminated in 1988, when the Supreme Court ruled in *Lyng* that Indians stand outside the purview of the First Amendment entirely when it comes to protecting tribal religious areas on federal lands for worship purposes.

In *Lyng,* a sharply divided court denied First Amendment protection to tribal worship at a sacred site in Northern California that would admittedly be destroyed by a proposed Forest Service logging road. One troubling aspect of the court's refusal to protect worship at this ancient holy area was that the court withheld protection knowing that "the threat to the efficacy of at least some religious practices is extremely grave":

> *Even if we assume that we should accept the Ninth Circuit's prediction, according to which the G-O Road will "virtually destroy the Indians' ability to practice their religion," . . . the Constitution simply does not provide a principle that could justify upholding respondents' claim.*

485 U.S. at 452-53. In short, the government may destroy an entire Indian religion under *Lyng* with constitutional impunity, unless it goes further and punishes the Indians or forces them to violate their religion. The court reached this harsh result by construing the Free Exercise Clause in the most narrow terms possible: holding that Free Exercise protections arise *only* in those rare instances when government *punishes* a person for practicing religion or *coerces* one into violating his religion. Because it is hard to imagine rare instances in which that will happen, the court's narrow interpretation renders the Free Exercise Clause a virtual nullity. This crabbed reading should deeply concern all citizens who cherish religious freedom principles. Under *Lyng,* United States law guarantees less religious freedom than most other democracies and some non-democratic nations.

As to the Indians in the *Lyng* case, the court disclaimed judicial responsibility to safeguard their religious freedom from government infringement, stating that any protection for them "is for the legislatures and other institutions." *Id.*

Former Justice Brennan's dissent noted the "cruelly surreal result" produced by the majority decision whereby, "governmental action that will virtually destroy a religion is nevertheless deemed not to 'burden' that religion." *Id.* at 472. He described the clear need for a federal law to protect the Native worship at sacred sites:

> *Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause. Having thus stripped respondents and all other Native Americans of any constitutional protection against perhaps the most serious threat to their age-old religious practices, and indeed to their entire way of life, the Court assures us that nothing in its decision "should be read to encourage governmental insensitivity to the religious needs of any citizen. . ." Given today's ruling that religious freedom amounts to nothing more than the right to believe that the religion will be destroyed. The safeguarding of such a hollow freedom not only makes a mockery of the "policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise their traditional religions," [quoting AIRFA], it fails utterly to accord with the dictates of the First Amendment.*

As a result of *Lyng,* there are no legal safeguards for Native worship at sacred sites under the U.S. Constitution and laws, laying bare a basic attribute of religion itself. This legal anomaly has frightening implications for remaining tribal religions struggling to survive. In 1991, for example, the traditional Blackfeet Indians of the Crazy Dog Society, who are attempting to protect their place of worship from destruction by the Forest Service, stand without any legal protections in American jurisprudence. The Crazy Dog Society recently received an ominous Forest Service letter threatening:

> *We both know a point of view the same as yours has been argued before the U.S. Supreme Court and they decided that while a government action may significantly affect a person's ability to pursue spiritual fulfillment, the government's action doesn't coerce individuals into violating their religious beliefs.*[10]

From a policy standpoint, no religious group should be stripped of First Amendment protections in a democratic society so that its ability to worship is made wholly dependent upon administrative whim. This is especially true for unpopular or despised minority religious groups, such as American Indians, who have suffered a long history of government religious suppression.

The inability of existing American law, as interpreted by the Supreme Court, to protect sacred sites is symptomatic of a larger failure of American jurisprudence to address and incorporate indigenous values and needs into the legal system that is intended to protect all citizens. Certainly, if this country contained holy ground considered important to the Judeo-Christian tradition, American law and social policy

would undoubtedly accord stringent protections. Because important Judeo-Christian sites are located in other nations, it is understandable that as American law developed in the United States it never addressed this aspect of religious freedom. Thus, when Native religious practitioners petitioned the courts, they found the law surprisingly ill-equipped to protect their religious liberty. However, if the purpose of law is to fairly protect all fundamental interests of our diverse and pluralistic society, then it must someday address the needs of indigenous people.

One way to start correcting the result of the *Lyng* decision is for society to respect Native sacred sites for what they are. The concept of religious worship at sacred sites is not unique to American tribal religions nor is it difficult to understand. *Hopefully, society will correct this injustice. It is morally intolerable for society to condone government infringement upon worship that predates the founding of this nation without providing Native Americans with some lawful means to safeguard basic human rights.*

The Smith Case:
Free Exercise Decline and the Miner's Canary

In 1990, the Supreme Court denied constitutional protection for an entire Indian religion of pre-Columbian antiquity which involves sacramental use of a cactus plant named peyote against state criminal prohibition of peyote use.[11] For Indians who lost constitutional protection for worship in the name of the "Drug War", *Smith* was devastating. For the rest of society, *Smith* caused an outcry because it dramatically departs from First Amendment law, weakens the Free Exercise Clause and religious liberty, and makes it easier for government to intrude upon freedom of worship.

Peyote is a cactus plant that grows in parts of the Rio Grande River valley of Northern Mexico and Southern Texas. Native religious use of peyote predates the founding of the United States. Peyotism is a spiritually profound religion and way of life that ranks among the oldest, largest and most continuously practiced tribal religions of the Western Hemisphere.[12] It is so interwoven with Native culture that contemporary tribal culture cannot be completely understood without knowledge of the long history of peyote worship.

Though harmless, peyotism is controversial because the cactus has psychedelic qualities and its ingestion is unlawful in most states. Although some states prosecuted Indian religious use earlier in this century, today the federal government and 28 states exempt the religious use of peyote by American Indians from drug laws. Many have done so for almost 30 years without experiencing any associated law enforcement or other problems. Nor has a single health problem among Indians ever been documented throughout centuries of sacramental use. In upholding the First Amendment right of Indians to practice this age-old religion, one court noted:

> *[T]he right to free religious expression embodies a precious heritage of our history. In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and group becomes ever more important. The varying currents of the subcultures that flow into the mainstream of our national life give it depth and beauty. We preserve a greater value than an ancient tradition when we protect the rights of the Indians who honestly practiced an old religion in using peyote one night at a meeting in a desert hogan near Needles, California.*[14]

In *Smith,* the high court was asked to protect the First Amendment rights of members of the Native American Church who were fired from their jobs for off duty religious use of peyote. Oregon asserted the First Amendment should not protect this form of worship because state law made peyote use illegal and contained no exemption for Native religious use.

Prompted by "Drug War" fear and speculation promoted by Oregon, the court went to great lengths to deny protection for the Indian Peyote Religion, even though peyotism is far removed from the nation's drug problem. First, the court threw out the traditional "compelling state interest" test;[15] then it exempted an entire body of law--criminal law--from First Amendment limitation altogether;[16] and finally it suggested that Free Exercise rights may not be entitled to protection unless some other constitutional right is also impaired by government action.

The court discarded the First Amendment test which had been applied for decades in religious cases, because it believed that the test too strictly protected religious liberty. Stating that America's religious diversity is a "luxury" that our pluralistic society "cannot afford",[17] the court left religious accommodation up to the legislative political process instead of the courts and the Bill of Rights, despite an admitted hardship upon unpopular or minority faiths:

> *. . . leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred . . .*"[18]

Justice O'Connor joined in the result and, as such, was not concerned about impacts of the decision upon Native religion. However, for the rest of society she expressed deep concern:

> *In my view, today's holding dramatically departs from well settled First Amendment jurisprudence, appears unnecessary to resolve the question*

presented, and is incompatible with our Nation's commitment to individual religious liberty.[19]

She decried the inherent danger of making individual freedoms dependent upon politics, quoting *Barnette:*

> *The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy. . . One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.*[20]

Mourning the declining role of the Bill of Rights in protecting religious freedom, Justice O'Connor warned about hard times ahead in the political arena, where Native citizens now find themselves:

> *[T]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups . . .*"[21]

Today, in the wake of *Smith* other religious groups are being treated like Indians by the courts.[22] The Eighth Circuit observed that *Smith* "does not alter the rights of prisoners; it simply brings the free exercise rights of private citizens closer to those of prisoners."[23] While some courts have expanded the *Smith* doctrine into the civil area, others reluctantly apply it with "deep" or "profound regret".[24]

Entire segments of the population are experiencing adverse effects of the new doctrine:

> *Smith cut back, possibly to minute dimensions, the doctrine that requires government to accommodate, at some cost, minority religious preferences: the doctrine on which all the prison religion cases are founded.*[25]

Indian religion is the "miner's canary." Its shameful treatment signals danger to American religious life.

Conclusion

Since 1831, the United States has maintained a trust responsibility for Indian tribes that has been continuously recognized by the Supreme Court and Congress.[26] That federal trust duty includes a duty to preserve Native communities "as distinct cultural entities."[27] It is time for Congress to "fulfill its constitutional role as protector of tribal Native Americans"[28] and legislate to protect religions that are crucial to the cultural survival of the tribes. Congress has ample constitutional authority for such legislation under the Indian trust doctrine.[29]

There is a need for our legal system to protect both sacred land and the endangered religions of Native people. We can only regret the enormous loss of our nation's heritage caused by a long history of government suppression of tribal religions. It is not enough, however, for our generation to mourn that loss. Rather, our challenge is to safeguard what little remains. After 500 years since the arrival of Columbus, the time is long overdue for his descendants to come to terms with those who were here first. Such is the nature of America's "Unfinished Business" as our maturing society observes its approaching quincentennial. *(Walter Echo-Hawk is a NARF staff attorney in the Boulder, CO office.)*

ENDNOTES

1. *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, __U.S.__, 108 L.Ed.2d 876 (1990); *Lyng v. Northwest Indian Cemetery Assn.*, 485 U.S. 439 (1988).

2. See, *American Indian Religious Freedom Act Report P.L. 95-341*, Federal Agencies Task Force, Secretary of the Interior (Department of the Interior, August 1979). This report was submitted to Congress as required by Section 2 of the American Indian Religious Freedom Act, 42 USC 1996.

3. Id. at 4.

4. Id. at 3.

5. Id. at 6.

6. *See,* Regulations of the Indian Office, effective April 1, 1904, Secretary of the Interior (Washington: Government Printing Office, 1904) at 102-03.

7. Citizenship Act of 1924, 8 USC 1401(b).

8. AIRFA Report, *supra* at 6.

9. *See, Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (Hopi and Navajo sacred site and shrines on San Francisco Peak destroyed by U.S. Forest Service to make room for a new ski lift); *Fools Crow v. Gullet*, 706 F.2d 856 (8th Cir. 1983) (Intrusions on Sioux vision questing at Bear Butte by U.S. Park Service); *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980) (Destruction of Navajo sacred site at Rainbow Bridge and intrusions upon Navajo ceremonies by U.S. Park Service and Bur. of Rec. upheld); *Sequoyah v. Tennessee Valley Authority*, 620 F.2d 1159 (6th Cir. 1980) (Cherokee sacred site flooded by TVA); *Inupiat Community of Artic Slope v. U.S.*, 548 F. Supp. 182 (D. Ala. 1982) (Eskimo religious activities on ice disrupted by federally-permitted off-shore drilling). *See also, United States v. Means*, 858 F.2d 404, 407 (8th Cir. 1988); *Havasupai Tribe v. U.S.*, 752 F.Supp. 1471 (D.Ar., 1990); *Dedman v. Hawaii Bd. of Natural Resources*, 740 P.2d 28 (Haw. 1987) (Destruction of Volcano sacred site by geothermal development upheld).

10. March 28, 1991 Letter from John Gorman, Forest Supervisor to Ronald West at 2.

11. *Employment Division v. Smith, supra,* 108 L.Ed.2d 876 (1990).

12. See, Omer Steward, *Peyote Religion a History* (Univ.Okla Press, 1987).

13. The constitutionality of the federal and Texas religious exemption was recently upheld in *Peyote Way Church of God v. Thornburgh*, 922 F.2d 1210 (5th Cir. 1991).

14. *People v. Woody,* 394 P.2d 813, 821-22 (Ca., 1964)

15. The court limited the test to unemployment compensation cases and gives no hint as to what judicial test should be applied to civil statutes that remain subject to First Amendment limitations. Id. at 888-893.

16. According to the Supreme Court, the First Amendment should really read, "Congress shall make no law, *except criminal laws*, prohibiting the free exercise of religion."

17. Id. at 892.

18. Id. at 893.

19. Id. at 893.

20. Id. at 901-02.

21. Id. at 901.

22. See, *Intercommunity Center for Justice and Peace v. I.N.S.,* 910 F.2d 42 (2nd Cir. 1990); *Salvation Army v. N.J. Dept. of Community Affairs,* 919 F.2d 183, 194-95 (3rd Cir. 1990); *South Ridge Baptist Church v. Indus. Com'n of Ohio,* 911 F.2d 1203, 1213 (6th Cir. 1990); *Cornerstone Bible Church v. City of Hastings, Mich.,* 740 F.Supp. 654, 669-70 (D. Mich., 1990); *Montgomery v. County of Clinton, Mich.*, 743 F.Supp. 1253, 1259 (W.D. Mich., 1990); *Yang v. Sturner,* 750 F.Supp. 558, 559 (D.R.I. 1990).

23. Salaam v. Lockhart, 905 F.2d 1168, 1171 n.1 (8th Cir. 1990). In 1987, the Supreme Court in *O'lone v. Estate of Shabazz,* 482 U.S. 342, carved out prisoners from meaningful First Amendment protection through its "judicial deference to prison wardens" exception to the First Amendment, abandoning these citizens to our country's most rigid authoritarian institutions without adequate constitutional protections. In the past twelve months alone, NARF has received numerous requests from Native American prisoners seeking protection for their religious practices.

24. Yang v. Sturner, supra at 558-59. In Yang the court wondered "what is left of Free Exercise jurisprudence"?

25. Hunafa v. Murphy, 907 F.2d 46, 48 (7th Cir. 1990).

26. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16-17 (1831).

27. Togiak v. United States, 470 F.Supp. 423, 428 (D.D.C. 1979). That duty was recognized by Congress in the 1978 passage of AIRFA. *Frank v. Alaska* 604 P.2d 1068, 1073 n.9 (Alaska 1979).

28. *Peyote Way Church of God v. Thornburgh, supra* at 1217.

29. *See, Peyote Way Church of God v. Thornburgh, supra* at 1214--19. *See also, Livingston v. Ewing*, 455 F.Supp. 825, 831 (D.N.M., 1978), *aff'd,* 601 F.2d 1110 (10th Cir. 1979), *cert. den.*, 444 U.S. 870 (1979).

Case Updates

Ernest v. Parisien v. Twin City Construction Company of Fargo

On May 19, 1991, the Tribal Court of the Turtle Mountain Chippewa Tribe in North Dakota held that the Tribal Court has the authority to resolve a contract dispute between a tribal member who lives on the reservation and a non-Indian construction company that lives off but was doing business on the reservation. The case required the Tribal Court to interpret an amended tribal law that clarifies the Tribal Court's authority. The Tribal Court also determined that no federal law bars it from hearing the case. It is expected that the construction company will appeal to the Tribal Court of Appeals. The case can also be reviewed by the federal courts. NARF represents the tribal member.

Northern Cheyenne Water Rights Settlement

The State of Montana and the Northern Cheyenne Tribe have approved a compact that settles the Tribe's reserved water rights claims. The State and Tribe have been in negotiations for the past several years to resolve the water claim. The approved compact provides for the administration of the tribe's water rights and the rehabilitation, repair and enlargement of the Tongue River Dam that sits above the reservation. NARF represents the Tribe in the matter.

Larsen Bay Human Remains

NARF recently received notification from Secretary Adams, head of the Smithsonian Institution, that all the remains that were taken from the Larsen Bay Tribal Council, Kodiak Island, Alaska, will be returned, as well as associated burial offerings. This marks the conclusion of a two-and one-half-year effort to reclaim the remains and offerings .

These dead represented the single largest "collection" of Alaskan remains held by the Smithsonian. The Smithsonian disputed the Village's right to obtain these remains based upon what the Smithsonian saw as insufficient scientific evidence. NARF demonstrated that the remains were culturally connected with the Larsen Bay Tribal Council and that the remains had to be returned pursuant to federal legislation which NARF helped to obtain. Repatriation is expected to occur in fall 1991.

Nebraska State Historical Society v. Pawnee Tribe of Oklahoma

The Nebraska District Court ordered the Nebraska State Historical Society (NSHS) to comply with the state public records law and provide historical documents requested by the Pawnee Tribe of Oklahoma.

The Tribe had requested documents under the public records law to determine how the NSHS was complying with a Pawnee tribal repatriation request filed pursuant to the Unmarked Human Burial Sites and Skeletal Remains Protection Act. In response, NSHS filed suit against the Tribe claiming it was not subject to the state public records law. The Nebraska Attorney General intervened on the side of the Pawnee Tribe on behalf of the State of Nebraska. NARF represents the Pawnee Tribe in the case.

NSHS argued unsucessfully that it was a non-profit organization not subject to the public records law. The court ruled that the NSHS is a state agency and ordered it to comply with the state public records law.

United States and Klamath Tribe v. Oregan

NARF represents the Klamath Tribe in this action to determine the State of Oregon's jurisdiction to quantify its federally-reserved water rights. On March 4, 1991, the federal court issued a preliminary injunction halting Oregon's water adjudication of federal and tribal water rights.

NARF RESOURCES AND PUBLICATIONS

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 treaties, 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.

AVAILABLE FROM NILL

The NILL Catalogue

One of NILL's major contributions to the field of Indian law is the creation of the National Indian Law Library Catalogue: An Index to Indian Legal Materials and Resources. The NILL Catalog lists all of NILL's holdings and includes a subject index, an author-title table, a plaintiff-defendant table and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law. (1,000 + pgs. Price: $75) (1985 Supplement $10; 1989 Supplement $30).

Bibliography on Indian Economic Development

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)

Indian Claims Commission Decisions

This 47-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available. The index contains subject, tribal and docket number listing. (47 volumes. Price $1,175). (Index priced separately at $25). (Available from the National Indian Law Library).

Prices subject to change

AVAILABLE FROM THE INDIAN LAW SUPPORT CENTER

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 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.

THE NARF LEGAL REVIEW is published by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Ray Ramirez, Editor. There is no charge for subscriptions.

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Main Office: Native American Rights Fund, 1506 Broadway, Boulder, Colorado 80302 (303-447-8760).

D.C. Office: Native American Rights Fund, 1712 N Street, N.W., Washington,D.C. 20036 (202-785-4166).

Alaska Office: Native American Rights Fund, 310 K Street, Suite 708, Anchorage, Alaska 99501 (907-276-0680).

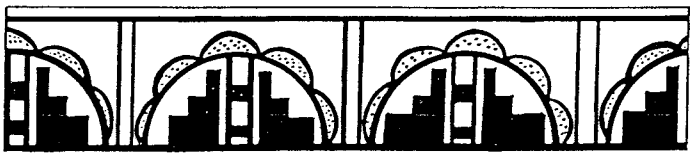
New Board Members Named

Willie Kasayulie, Richard G. Hill and Evelyn Stevenson were elected to NARF's Board of Directors during the fall Board of Directors meeting.

Richard Hill, a member of the Oneida Tribe of Indians of Wisconsin, currently serves as the Tribe's chairman. He has had a wide range of experience in tribal affairs working in areas of economic development, environmental concerns, gaming and finance.

Willie Kasayulie is a Yupik Eskimo from the Akiachak Native Community in Alaska. He is the Chief Executive Officer of the Akiachak Indian Reorganization Act Council and also serves as the Chairman of the Association of Village Council Presidents.

Evelyn Stevenson is a member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation of Montana. She is presently the attorney for the Tribes and was very involved in the development of the Tribal Court System.



SPECIAL ACKNOWLEDGEMENT

For over 20 years, the Native American Rights Fund [NARF] has continued working on behalf of thousands of Native Americans. This has been made possible by the genuine concern of tribes and individuals.

In this true spirit of concern, we offer special thanks to RICHARD A. HAYWARD, CHAIRMAN, AND THE MASHANTUCKET PEQUOT TRIBAL COUNCIL for their generous gift of $ 20,000 to NARF. The Mashantucket Pequot Tribal Council sponsored a Benefit Bingo on May 24, 1991, with all net proceeds being donated for the protection of Indian Rights.

We encourage other tribes to support NARF's efforts in protecting your rights.

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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