

CONGRESS OVERTURNS SUPREME COURT'S PEYOTE RULING

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James Botsford*

I. INTRODUCTION

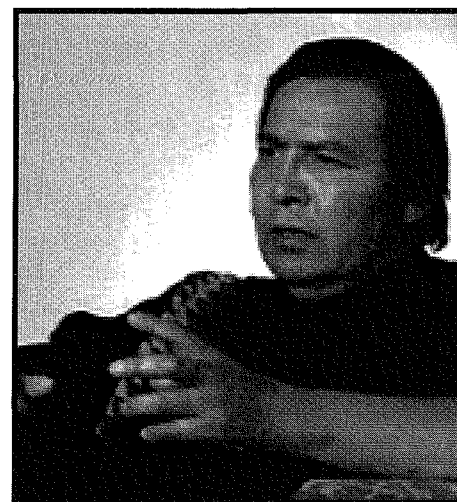
On October 6, 1994, President Clinton signed historic legislation guaranteeing American Indians the right to use the sacrament of peyote in traditional religious ceremonies.¹ This landmark religious freedom legislation, Public Law 103-344, culminated over a century of persecution and prosecution of members of the Native American Church (NAC). Equally important, it ended a crisis in Indian country created by the Supreme Court in 1990 when it ruled in *Employment Division of Oregon v. Smith*² that the First Amendment does not protect the religious use of peyote by Indians. The new law precludes the federal and state governments from prohibiting the use, possession or transportation of peyote by Indians for traditional religious purposes. It also prohibits discrimination based on such use, including the denial of otherwise applicable benefits under

public assistance programs.³

The legal history of the Native American Church offers lessons in both the highest, most noble aspects of American law and social policy, as well as, the lowest, most deplorable examples of American religious intolerance. On one hand, peyotism has been outlawed, banned, and suppressed during shameful, dark periods in our nation's history—most recently in the period 1990-1994. On the other hand, peyotism has been protected by some of the most outstanding and moving court decisions rendered in American jurisprudence. The sacramental use of peyote by Native American Church members has been both outlawed and protected by State laws as well. The subject of a myriad of government laws and agencies, this ancient, traditional religion is ironically the most highly regulated religion in America. In 1990, when constitu-

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IN MEMORY OF



REUBEN A. SNAKE, JR.

The Native American Rights Fund is proud to dedicate this issue of the *NARF Legal Review* to the late Reuben A. Snake, Jr. of the Winnebago Tribe of Nebraska. Reuben was a renowned Indian leader of national and international prominence. Among his many distinctions, Reuben was a lifelong member of the Native American Church (NAC), which uses the peyote sacrament. He served for many years as a highly respected roadman, or spiritual leader,

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Reuben A. Snake

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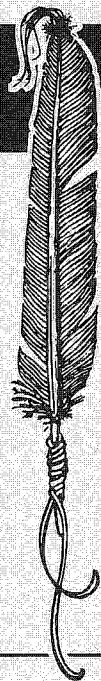
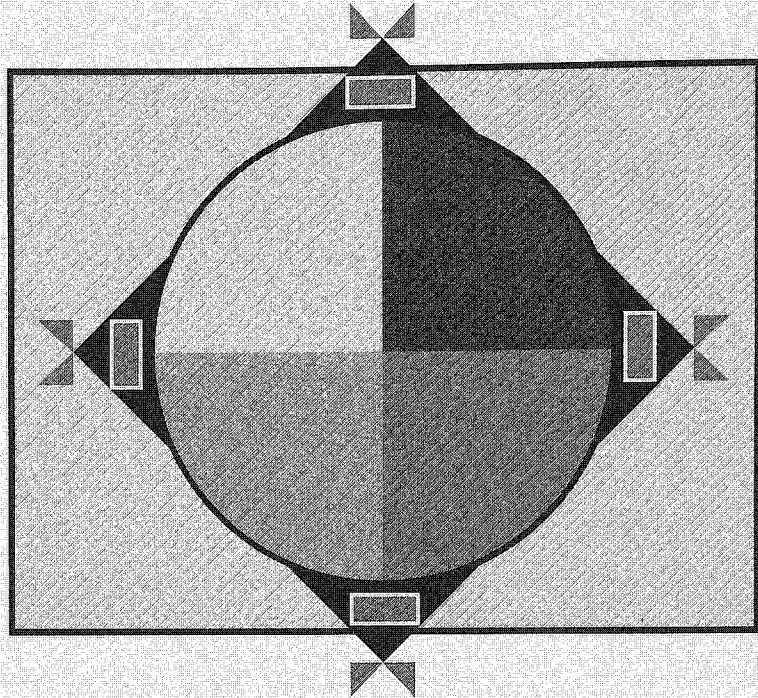
within this age-old spiritual tradition. NAC leaders throughout the country turned to Reuben for leadership and direction to overcome the devastating blow dealt by the Supreme Court in 1990 when the high Court ruled the First Amendment does not protect the religious use of peyote by Indians. Despite failing health, Reuben answered this national call to arms in his classic, selfless style, determined to devote the rest of his life, if necessary, to overturning the Supreme Court's destructive decision. To carry out this mission, Reuben immediately resigned from virtually every position he held. Contemporaneously, he established the Native American Religious Freedom Project to restore to the NAC the legal protection and dignity which any bona fide religious tradition deserves.

To this end, Reuben worked faithfully and tirelessly during his last days in this world. Having succeeded in bringing together the people, elements and forces that would pave the way for legislation to protect the beloved religion and way of life he fought so long and hard to preserve, this great warrior left this world in June of 1993. His undying spirit remains an inspiration to all of us.

On June 29, 1993, the Honorable Daniel K. Inouye, Chairman of the Senate Commit-

tee on Indian Affairs, delivered a moving speech on the floor of the United States Senate in memory of Reuben. We can think of no better way to honor Reuben than

to reprint the words of one great warrior/statesman proclaimed in tribute to another. The following is the full text of Senator Inouye's floor speech in honor of Reuben.



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IN MEMORY OF REUBEN A. SNAKE, JR.

BY CHAIRMAN DANIEL K. INOUE

SENATE COMMITTEE ON INDIAN AFFAIRS, JUNE 29, 1993

Mr. President, I rise today to mourn the passing of a great Indian Leader, Mr. Reuben Snake, Jr.

Throughout his forty years of service as a leader of the Winnebago Tribe of Nebraska, Reuben was driven by one fundamental goal. That goal was to improve the lives of all human beings through cultural awareness and respect for the divine gifts provided by the creator.

As a lifelong member of the Native American Church, Reuben Snake utilized his faith to guide him in promoting tribal sovereignty, advocating for indigenous rights and educating others about the valuable contributions made by our country's First Americans.

In 1954, Reuben joined the United States Army as a Green Beret under the Berlin Command. Upon receiving his Honorable Discharge in 1959, Reuben Snake pursued an education at a time when many universities were turning away young Native Americans.

Reuben Snake attended college at Northwestern College in Orange City, Iowa, at the University of Nebraska, Omaha, Nebraska and at the Peru State College, in Peru, Nebraska. Eventually, Reuben was awarded an Honorary Degree, Doctorate of Humanities

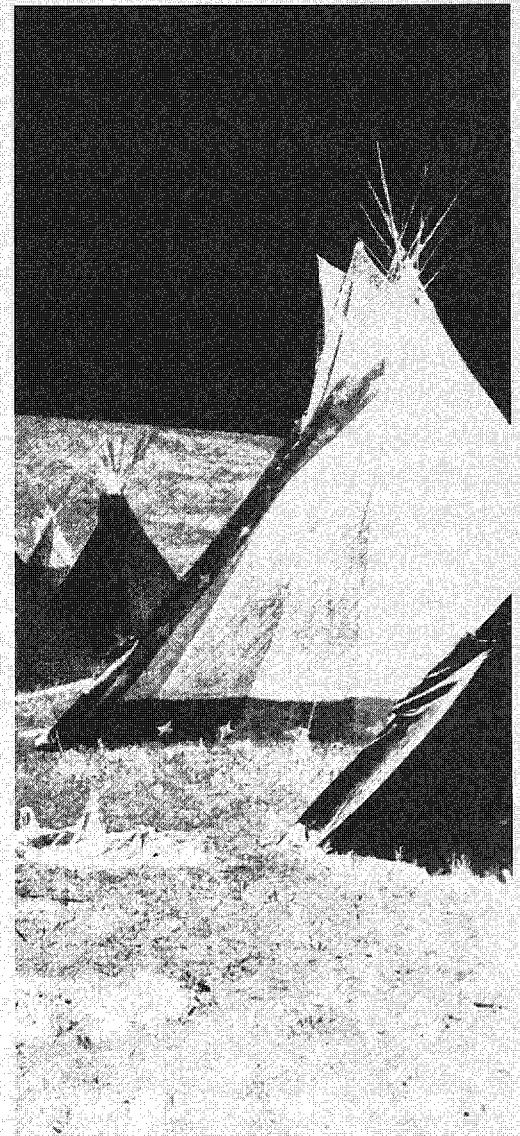
by the Nebraska Indian Community College in 1989. The coursework that Reuben completed enabled him to fill a variety of positions which advanced the social conditions affecting American Indian people.

Early in Reuben Snake's career, he gave more than a 100 percent of himself to fight the war on poverty afflicting the American Indian people. With very little funding, Reuben Snake worked in Community Action Programs in the Northern Plains region to assist Indian youth and their families to achieve self-sufficiency. As a Director of the National Indian Education Training Project, Reuben was instrumental in training Indian parent groups, tribal governments and Indian communities to acquire federal funding to advance the education of native people in 27 states. These positions, as well as other service-related responsibilities, gave Reuben the knowledge and skills to assist nearly every American Indian and Alaska Native in grass-roots development.

Reuben may be best remembered for his decade of service as Chairman of the Winnebago Nation of Nebraska. His major accomplishment was to bring the tribal government out of debt and financial ruin to a thriving

and resourceful multi-million dollar enterprise. This accomplishment was driven by his desire to make tribal government responsive to community needs. Reuben worked diligently to build continuity in economic, educational and social programs so

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Reuben A. Snake

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important to his people. As a spokesman for the Winnebago people, Reuben was responsible for fostering inter-governmental liaison with other governmental entities at the federal, state and local levels.

Due in large part to this success within his own tribal community, Reuben was elected as President of the National Congress of American Indians. Over 130 tribal governments were active during Reuben's tenure in the nation's oldest and largest Indian organization. The development and enactment of native cultural rights legislation such as the American Indian Religious Freedom Act, the National Museum of the American Indian, the Native American Graves Protection and Repatriation Act and the Native American Language Act can be attributed to Reuben's advocacy. This advocacy was recognized by the Congress in 1976 when Reuben Snake was appointed Chairman of Task Force XI of the American Indian Policy Review Commission, the Task Force on Drug and Alcohol Abuse. Later in 1989, my colleague and friend from Nebraska, Senator Robert Kerrey, hired Reuben to serve as a Legislative Assistant with responsibilities involving all Native American affairs—a position which Reuben enjoyed because he loved his fellow Nebraskans with

“For 500 years, we have had 99 percent of what is written about Indians slanted with a Eurocentric bias. Now we are in the process of writing about ourselves and our truth may be disconcerting to those who have had only their truth to read about until now.”

great compassion.

In 1972, Reuben was nationally recognized for his book, “BEING INDIAN IS”, which captured in small part, his humor and in large part, his understanding of Indian life. For example: “BEING INDIAN IS ... tough; BEING INDIAN IS ... owning land and not being able to rent, lease, sell or even farm it yourself without B.I.A. approval; and BEING INDIAN IS ... never giving up the struggle for survival.” It is highly likely, that every Indian baby-boomer working in high-level positions within the Federal Government was influenced by Reuben's wit and essays on what life is like for Indian people. In response to the Columbus Quincentennary in 1992, Reuben constructed his works as “BEING INDIAN IS AND ISN'T”. While the foundation for this work was developed by Reuben, unfortunately, his illness precluded its final release. Reuben Snake stated

in his essay that, “For 500 years, we have had 99 percent of what is written about Indians slanted with a Eurocentric bias. Now we are in the process of writing about ourselves and our truth may be disconcerting to those who have had only their truth to read about until now.”

Many in Indian Country are probably reflecting on his views today, since Reuben had the gift to lend humor to the everyday challenges affecting Indian people. He used his god-given capacity to make people laugh.

Most recently, Reuben served as the Dean for the Center for Research and Cultural Exchange at the Institute of American Indian Arts in Santa Fe, New Mexico. Much of this work focused on American Indian History, Comparative Cultures, Native Cultures, Native Religions and Practices, Cultural Rights and Tribal Government. It was Reuben's ambition to foster a

leadership role in shaping national and international perceptions regarding American Indian and Alaska Native cultures. Reuben perfected his skills as a great orator regarding cultural resources and indigenous rights while travelling extensively throughout the United States and internationally on behalf of the Institute of American Indian Arts. More importantly, this humble Dean was widely respected by students, faculty and Native people for his spiritual inspiration. Every week he would conduct Sunrise Services to foster greater understanding of the god-given blessings that everyone on earth should enjoy. In this regard, Reuben inspired others to the extent that the SIKHS Religion, an international religious group with more than 60 million members, awarded Reuben Snake with the "World Peace Award" for his humanitarian efforts.

His multi-faceted understanding and concern was appreciated by those board members with whom he served with in the following organizations: The National Congress of American Indians, the First Nations Development Institute, the Native Research and Policy Institute, the Seventh Generation Fund, the American Indian Law Resource Center, the American Indians for Opportunity, the International Circle of Indian Elders and Youth,

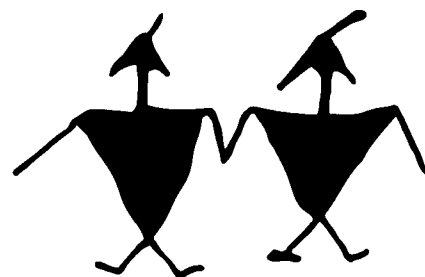
the 1992 Alliance, the American Indian Ritual Object Repatriation Foundation, and the Native American Religious Freedom Project. Reuben Snake also served on the United Nations Committee on Human Rights.

Probably, no one will miss Reuben Snake more than his wife, Cathy Snake and his six children. It seemed to many in Indian Country that when Reuben gave of himself, there was so much to give because of the love that was shared by his family. This love was obvious when Reuben, Cathy and many of his children and grandchildren drove all the way from Nebraska to conduct a prayer service on behalf of the Native American Church of North America here in Washington, D.C. Over twenty members of Reuben's family worked closely with the Native American Religious Freedom Project to inform the decision-makers here in Washington of the violation of religious freedom rights resulting from the 1990 Supreme Court ruling in the *Oregon vs. Smith* case. Reuben's family hosted an all night prayer service to promote peace in the midst of religious prosecution affecting American Indians.

In Reuben Snake's final days, he worked tirelessly to advocate for the introduction of legislation to protect the religious freedom rights of Native Americans. Reuben testified at the

Committee's first oversight hearing in Portland, Oregon on March 7, 1992 which laid the groundwork for introduction of legislation. In large part due to Reuben's efforts, the Committee recently introduced S. 1021, the Native American Free Exercise of Religion Act of 1993. I am dedicated to securing passage of this vital legislation to complete the work which Reuben Snake helped to foster.

Mr. President, as a tribute to Reuben Snake, Jr., his family and the Winnebago Nation of Nebraska, I ask unanimous consent that a speech which Reuben Snake delivered at the future site of the National Museum of the American Indian on the mall here in Washington, D.C. be made a part of Congressional Record following this statement. As a statesman for the Indian people, Reuben Snake will be remembered for his humor, his kindness and his love of his fellow people. Personally, I like the thought he had that "BEING INDIAN IS ... Having compassion, respect and honor for your fellowman, regardless of color!"



Peyote Ruling

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tional protection for the religious use of peyote by the Native American Church was stripped away entirely by the United States Supreme Court in the *Smith* decision, a loophole in the First Amendment opened for Indians and another frightening era of religious suppression was created. This forced the Native American Church to go to Congress, which ultimately enacted the American Indian Religious Freedom Act Amendments of 1994 to restore legal protection for the religious use of peyote by Indians.

These swings of the pendulum sorely tested our nation's basic commitment to the values of the First Amendment and produced profound changes in the nature of American religious liberty. In the United States, freedom of worship is considered a cornerstone of individual liberty, which most Americans take for granted. Indeed, this nation was founded in large part on the principle guaranteeing religious liberty for all. Traditionally, this human right has been stringently protected by American courts through the "compelling government interest" test of the First Amendment.⁴ Yet, as seen below, when it came to applying these values and principles to the Native American Church—comprised of this nation's first Americans—the system collapsed.

If the First Amendment is not strong enough to protect a unique, minority religion, does it have the vitality to protect the rest of society? Ultimately, in *Smith* the Supreme Court answered that the First Amendment provides no protection for the Native American Church. This shocking opinion seriously weakened religious liberty for all Americans and produced a firestorm of outrage by the American religious community and constitutional law scholars. It had profound impacts upon the concept of American religious liberty in general, and in particular, narrowed the religious liberties of Americans from many

different faiths and religious backgrounds. Until the 1990 *Smith* decision, Americans relied upon the First Amendment to protect the human right of worship as a fundamental constitutional liberty, which was what the Founding Fathers intended. After *Smith*, the time-honored constitutional right of religious freedom was reduced to a statutory right—dependent upon politics and the good will of legislators. In this new, post-*Smith* era of American religious liberty, Congress enacted the Religious Freedom Restoration Act of 1993 to restore the "compelling government interest" test of the First Amendment to



protect worship for all citizens; and for Native Americans who use the sacrament of peyote in traditional religious ceremonies, Congress enacted the American Indian Religious Freedom Act Amendments of 1994. Public Law 103-344 is the product of the persistent efforts of Native American Church members to achieve equal protection and dignity of their cherished religious beliefs, practices and "way of life," as practitioners term the religion.

Peyote, the scientific name of which is *Lophophora williamsii*, is a small, spineless cactus that grows primarily in the Rio Grande valley of southern Texas and in northern Mexico. Medical evidence, based on scientific studies and opinions of medical doctors, former directors of the Indian Health Service and anthropologists, demonstrates that peyote is not injurious to the Indian religious user, and, in fact, is often helpful in controlling alcoholism and alcohol abuse among Indian people. Ingested as a solid or tea in strictly prescribed religious ceremonies, the sacrament is neither addictive nor habit forming. Courts which have made factual findings regarding the religious use of peyote by Indians have correctly concluded that such is not harmful.⁵

Notwithstanding these facts, this religion, like no other in this nation, has endured a perni-

Public Law 103-344 is the product of the persistent efforts of Native American Church members to achieve equal protection and dignity of their cherished religious beliefs, practices and "way of life," ...

cious history of attempts to destroy it. This article briefly examines this history, explores the background and legal basis for the new law, and provides an overview of the statutory provisions and protection now afforded practitioners of this age-old religion.

II. OPPRESSION IN THE EARLY YEARS

The peyote religion has a remarkable and widely variable legal history. It has been marked by efforts to suppress and to protect it because the religious use of the peyote cactus plant by Indians is unique and little understood by non-Indians.

Native American peyotism predates the arrival of Europeans. Anthropologists date the sacramental use of the peyote cactus among indigenous peoples back 10,000 years. Native American religious use of peyote was discovered by Spanish explorers in the 1600's and has continued to the present. Such use exists today, largely through the Native Ameri-

can Church (NAC), among more than 50 Indian tribes throughout the United States, Canada and Mexico. The NAC is the present-day embodiment of one of the oldest religious traditions in the western hemisphere. The contemporary NAC was first incorporated in Oklahoma in 1918, and now has chapters in 20 States, as well as numerous chapters in Canada. About 250,000 American Indians are affiliated with the NAC.

The oldest recorded references to peyote come from Mexico, where the cactus grows in relative abundance. The oldest known reference to peyote in what is now the United States comes from Shumla Cave, which overlooks the Rio Grande River in Texas. Peyote found there has been carbon dated at 7,000 years old, and is currently being kept at the Witte Museum in San Antonio, Texas.⁶

The Catholic Church, which was busily converting the indigenous people of Mexico,

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apparently felt quite threatened by the power and the prevalence of peyote among the Indian people: *"That the use of peyote was pervasive throughout central and northern Mexico and deeply ingrained in the lives of those who used it can be judged by the radical efforts of the Catholic Church to stamp it out. The Church, afraid that peyote was spreading among converted Christians, and possibly to some Spaniards as well, took its strongest measures to fight it. In 1620, it brought the inquisition to bear against peyote..."*⁷

Over the next two centuries, ninety prosecutions of the 1620 edict were brought to repress the spiritual use of peyote.⁸ The use of the inquisition and the terrible punishments associated with it were not enough, however, to overcome the significance of peyote to those who used and understood it. "In spite of the efforts of the Catholic Church to eradicate peyote, its use continued to flourish, especially among the tribes where it grew and farther north."⁹ Records in the eighteenth century show that it was still used individually and ceremonially as it spread northward into Texas beyond the geographic limits of its natural growth areas.¹⁰

The evidence suggests that movement of the peyote ritual

through the southern United States after the arrival of Europeans can be linked first to the Carrizo Indians (as recorded by the Spanish in 1649); and from them to the Lipan Apaches (1700's); and from them to the Kiowas and Comanches (1800's). Much of the early history of the Native American Church is centered in Oklahoma where, in the latter nineteenth century, 35% to 90% of the members of various tribes were affiliated with the peyote religion.

Quanah Parker, a Comanche, is generally credited as one of the most influential people to introduce peyote rituals to Indian tribes in the late 1800's. Quanah, and many who followed, argued eloquently and persuasively to overcome the numerous efforts to kill this religion.

The following chronology was gleaned from the highly respected book entitled *Peyote Religion: A History*, by the late Omer Stewart. It comprises a selected account of some of the attempts to suppress and criminalize the religious use of peyote by the first Americans, and their efforts to combat this oppression:

1883: The "Rules Governing the Court of Indian Offenses" were approved by the Secretary of the Interior. Under these rules, each Court of Indian Offenses was authorized to stop "old heathenish

dances" or ceremonies, plural marriage, usual practices of medicine men, destruction of property at a burial, and use of any intoxicants, and to punish those Indians who practiced these "offenses."

1888: Federal Indian agents and missionaries posted an order on the Kiowa-Comanche Reservation prohibiting the use of peyote. The order read in part: "...all Indians on this Reservation are hereby forbidden to eat...[peyote] or to drink any



decoction...or liquor distilled therefrom...Any Indian convicted of violating this order will be punished by cutting off his annuity goods and rations...In extreme cases the grass money will be cut off.”¹¹

1890's: Quanah and other Indian leaders successfully argued against a proposed law to outlaw peyote in the Oklahoma territorial legislature.¹²

1899: The Oklahoma territorial legislature enacted the first statute specifically intended to criminalize the religious use of peyote. This was done at the independent urging of the local U.S. Indian agent without authorization from Washington, D.C. Ironically, when Indian religious use of peyote began being outlawed (and until the 1920's), peyote was being prescribed medicinally for non-Indians and offered for sale by pharmaceutical firms such as Park Davis.¹³

1907: Indicative of the misunderstanding associated with this religion, Oklahoma had mistakenly identified peyote as “mescal” in its law. An Oklahoma appellate court ruled in favor of the Indians, because they were using peyote, not mescal.¹⁴

1908: Sixteen peyotists registered as lobbyists helped defeat anti-peyote legislation drafted by an Indian agent in preparation for Oklahoma statehood.¹⁵

The NAC is the present-day embodiment of one of the oldest religious traditions in the western hemisphere.

1909: The Bureau of Indian Affairs (BIA) appointed a prohibitionist from New York as a Special Officer to Oklahoma. He attempted to apply an 1897 liquor prohibition law to suppress the religious use of peyote, but the courts ruled the prohibition law inapplicable. He also employed numerous other egregious tactics, such as raiding peyote prayer services with Indian agents, and purchasing all the peyote available from Texas and destroying it. He even went to the pharmacists and threatened them with prosecution if they continued to order it as a medicine from the pharmaceutical companies. The pharmacists responded that even if it was made illegal for the Indians, it should still be available for whites.¹⁶

1910: Anthropologist James Mooney of the Smithsonian Institution published an article in the “*Handbook of American Indians*” reporting that peyote “possesses varied and valuable medical properties.” This temporarily stopped the harassment of the NAC by the Indian agents and churches.¹⁷

1911: The federal Indian agent in South Dakota arrested peyotists and put them in jail—in the absence of any legal authority to support his actions.

1912: The Federal Board of Indian Commissioners (oversers of the BIA) began lobbying for a federal law banning peyote. They were joined by a representative of the YMCA and the Directors of the Bureau of Catholic Indian Missions, who wrote that it was important to “rid the reservations of the mescal [peyote] evil.”

1913: Congress attempted to amend the Indian Prohibition Act of 1897 by adding the words “and peyote” following “intoxicating liquors.” This attempt failed due in large measure to the efforts of Indian people who signed petitions and travelled to Washington.¹⁸

1914-17: In spite of the failure of Congress to amend the Prohibition Act to include peyote, numerous arrests and prosecutions took place in Indian country charging church members with violations of the Prohibition Act.¹⁹

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1916-17: Bills were introduced in both the U.S. House and Senate to criminalize Indian peyote use. They did not advance.²⁰

1917: Utah, Nevada and Colorado enacted laws prohibiting peyote use.²¹

1918: Anti-peyote legislation was introduced in the House and extensive hearings were held. Anthropologists and ethnobotanists from the Smithsonian joined many NAC members from numerous tribes to oppose the legislation. Missionaries and others testified in favor. One bill (H.R.2614) passed the House, but was rejected by the Senate. Similar bills were introduced in subsequent years, but none posed a serious threat again until 1937.²²

1918: Although there had been a few earlier attempts to formally organize and establish a peyote church, the first Articles of Incorporation for a Native American Church were filed in El Reno, Oklahoma on October 10, 1918.²³

1919: The Bureau of Indian Affairs published an anti-peyote pamphlet entitled "*Peyote*." This pamphlet was reproduced and widely distributed by the BIA until 1934.²⁴

1920: At the request of the local federal Indian agents, an attempt was made to insert a ban on peyote use into the Nebraska Constitution. Indian leaders

invited to address the Constitutional Convention defeated this effort.²⁵

1921: The Winnebago Tribe of Nebraska became the first tribe outside Oklahoma to incorporate the NAC.²⁶

1921-22: Anti-peyotists in Congress amended the Indian appropriation bill to authorize \$25,000 to suppress the use of peyote by Indians. This line item appropriation continued until 1934.²⁷

1923: Arizona, Kansas, Montana, North Dakota and South Dakota enacted laws prohibiting peyote use.²⁸

1924-26: Anti-peyote laws were introduced in Congress, but failed to advance.²⁹

1925: Iowa enacted a law prohibiting peyote use.³⁰

1929: New Mexico and Wyoming enacted anti-peyote legislation.³¹

1933: Idaho enacted anti-peyote legislation.³²

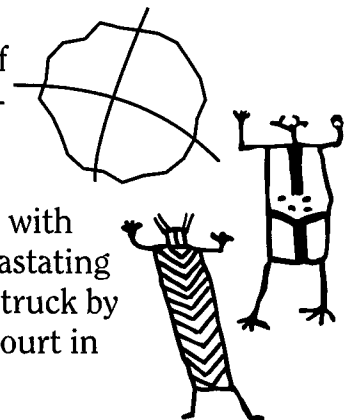
1934: The anti-peyote pamphlet circulated by the BIA since 1919 was withdrawn and replaced with Bureau Circular 2970 entitled "*Indian Religious Freedom and Indian Culture*", which stated in part "no interference with Indian religious life or ceremonial expression will hereafter be tolerated." This new BIA attitude was due largely to a new Commissioner for Indian Affairs, John Collier. It diminished the

harassment and stigma, but it did not end the persecution of the NAC.³³

1939: Another anti-peyote bill was introduced in the U.S. Senate. The bill was defeated by Indian practitioners with the help of John Collier, anthropologists, and authors who had begun writing about the NAC.³⁴

1963: The last attempt of Congress to legislate against peyote was contained in H.R. 9488, a bill regulating other substances. Opposed by NAC leaders in many states and the Commissioner of Indian Affairs, the bill died in Committee.³⁵

This chronology of oppression is not a comprehensive listing. It by no means tells the entire story. Consistent with the genius of the U.S. Constitution, it was frequently the courts which had the clarity and detached objectivity to remedy government attacks against this minority religion, and to hold in abeyance majoritarian attempts to diminish diversity. The following section describes judicial treatment of peyote use in the latter half of the twentieth century, concluding paradoxically with the most devastating blow of all...struck by the highest court in the land.



III. FROM WOODY TO SMITH (1964-1990): THE RISE AND FALL OF THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT

In the years 1964-1990, the struggle of the Native American Church to obtain legal protection for its religion was marked by victory and defeat. On the federal level, this period was relatively free from controversy. In 1965, Congress passed the Drug Abuse Control Amendments with the intent to protect the religious use of peyote by Indians. In 1966, peyote was added to Schedule I controlled substances by the Administration, with an exemption for the non-drug use of peyote in religious ceremonies of the Native American Church. After Schedule I was enacted into law in 1971, the U.S. Drug Enforcement Administration adopted 21 CFR Sec. 1307.31 to implement the new law, which provides: *The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church.*

Relationships between the federal government and the Native American Church have been smooth since the inception of this regulation. Notwithstanding, on occasion non-Indian "new agers" or others have attempted to use peyote and avail themselves to the

Consistent with the genius of the U.S. Constitution, it was frequently the courts which had the clarity and detached objectivity to remedy government attacks against this minority religion...

federal exemptions. For example, in *Peyote Way Church of God v. Thornburgh*³⁶, a non-Indian church sought protection under the DEA regulation. When it was denied, the church filed suit to challenge the constitutionality of the NAC exemption. The practical thrust of this non-Indian legal challenge was "if we can't use peyote legally, then the Indians should not be able to do so either." However, in that case, the United States, the State of Texas and the NAC successfully defended the constitutionality of the federal NAC exemption for Indians based upon the federal government's trust relationship with tribal Native Americans. Finding that Native American Church members were also members of federally recognized tribes, the appellate court ruled: *We hold that the federal NAC exemption allowing tribal Native Americans to continue their centuries-old tradition of peyote*

*use is rationally related to the legitimate governmental objective of preserving Native American culture. Such preservation is fundamental to the federal government's trust relationship with tribal Native Americans. Under Morton, [non-Indians] are not similarly situated to . . . NAC [members] for purposes of cultural preservation and thus, the federal government may exempt NAC members from statutes prohibiting possession of peyote without extending the exemption to [non-Indians].*³⁷

However, during this same period, many States had drug laws that prohibited the use or possession of peyote without granting an exception for the religious practices of Native American Church members. These state laws led to numerous arrests of Indians for their religious use or possession of peyote. Other problems resulted, such as employment discrimina-

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Peyote Ruling

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tion. These cases, some of which are discussed below, had major impacts upon American constitutional law and the nature of religious liberty in the United States.

In *People v. Woody, et. al.*³⁸, three Navajo Indians were arrested during a peyote ceremony, jailed and charged with illegal use of peyote. At trial, they pleaded not guilty, contending their possession of peyote was an integral part of their religious faith and that the law prohibiting peyote use infringed upon their religious freedom in violation of the First Amendment to the United States Constitution.

Following a widely publicized trial in San Bernardino, California, the County Court found the defendants guilty, stating that, "the Native American Church must forsake its peyote rituals in deference to the unqualified legislative command of prohibition." The convictions were upheld by the Court of Appeals. However, further appeal was taken to the Supreme Court of California, which reversed the conviction and set the Indians free. In its landmark decision, the Supreme Court ruled that the First Amendment protected the Indians' right to use peyote for religious purposes, and since their worship did not harm or frustrate any compelling state interest,

application of the law to the Indians impermissibly violated their right to the free exercise of their religion.

In *Woody*, the State of California claimed that peyote use was harmful to Indians and that an Indian religious exemption would adversely impact State enforcement of its drug law. The Court reviewed these claims and rejected them as unproven speculation, stating that "the State's showing of a 'compelling state interest' cannot lie in untested assertions."³⁹ The *Woody* court did not shrink from a straightforward application of the well-established First Amendment "compelling state interest" legal standard to the Indians' traditional religion. The Court stated: *We have weighed the competing*

*values represented in this case on the symbolic scale of constitutionality. On the one side, we have placed the weight of freedom of religion as protected by the First Amendment; on the other, the weight of the state's "compelling interest." Since the use of peyote incorporates the essence of the religious expression, the first weight is heavy. Yet the use of peyote presents only slight danger to the state and to the enforcement of its laws; the second weight is relatively light. The scale tips in favor of the constitutional protection.*⁴⁰

As a result, the Navajos were freed and granted an exemption from the California law to protect the free exercise of their ancient religion. This remarkable result gave true meaning and



“teeth” to the words of the First Amendment, allowing even a most unique and little understood religion to receive strong legal protection under the American Constitution. The California Supreme Court noted the larger social interests at stake in granting real meaning to the First Amendment:

We know that some will urge that it is more important to subserve the rigorous enforcement of the narcotic laws than to carve out of them an exception for a few believers in a strange faith. They will say that the exception may produce problems of enforcement and that the dictate of the state must overcome the beliefs of a minority of Indians. But the problems of enforcement here do not inherently differ from those of other situations which call for the detection of fraud. On the other hand, the right to free exercise of 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 the 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

The case is a classic example of American justice at its best, giving testament to the high ideals that the Founding Fathers sought to enshrine in the First Amendment.

*in using peyote one night at a meeting in a desert hogan near Needles, California.*⁴¹

Thus, under the *Woody* decision, the Native American Church fell within the ambit of First Amendment protection, and this ancient faith joined other protected minority religions. The case is a classic example of American justice at its best, giving testament to the high ideals that the Founding Fathers sought to enshrine in the First Amendment.

The *Woody* case was followed a few years later in *State of Arizona v. Whittingham*.⁴² In *Whittingham*, police raided a hogan in Parks, Arizona, where a Native American Church prayer meeting was in progress to bless a recent marriage. About forty Indians and non-Indians were arrested. In reversing the conviction of two of these persons, the Court of Appeals applied the “compelling state interest” test. As part of its decision to grant First Amendment protection for the Indians, the court reviewed the well-developed evidence

presented at trial regarding the State’s interests in protecting Indians against alleged “ill effects” of peyote. The Court ruled that the State failed to prove any ill effects to public health, safety or morals sufficient to establish a compelling interest in restricting the religious practice of Native American Church members: *The uncontroverted evidence on the record was that peyote is not a narcotic substance and is not habit forming. The fact that the use of peyote will not result in addiction is crucial because the State would have a great interest in protecting its citizens from drug abuse. Had the addictive qualities of peyote been proven, the State’s interest would be stronger because of the possible burden upon our resources that an addict can become if the State is forced to assume the maintenance of this individual. Furthermore, the State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently*

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*harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power.*⁴³

As in *Woody*, the Arizona court emphasized the bona fide and longstanding religious tradition of the Native American Church:

*... [W]e must emphasize that the record, and the trial court's findings, made several determinations in which Peyotism was found to be an established religion of many centuries' history. Suffice it to say, therefore, that Peyotism is not a twentieth century cult nor a fad subject to extinction at a whim. Most of the members who testified at trial, e.g., were active participants in the Native American Church and had been for years, in fact, in many instances, for decades. The religion is established with a following of several hundred thousand believers.*⁴⁴

In *Whitehorn v. State of Oklahoma*,⁴⁵ the Oklahoma Court of Criminal Appeals considered the appeal of an Otoe Indian who was stopped by the Highway Patrol for a traffic offense. When the patrolman discovered peyote on his person, Mr. Whitehorn was arrested and later convicted of possession of peyote in violation of Oklahoma's controlled substances law. On appeal, applying the rule of *Woody* and *Whittingham*, the

Court held:

*In the instant case the State did not present evidence which would sustain a finding of a state interest in regulation compelling enough to prohibit the exercise of the religious practice of peyotism by the Native American Church and its members. From the record before us it is apparent that the Native American Church is recognized by the State of Oklahoma and has a statewide organization of local chapters. It is, therefore, our opinion that in a prosecution for possession of peyote under the provisions of the Uniform Controlled Dangerous Substances Act it is a defense to show that the peyote was being used in connection with a bona fide practice of the Native American Church and that it was used or possessed in a manner not dangerous to the public health, safety or morals.*⁴⁶

The common thread of *Woody*, *Whittingham* and *Whitehorn* is that the Indians were accorded the opportunity to present evidence, and the decisions were based upon a full evidentiary record necessary to apply the "compelling state interest" test of the First Amendment. In short, given an opportunity to present evidence, the Native American Church was able to prove its entitlement to First Amendment protection. Under these rulings, Native American Church survival seemed more

secure, despite occasional arrests and discrimination against its members. However, some cases during this period, such as, *State of Oregon v. Soto*,⁴⁷ ruled that the First Amendment does not protect the Native American Church. In contrast to the *Woody*, *Whittingham* and *Whitehorn* cases, the *Soto* courts refused "to allow [the Indian defendant] to present as a defense to the charge evidence of his religious belief, i.e., that peyote (containing mescaline) is an integral part of the religious ceremonies of the Native American Church, and is carried by him only for its religious significance."⁴⁸ In addition to cases of this nature, legal uncertainties regarding federal protection lingered, because the Native American Church exemption was based solely upon an administrative regulation.

This mixed state of affairs changed sharply in 1990 when the United States Supreme Court handed down its infamous ruling in *Employment Division of Oregon v. Smith*. The nation's high Court lacked judicial courage to apply the long established "compelling state interest" First Amendment legal test when it considered the religious rights of Native American Church members in this landmark case. Instead, the Supreme Court went to extraordinary lengths to deny protection for NAC members, includ-

ing the complete abandonment of the “compelling state interest” test and the weakening of religious liberty for all Americans.

In *Smith*, the Supreme 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 in Oregon. Oregon, which had no religious exemption in its state drug law for Indians, asserted that the First Amendment should not protect this form of worship, because state law made peyote use illegal.

Prompted by “drug war” fear and speculation promoted by Oregon, the Supreme Court conducted major surgery on the First Amendment in its search for grounds to deny protection for this Indian religious practice, even though peyotism is far removed from the nation’s drug problem. First, the Court threw out the “compelling state interest” test, stating that it too strictly protected religious liberty.⁴⁹ To support this retreat from well established legal precedent, Justice Scalia opined that America’s religious diversity is a “luxury” that a pluralistic society “cannot afford.”⁵⁰ Next, the Court exempted an entire body of law—criminal law—from the reach and protection of the First Amendment. By carving out a whole body of law from First Amend-

... the Supreme Court went to extraordinary lengths to deny protection for NAC members, including the complete abandonment of the “compelling state interest” test and the weakening of religious liberty for all Americans.

ment protection, the Court, in effect, rewrote the First Amendment to read, “Congress shall make no laws *except criminal laws* prohibiting the free exercise of religion!” And finally, the Court watered down religious protection further by suggesting that the First Amendment may not protect the free exercise of religion unless some additional First Amendment right, such as speech or association, is also infringed upon by the government.

In lieu of judicial protection for the constitutional freedom of worship, the Court recommended that religious practitioners look elsewhere to Congress or state legislatures for protection of their practices, instead of the courts and the Bill of Rights. The Supreme Court so instructed, even though it recognized legislative relief imposes a burden on minority or unpopular religions: *... 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...⁵¹

After conducting this major surgery, the Supreme Court was able to rule against the Native American Church. However, the ruling also “threw the baby out with the bath water” because the new interpretation of the First Amendment seriously weakened religious liberty for all Americans. Justice O’Connor stated in a concurring opinion:

In my view, today’s ruling dramatically departs from well established First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation’s commitment to individual religious liberty.⁵²

Justice O’Connor also expressed grave concern about the majority’s suggestion that American religious liberty can be protected through the political process in state legislatures and Congress, quoting Justice Jackson

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in an earlier case:

*The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. 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 election.*⁵³

Justice O'Connor pointed out the dangers of abdicating judicial responsibility for the protection of such rights in favor of entrusting such protection to majoritarian politics:

*In my view . . . the 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 upon unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish.*⁵⁴

The *Smith* decision dealt a devastating blow to the Native American Church. In the long and dark years following the 1990 decision, discrimination, arrests and fear were common watch-

words, as Native American Church members were forced to practice their religion underground.

However, because *Smith* also weakened the right to worship of all faiths and forced the courts to treat other religious practitioners like the Indians in *Smith*, the infamous decision prompted an enormous public outcry as citizens of all religious ways of life turned toward Congress to restore their human right of worship.

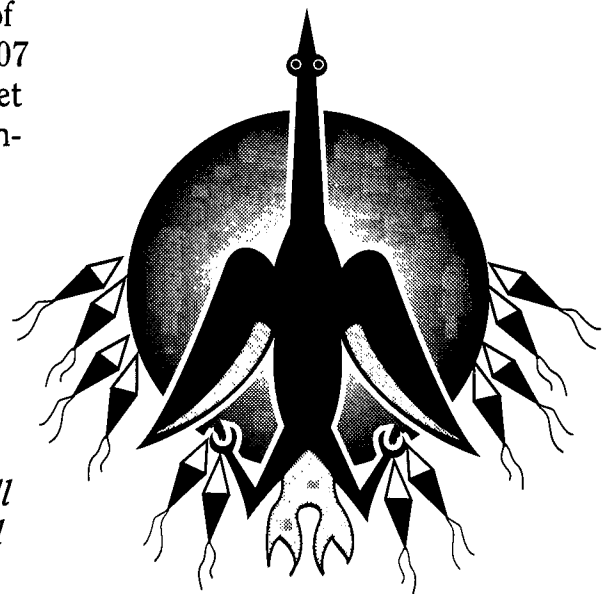
IV. RESTORATION OF THE COMPELLING GOVERNMENT INTEREST TEST: THE CONTINUING NEED FOR LEGISLATION TO PROTECT THE PEYOTE RELIGION

The compelling government interest test was ultimately reinstated pursuant to the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. 103-141, 107 Stat. 1488 (42 U.S.C. §§ 2000bb et seq.). Ironically, RFRA left endangered the very religious practice impaired by the *Smith* decision, the traditional use of peyote by Indians. As President Clinton emphasized when he signed the Religious Freedom Restoration Act on November 16, 1993:

The agenda for restoration of religious freedom in America will not be complete until traditional Native American religious practices have received the protection they deserve. My administration has been and will continue to

work actively with Native Americans and the Congress on legislation to address these concerns.

For several compelling reasons, special legislation remained necessary to protect the traditional use of peyote by Indians, notwithstanding the enactment of the RFRA. Foremost, Justice O'Connor agreed with the judgment of the majority in *Employment Division v. Smith* that Oregon's prohibition of the sacramental use of peyote was constitutionally permissible. However, she thought it unnecessary to discard the compelling state interest test in order to reach this result. Instead, Justice O'Connor would have retained the traditional test and applied it to



the Indians to rule that the religious use of peyote is not protected by the First Amendment, since in her view the “State in this case has a compelling interest in regulating peyote use by its citizens...”⁵⁵ In Justice O’Connor’s view, Oregon would have met the compelling government interest test solely on the judgment of the Oregon legislature to make peyote a class 1 controlled substance, and notwithstanding compelling factual considerations.

The Supreme Court’s reliance on Oregon’s position in *Smith* that the state has an interest in protecting the health and safety of its citizens from the “dangers” of peyote is questionable and frightening. As pointed out by Justice Blackmun in the dissent in *Smith*, Oregon’s position “rests on no evidentiary foundation at all,” and is therefore “entirely speculative”.⁵⁶ The high Court agreed with Oregon’s assertion, notwithstanding that Oregon failed to offer any “evidence that the religious use of peyote has ever harmed anyone.”⁵⁷ To the contrary, the record in *Smith* amply showed that:⁵⁸

(1) factual findings of other courts contradict Oregon’s assumption that the religious use of peyote is harmful;

(2) medical evidence, based on the opinion of scientists and other experts, including medical doctors and anthropologists, is that peyote

The Supreme Court’s reliance on Oregon’s position ... that the state has an interest in protecting the health and safety of its citizens from the “dangers” of peyote is questionable and frightening.

is not injurious to the Indian;

(3) the distribution and use of peyote has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country;

(4) there is virtually no illegal trafficking in peyote—Drug Enforcement Administration (DEA) data indicates that between 1980 and 1987, only 19.4 pounds of peyote was confiscated, while during the same period the DEA seized over 15 million pounds of marijuana;

(5) the distribution of peyote is strictly controlled by federal and Texas state regulations—the only state where peyote grows in significant quantities;

(6) the carefully circumscribed religious context in which peyote is used by Indians is far removed from the irresponsible and unrestricted recreational use of unlawful drugs, and is similar to the sacramental use of wine by the Roman Catholic Church, which was exempted from the general statutory ban on possession and

use of alcohol during Prohibition;

(7) the Federal government and 23 states [now 28] provide an exemption from respective drug laws for the religious use of peyote by American Indians;

(8) Native American Church doctrine forbids the non-religious use of peyote, and also advocates self-reliance, familial responsibility and abstinence from alcohol;

(9) spiritual and social support provided by the Native American Church has been effective in combatting the tragic effects of alcoholism among the Native American population;

(10) Oregon’s assertion that granting a religious exemption for the use of peyote would open the floodgates to claims for the religious use of controlled substances by other religious denominations is not an issue because the Supreme Court and lower courts over the years have consistently rejected similar arguments in past free exercise cases, having held that the religious use of peyote by

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American Indians is the sole circumstance warranting claims of a religious exemption from controlled substance laws.

Notwithstanding the above-referenced record in *Smith*, Justice O'Connor felt Oregon had a compelling interest "in this case" to prohibit the religious use of peyote, even though Oregon had never evinced a concrete interest in enforcing its drug laws against religious users of peyote—including Al Smith, the Klamath Indian plaintiff in the *Smith* case. Native American Church leaders recognized, and indeed feared, that if the Supreme Court could find a "compelling government interest" to prohibit the religious use of peyote under the facts of the *Smith* case, as Justice O'Connor suggested, it could and would find it in any case. The NAC leadership concluded this ancient religious practice did not stand a chance in the highest court of this democratic nation, even after the passage of RFRA, and that if this traditional way of life was to be protected, it must necessarily be accomplished pursuant to a specific federal statutory law which would expressly bind the states.

Moreover, absent national legislation, the "question" of whether a given state has a compelling interest to prohibit the religious use of peyote by Indians

is one that necessarily would have been determined by the courts on a state-by-state basis. The NAC leadership was concerned that such determinations could take numerous state supreme court decisions with varying results possible, as well as numerous lower state and federal court decisions. Such piecemeal judicial resolution would not likely produce uniform, just or equal results, and would be unduly burdensome, costly and time consuming. Uniform and equal protection of Indians without regard to state or reservation of residence, or tribal affiliation, could only be accomplished by Congress through comprehensive legislation.

In addition to the federal regulatory exemption of the DEA, 28 States had acted to provide some degree of legal protection of the religious use of peyote by Indians. However, neither the federal regulation nor the state laws provided the full range of protection needed for the unhindered religious use of peyote by Indians. In some states, the legal protection for Indians was limited to the opportunity to assert the religious use of peyote as an affirmative defense in the context of felony prosecution. This meant bona fide NAC members could have been arrested, finger-printed, incarcerated and subjected to all the indignities of a felony prosecu-

tion before being vindicated and set free. Even then, they would have a criminal record—simply for practicing a bona fide religion that predates the founding of this country by some 10,000 years. More importantly, 22 of the States had no legal protection at all.

As a result of the diverse state laws governing the use of peyote, Indians in different tribes



from different states, as well as from different tribes within some states, were treated differently regarding the religious use of the peyote sacrament.⁵⁹ NAC members who lawfully acquired the sacrament in Texas could have been arrested and subjected to felony prosecution and imprisonment in the 22 states which did not provide legal protection—states in which NAC members may live or through which they must travel on their way home from Texas after lawfully acquiring the sacrament. This state-by-state patchwork of laws had a chilling effect on the freedom of many Indian people to travel in this country. Legislation was therefore needed to assure comprehensive, equal and uniform protection of the religious use of peyote by Indians throughout the United States, without regard to state or reservation of residence, or tribal affiliation.

V. THE CAMPAIGN FOR THE ENACTMENT OF A PEYOTE BILL—H.R. 4230

Immediately after the *Smith* decision, the NAC organizations of the Omaha and Winnebago Tribes asked the late, nationally prominent Reuben A. Snake, Jr. (Nebraska Winnebago) to take the lead in overturning the Supreme Court's devastating ruling. Mr. Snake, former chairman of the Winnebago Tribe of

This state-by-state patchwork of laws had a chilling effect on the freedom of many Indian people to travel in this country.

Nebraska and past president of the National Congress of American Indians, devoted the rest of his illustrious life to this enormous task.⁶⁰ His first move was to establish the Native American Religious Freedom Project. For legal assistance, he recruited his adopted brother, James Botsford, a Native rights attorney who was no stranger to First Amendment battles on behalf of Native Americans.

In 1991, Senator Daniel K. Inouye (D-HI), the dedicated and relentless champion of Native rights in the United States Senate, sponsored a national leaders forum in Denver, Colorado. Out of this forum was born the American Indian Religious Freedom Coalition (the Coalition), co-chaired by President Peterson Zah of the Navajo Nation and Patrick Lefthand, of the Confederated Salish and Kootenai Tribes of the Flathead Nation. The Coalition held its first national conference in Albuquerque, New Mexico on November 22, 1991. Over the course of the next two years, the Coalition grew to over 100 members, consisting of an unprec-

edented association of the nation's major mainstream religious denominations, human rights groups, environmental organizations, and Indian tribes and national Indian organizations. In 1992, the Native American Rights Fund began its legal representation of the Native American Church of North America to overturn *Smith*.

In May of 1993, Senator Inouye, as chairman of the Senate Committee on Indian Affairs, introduced S. 1021, omnibus Native American religious freedom legislation designed to protect Native worship at sacred sites, the religious use of peyote, worship of Native prisoners, and the religious use of eagle feathers. The introduction of S. 1021 culminated nine congressional oversight hearings held throughout the country, chaired by the tireless Chairman Inouye.

After working with tribal and Coalition leaders and the Administration on extensive amendments to S. 1021, Senator Inouye introduced S. 2269 in the summer of 1994, new legislation

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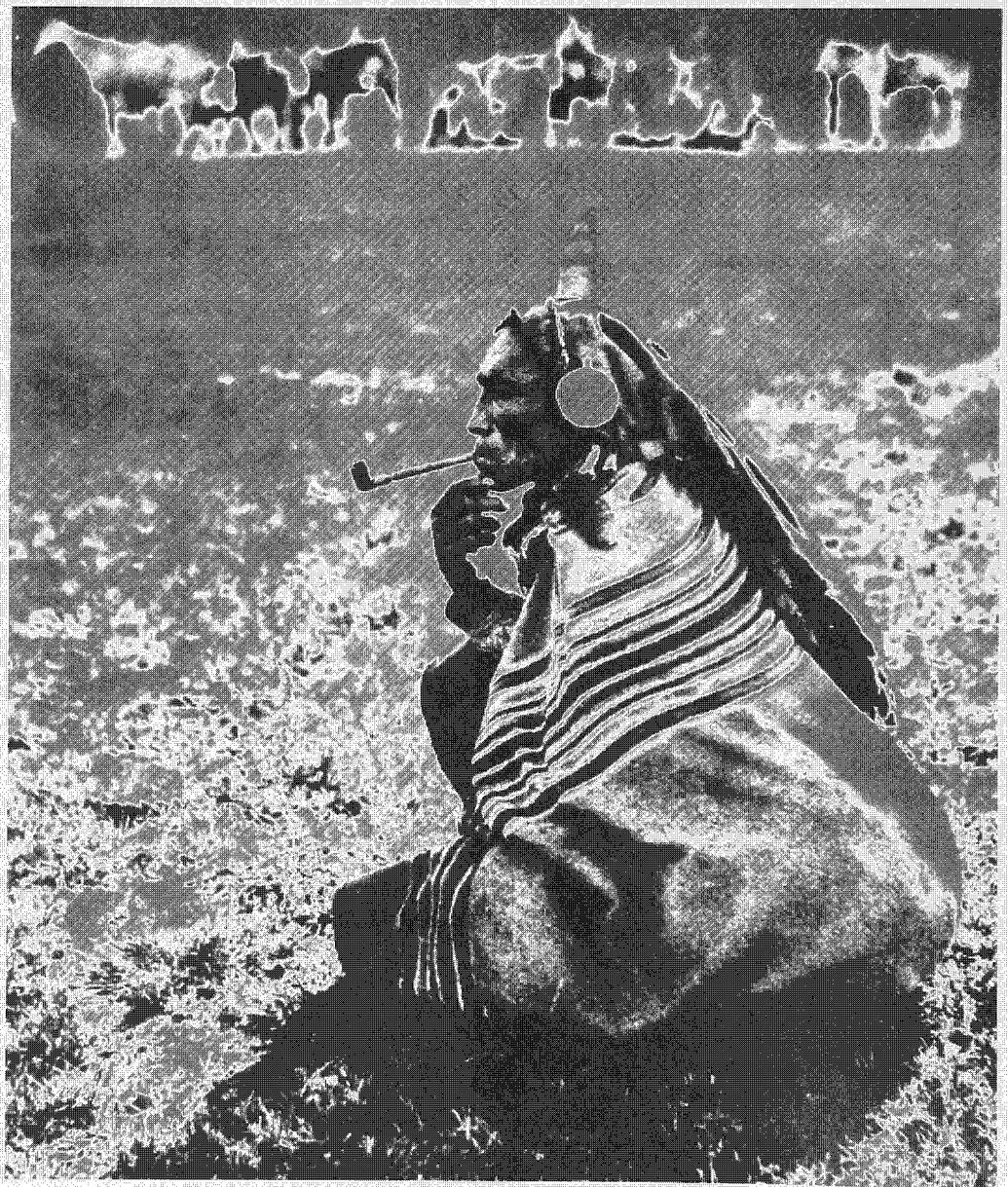
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that included cultural protection, as well as religious protection. S. 2269 was passed by the Senate Committee on Indian Affairs and referred to the Senate Energy and Natural Resources Committee. No further action was taken on the bill due to mounting concerns regarding sacred sites by various senators and representatives of the development and extraction industries.

In late 1993, a core team came together to develop a strategy for the enactment of peyote legislation. This team consisted of an unprecedented coalition of Native American Church leaders,⁶¹ led by the Native American Church of North America, tribal leaders, NARF attorneys and associated counsel, and the firm of Ducheneaux and Taylor. This group focused on House legislation, in response to earlier commitments initiated by Congressman Bill Richardson (D-NM), chairman of the Native American Affairs Subcommittee, to introduce separate bills to address the peyote and sacred sites issues. Congressman Richardson's strategy for separate bills was designed to avoid the probable legislative deathtrap of multiple committee referrals in the House, a likely prospect if the legislation addressed more than one issue, or was of an omnibus nature.

Chairman Richardson held an oversight hearing on March 16, 1993. Testimony was presented by Gene R. Haislip, deputy assistant administrator, Office of Diversion Control, Drug Enforcement Administration, U.S. Department of Justice; Craig Dorsay of Portland, OR; Douglas J. Long, president, Native American Church of

North America; Robert Billy Whitehorse, president, Native American Church of Navajoland; and Gus Palmer, Kiowa and Apache Chapter of the Native American Church of Anadarko, OK, accompanied by Henry Ware, member, Kiowa Chapter, Native American Church. In late March of 1994, the NAC sponsored a



lobby day on Capital Hill. During this time, several NAC leaders, as well as President Zah, met with Congressman Richardson to urge swift introduction of peyote legislation.

Throughout the campaign to enact H.R. 4230, NAC leaders and representatives worked closely with the officials of the Drug Enforcement Administration (DEA) and U.S. Department of Justice. The DEA, recognizing that the religious use of peyote by Indians is sacramental use rather than drug use, testified at the March 16, 1994 hearing that it is not aware of the diversion of peyote to any illicit market, and that the religious use of peyote by Indians is not related to the nation's drug problem. The DEA further testified that its long-standing (30 years) exemption (21 CFR § 1307.31) for the religious use of peyote by Indians has not resulted in any abuse.

On April 14, 1994, Chairman Richardson introduced H.R. 4230, a bill to amend the American Indian Religious Freedom Act to provide for the traditional use of peyote by Indians for religious purposes. A hearing on the bill was held by the Subcommittee on June 10. Testimony was presented by Frank Dayish Jr., on behalf of the Native American Church of North America; Jessie Thompson, vice-president, Native American Church of Navajoland; and Walter

...that the religious use of peyote by Indians is not related to the nation's drug problem. The DEA further testified that its long-standing (30 years) exemption (21 CFR § 1307.31) for the religious use of peyote by Indians has not resulted in any abuse.

R. Echo-Hawk, senior staff attorney, Native American Rights Fund, Boulder, CO. On July 22, 1994, the Subcommittee advanced the bill to the Natural Resources Committee, which approved it with amendments on July 27, 1994. H.R. 4230 passed the House of Representatives on suspension of the rules by a unanimous voice vote on August 8, 1994.

The amended bill was placed on the Unanimous Consent Calendar by Senators Inouye and McCain after it was sent to the Senate. A number of anonymous Republican holds were placed on the bill, which was referred to the Senate Indian Affairs Committee. After negotiations with relevant Republican Senators, led by President Zah, Andrew Tso, Mark Maryboy and other representatives of the Navajo Nation, the holds were lifted. This ultimately paved the way for unanimous consent to discharge the bill from the Committee and passage by the Senate

on September 27, 1994. H.R. 4230 was signed into law by President Clinton on October 6, 1994 as an Amendment to the American Indian Religious Freedom Act, Pub.L. 103-344, 108 Stat. 3125 (Oct. 6, 1994).

VI. PROVISIONS OF PUBLIC LAW 103-344

Technically, Public Law 103-344 is an amendment to the American Indian Religious Freedom Act of 1978 ("AIRFA"), 42 USC § 1996. It amends AIRFA by adding a new Section 3 with provisions to protect the religious use of peyote by Indians. The term "Indian" is defined to mean a member of: *community of Indians, including any Alaska Native village (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)), which is recognized as eligible for the special programs and services provided by the*

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*United States to Indians because of their status as Indians.*⁶²

The term “Indian religion” means any religion which “is practiced by Indians, and . . . the origin and interpretation of which is from within a traditional Indian culture or community.”⁶³

The intent of Public Law 103-344 is to overturn the *Smith* decision. To accomplish this, Section 3(b)(1) provides: (1) the use, possession, or transportation of peyote by Indians for religious purposes is lawful and shall not be prohibited by any State or by the Federal Government; and (2) no Indian shall be penalized or discriminated against for such use, possession or transportation, including the denial of otherwise applicable benefits under public assistance programs.

Consistent with these protection, Section 3(b)(2) and (3) preserve the existing authority of the Drug Enforcement Administration and the State of Texas to reasonably regulate the cultivation, harvest and distribution of peyote by Indians for religious purposes. Public Law 103-344 preserves the Texas regulatory system and statute (with the 1/4 degree blood quantum requirement) insofar as regulating the cultivation, harvest, and distribution of peyote. The sole change to Texas law is that “Indians”, as defined in the statute, may use

peyote for religious purposes in Texas without regard to the 1/4 degree blood quantum requirement.

Section 3(b)(5) clarifies the intent of NAC leaders that the bill does not require prison authorities to permit the use of peyote by Indian inmates, even though such authorities may allow such use in their discretion. This subsection provides:

This section shall not be construed as requiring prison authorities to permit, nor shall it be construed to prohibit prison authorities from permitting access to peyote by Indians while incarcerated in Federal or State prison facilities.

The House Committee Report explained this section:⁶⁴

The Committee does not intend the act to impose requirements that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and orderly manner. Accordingly, the Committee does not intend the Act to require prison officials to either prescribe or proscribe the religious use of peyote by Indian inmates. Rather, the Committee expects that these matters will be addressed under the Religious Freedom Restoration Act of 1993, and that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in estab-

lishing necessary rules and procedures to maintain good order, security and discipline.

Sections 3(b)(4) and (7) improve the present situation with regard to existing Federal and State authority to protect public safety by requiring that any public safety regulations limiting Indian use of peyote must: (1) be reasonable; (2) be done in consultation with religious leaders; and (3) be subject to the religious freedom “compelling state interest” balancing test of the Religious Freedom Restoration Act, 42 USC 2000bb-1 (“RFRA”).⁶⁵ This subsection was requested by the Administration in order to preserve existing authority of federal law enforcement and public transportation agencies to place “reasonable” limitations on the use of peyote prior to the performance of “safety sensitive” jobs. This provision does not apply to all federal jobs, but only to “safety sensitive”, law enforcement, and similar positions, such as those in federal public transportation. The NAC asserted this was a non-issue because members do not go to work in an impaired condition, and there has never been any problem in the public safety area.

Finally, existing State traffic safety regulatory authority is preserved in Section 3(b)(6), which also subjects such authority to the RFRA religious freedom balancing test. The Department of

Transportation lobbied for the inclusion of a provision to clarify that the bill would not alter the existing traffic safety regulatory authority of the States. NAC leaders felt that such a provision was not necessary—no state has ever enacted traffic safety laws in this area because there has never been a problem. Thus, NAC leaders insisted upon language in the provision making any such laws subject to the RFRA test in order to protect NAC interests. Since traffic safety and the religious use of peyote are non-issues (i.e., members do not drive “while under the influence of peyote” and there is no history of NAC traffic safety problems), this subsection is not likely to affect any NAC member. However, in those rare instances where a member may be affected, RFRA will provide adequate legal protection. Since States already have authority to enact such safety traffic laws, by inserting the RFRA test into this subsection, Public Law 103-344 improves the existing situation by making clear that any such laws affecting NAC religious use of peyote will be subject to the balancing test of RFRA.

VII. CONCLUSION

Public Law 103-344 brought to an end a prolonged epic struggle of Native American Church members to secure religious liberty in a nation founded

Public Law 103-344 brought to an end a prolonged epic struggle of Native American Church members to secure religious liberty in a nation founded in large part on that very principle over two hundred years ago.

in large part on that very principle over two hundred years ago. Perhaps the significance of this historic action is best summarized by two prominent leaders of the Native American Church. Frank Dayish, Jr., president of the Native American Church of North America, proclaimed that “It is right and just that the First Americans will finally have the freedom to worship with the peace and dignity they deserve.” Abraham Spotted Elk, Sr., president of the Native American Church of Wyoming, declared that “It’s a great day for members of the Native American Church to finally be able to pray without fear.”

By enacting this historic legislation, Congress demonstrated it will pass laws sorely needed to protect Native American religious freedom. Indeed, Public Law 103-344 and the Religious Freedom Restoration Act, passed by the 103rd Congress, serve as strong precedents for the enactment of additional laws by the

104th Congress necessary to protect other aspects of Native American religious practices, such as worship at sacred sites, the ceremonial use of eagle feathers, and Native prisoner worship.

** Robert Peregoy and Walter Echo-Hawk are senior staff attorneys employed by the Native American Rights Fund. Peregoy (Flathead) works in NARF’s Washington, D.C. office, while Echo-Hawk (Pawnee) operates out of NARF’s headquarters in Boulder, Colorado. James Botsford served as attorney for the Native American Religious Freedom Project, and is currently the director of the Indian Law Office of Wisconsin Judicare in Wausau, Wisconsin. The three served as legal counsel to the Native American Church of North America in securing enactment of the American Indian Religious Freedom Act Amendments of 1994, Public Law 103-344. Portions of this article are pre-printed with permission from Mrs. Echo-Hawk and Botsford’s appendix, “The Legal Situation,” to Reuben Snake and Huston Smith (ods.), *Voices of the Native American Church* (Santa Fe, NM: Clear Light Publishers, Fall 1995).*

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ENDNOTES

¹ Public Law 103-344, 108 Stat. 3125 (October 6, 1994)

² 494 U.S. 872 (1990).

³ Pub. L. 103-344, Sec. 3(b)(1)

⁴ The First Amendment provides that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The "compelling government interest" test is a legal standard fashioned by the Supreme Court to interpret rights under the First Amendment. The test provides that government may not infringe upon the freedom to worship unless there is a "compelling government interest" at stake which cannot be protected by any less restrictive manner than infringement upon worship. *See, e.g., Sherbert v. Verner*, 374 U.S. 398 (1963).

⁵ H.R. Rep. No. 103-675, 103rd Cong., 2d Sess., at 3 (1994) (hereafter H.R. Rep. No. 103-675).

⁶ Franklin, Virgil, "Peyote: An Overview of the Native American Church," *Cheyenne and Arapaho Bulletin*, Concho, Oklahoma, March 9, 1991.

⁷ Stewart, Omer, *Peyote Religion: A History*, University of Oklahoma Press, Norman Oklahoma, at 20 (1987) (hereafter Stewart).

⁸ Stewart at 21.

⁹ Stewart at 26.

¹⁰ Stewart at 26.

¹¹ Stewart at 75.

¹² Stewart at 75.

¹³ Stewart at 131.

¹⁴ Stewart at 136.

¹⁵ Stewart at 136.

¹⁶ Stewart at 139.

¹⁷ Stewart at 147.

¹⁸ Stewart at 215.

¹⁹ Stewart at 215.

²⁰ Stewart at 218.

²¹ Stewart at 218.

²² Stewart at 218-221.

²³ Stewart at 224.

²⁴ Stewart at 226-27.

²⁵ Stewart at 228.

²⁶ Stewart at 230.

²⁷ Stewart at 227.

²⁸ Stewart at 227.

²⁹ Stewart at 227.

³⁰ Stewart at 228.

³¹ Stewart at 229.

³² Stewart at 229.

³³ Stewart at 232.

³⁴ Stewart at 237-38.

³⁵ Stewart at 238.

³⁶ 922 F.2d 1210 (5th Cir., 1991)

³⁸ *Id.* at 1216. The Fifth Circuit also ruled that the DEA exemption for NAC members did not violate the establishment clause of the First Amendment: *The unique guardian-ward relationship between the federal government and Native American Indian tribes precludes the degree of separation of church and state ordinarily required by the First Amendment. The federal government cannot at once fulfill its constitutional role as protector of tribal Native Americans and apply conventional separatist understandings of the establishment clause to that relationship.*

...Thus, we hold that the federal NAC exemption represents the government's protection of the culture of quasi-sovereign Native American tribes and as such, does not represent an establishment of religion in contravention of the First Amendment. Id. at 1217.

Accordingly, in granting a statutory religious exemption for the sacramental use of peyote solely protecting American Indians, Public Law 103-344 rests on a solid constitutional footing.

³⁸ 394 P.2d 813 (Ca.Sup.Ct., 1964)

³⁹ 394 P.2d. at 819.

⁴⁰ *Id.* at 821.

⁴¹ *Id.* at 821-22.

⁴² 504 P.2d 950 (Az. Ct. Appeals, 1973).

⁴³ 504 P.2d. at 953.

⁴⁴ *Id.* at 952.

⁴⁵ 561 P.2d 539 (Okl.Cr., 1977).

⁴⁶ *Id.* at 545.

⁴⁷ 537 P.2d 142 (Or.App., 1975).

⁴⁸ *Id.* at 142.

⁴⁹ 494 U.S. at 888-893.

⁵⁰ *Id.* at 892.

⁵¹ *Id.* at 893.

⁵² *Id.* at 893.

⁵³ *Id.* at 903.

⁵⁴ *Id.* at 902.

⁵⁵ 494 U.S. at 907.

⁵⁶ 494 U.S. at 911.

⁵⁷ 494 U.S. at 911-12.

⁵⁸ *See* 494 U.S. at 911-18 for precise citations of the enumerated paragraphs.

⁵⁹ For example, there are three Indian reservations in Nebraska where Native Americans reside: the Winnebago, Omaha and Santee Sioux. Nebraska state law never provided an exemption for the religious use of peyote by Indians. Therefore, Native American Church members transporting the sacrament to any of the three Nebraska reservations could have been arrested, prosecuted and incarcerated if caught in possession of the sacrament anywhere in the state before they entered the reservation. As a result of federal Indian policy and related jurisdictional matters, the state of Nebraska does not have criminal jurisdiction over the Winnebago or Omaha reservations, but does have such authority over the Santee Sioux Reservation. Thus, Omaha and Winnebago Indians could lawfully use peyote for religious purposes on their own reservations,

because state law is not applicable there and such use was protected by the federal exemption of the DEA prior to the enactment of Public law 103-344.

However, Indians using the sacrament on the Santee Sioux Reservation could have been prosecuted under state law since Nebraska criminal law is applicable at Santee and there never has been a state law exemption for the religious use of the sacrament. Such anomalous situations are not uncommon and underscored the need for a uniform national law that would provide American Indians with equal protection throughout the nation.

⁶⁰ The Native American Rights Fund has dedicated this issue of the *NARF Legal Review* to the late, great Reuben Snake in recognition of his leadership and inspiration which culminated in the enactment of the peyote legislation. The sidebar in this issue reprints a tribute delivered in memory of Reuben by the Honorable

Daniel K. Inouye, before the United States Senate on June 29, 1993.

⁶¹ The NAC coalition consisted of: the Native American Church of North America; the Native American Church of Navajoland; the Native American Church of Oklahoma; the Native American Church of South Dakota; the Native American Church of Wyoming; Crow Indian Peyote Ceremonies; the Native American Church of the Omaha Tribe of Nebraska; the Native American Church of the Uintah and Ouray Reservation, Northern Ute Tribe; the Native American Church, Half-Moon Fireplace, State of Wisconsin; the Native American Church of Tokio, North Dakota; and the Native American Religious Freedom Project of the Native American Church. Other NAC organizations, such as the Native American Church of Idaho helped in this effort, although they did not formally join the coalition.

⁶² See, Section 3(c)(2) of the bill, which provides a definition of Indian tribe definition patterned after the Indian Self-Determination Act, 25 U.S.C. § 450b (b).

⁶³ See Section 3(c)(3).

⁶⁴ H.R. Rep. No. 103-675 at 9-10.

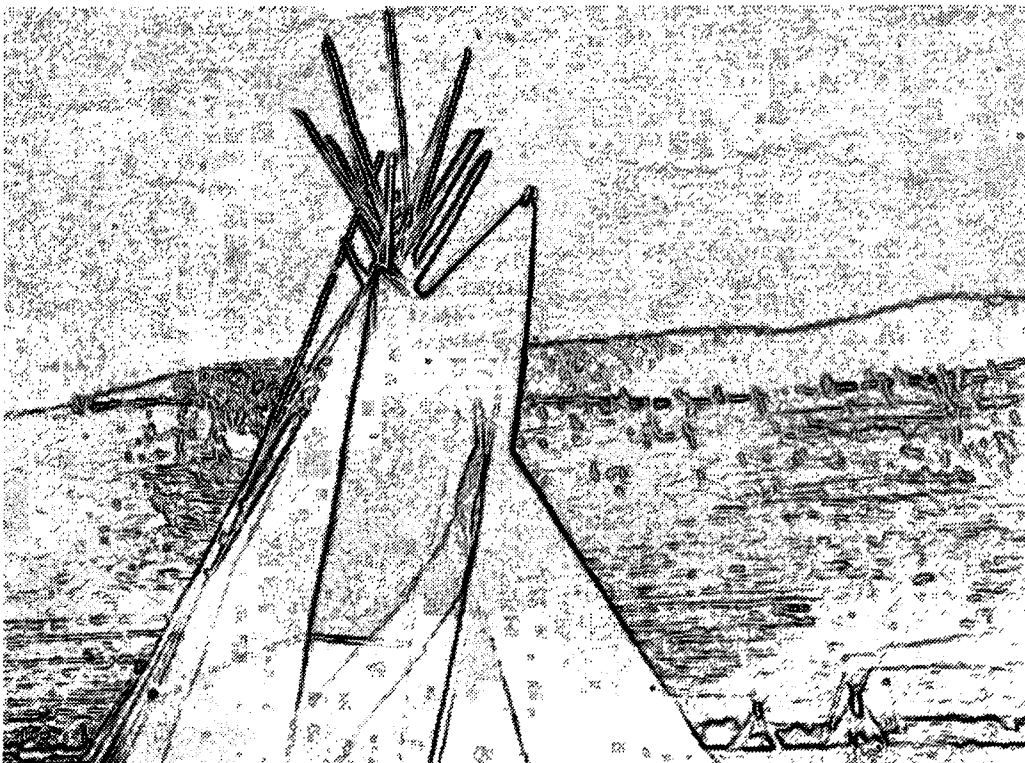
⁶⁵ The RFRA test is known as the "compelling government interest" test which provides:

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —

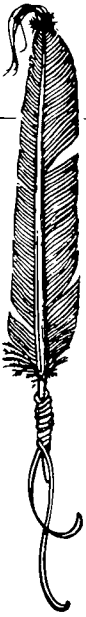
(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

In virtual substance, this is the First Amendment test under which *People v. Woody* and earlier cases were won to protect the religious right of NAC members to use the peyote sacrament.



**Native
American
Rights
Fund**



CASE UPDATES

SENATE REFERS TREATY CLAIM OF THE POTTAWATOMI NATION IN CANADA TO U.S. COURT OF FEDERAL CLAIMS

On October 4, 1994, the Senate approved a resolution, S. Res. 223, that will provide an opportunity for the Pottawatomi Nation in Canada to have its day in court to present claims against the United States for unpaid payments promised under Treaties.

Between 1795 and 1846, thirteen treaties were concluded between the United States and the Pottawatomi Nation, providing for the cession of land in the States of Ohio, Michigan, Indiana, Illinois, and Wisconsin, in exchange for the payment of annuities and other considerations. These annuities were to be paid to the Pottawatomi people on a per capita basis.

Pursuant to the Federal Removal Policy, and under the Treaty of Chicago in 1833, the U.S. planned to remove the Pottawatomi west of the Mississippi River. However, many members of the Wisconsin Band remained in Wisconsin or fled into Canada to avoid forced removal from their homelands near the Great Lakes. Congress expressly stated that no forfeiture of treaty rights to annuity payments occurred for those Pottawatomi who refused to relocate to the West.

In 1949, the Pottawatomi Nation in Canada were dismissed from an original claim filed under the Indian Claims Commission Act by them and the Wisconsin Band of Pottawatomi, because they resided in Canada. The Claims Court ultimately ruled in favor of the Wisconsin Band in 1983. And, in 1984, the Claims Court refused to reopen the judgment to allow disbursement to Wisconsin Pottawatomi residing in Canada.

The Senate Resolution, S. Res. 223, was introduced by Senator Daniel K. Inouye (D-HI), and co-sponsored by Senator Paul Simon (D-IL). The Resolution refers pending Senate Bill, S. 2188, to the Chief Judge of the United States Court of Federal Claims under the congressional reference process. In the Resolution, the Senate asks the Court to determine which claims of the Pottawatomi Nation in Canada would have been compensable under the Indian Claims Commission Act, if residence outside the territorial limits of the United States were not a limitation on the Court's exercise of jurisdiction under that Act. The Resolution also asks that the Court determine the payment of damages, if any, plus interest calculated at five percent interest. A trial will be held and then the Court will report its findings back to the Senate.

Native American Rights Fund attorneys, in representing the Pottawatomi Nation, said, "The United States has breached its treaty and statutory obligations by not paying members of the Pottawatomi Nation, who fled to Canada, their proportionate share of funds and annuities. This reference is long overdue and it is a tribute to the perseverance of the Pottawatomi people, who have pursued this claim for nearly ninety years."

The Pottawatomi Nation in Canada, who also refer to themselves as the *Keewatinosagiganing* Pottawatomi, or "Northern Lakes" Pottawatomi, now reside in communities in Ontario, Canada. They are represented politically by an elected Executive Council, which maintains its office in Mactier, Ontario.



TRIBAL CIVIL JURISDICTION AFFIRMED BY COURT



In the case of *A-1 Contractors v. The Honorable William Strate*, the Tribal Court for the Three Affiliated Tribes of the Fort Berthold Indian Reservation in North Dakota found that it had jurisdiction over a personal injury action arising between two non-Indians on the reservation. One of

the non-Indians challenged the Tribal Court decision in federal court. NARF undertook representation of the Tribal Court in the federal proceedings. The federal district court upheld NARF's position that the Tribe had jurisdiction, holding that tribes have jurisdiction over civil cases arising

on Indian land regardless of the race or political status of the parties. A-1 Contractors appealed to the Eighth Circuit Court of Appeals and in November of 1994, the Eighth Circuit issued an opinion affirming the civil jurisdiction of the Tribal Court of the Three Affiliated Tribes.

ALASKA SUBSISTENCE REGULATIONS NEAR SETTLEMENT

NARF represents the Native Village of Kluti Kaah against the State of Alaska in action to enforce the subsistence priority under state law, which regulate harvests of caribou and moose in the Copper River Basin. NARF argues that the Board of Game violated the state subsistence law by failing to provide an adequate hunting season to obtain

moose and caribou for subsistence uses and seeks to establish that the subsistence priority include consideration of customary and traditional uses of a resource.

Anticipating a new attitude by the newly elected governor and administration, the State's attorneys have now suggested that Kluti Kaah work with the state on a proposal that would provide

subsistence users with a reasonable opportunity to get subsistence needs satisfied. The case of *Kluti Kaah v. Rosier* will be delayed pending these negotiations. If the Board of Game accepts the jointly recommended proposal at its spring meeting, it is possible that this case may not be litigated.



COURT RULES ON ALASKA NATIVE SOVEREIGNTY

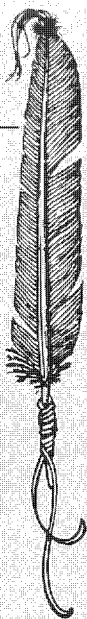


United States District Court Judge Russel Holland issued a decision in consolidated cases of Native Village of Venetie v. State of Alaska that involve the rights of two Alaska Native villages to tax non-members doing business on tribal land, and to issue adoption decrees that must be recognized by the State of Alaska. The Court ruled that the Neets'aii Gwich'in of Venetie and Arctic Village constitute a sovereign Indian tribe whose tribal court adoption

decrees must be given full faith and credit by the State of Alaska. The question of taxation of non-members will be dealt with in an opinion to be issued by the Court at a later date.

Judge Holland found that the evidence at trial established that the Neets'aii Gwich'in have been consistently identified as a separate and distinct group of American Indians and that they have historically inhabited and presently occupy the same land as

a united community led by their chiefs. He went on to say that "Tribal status and its continuity may not be rejected because a native group fails to organize in some particular way that is useless to it..." and that "...the Neets'aii Gwich'in still live what is essentially a subsistence lifestyle and do so on their own land with leaders chosen by them and governance in their chosen form, much as they did when they were first observed..."

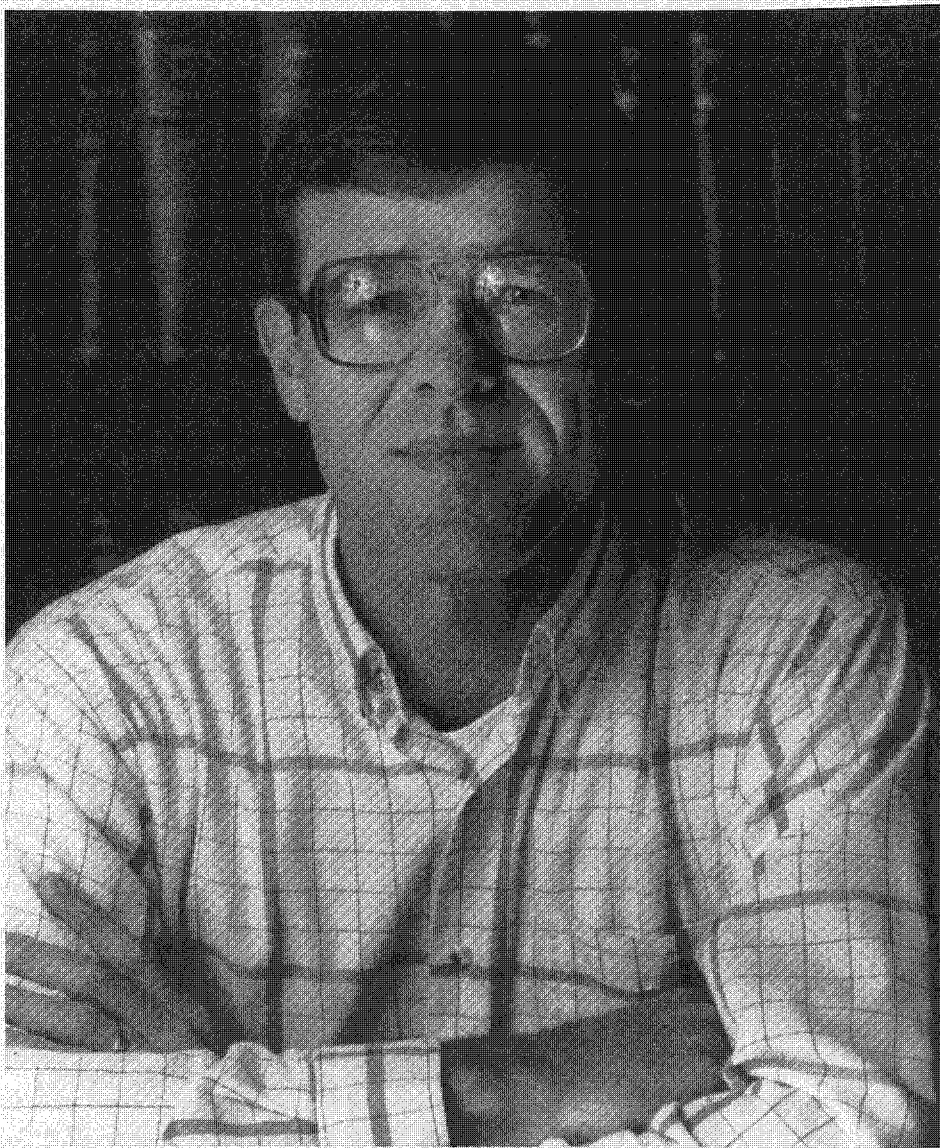


NARF ATTORNEY

K. Jerome Gottschalk

K. Jerome Gottschalk joined NARF as a staff attorney in August of 1982. He was with the law firm of Fettinger and Bloom in Alamogordo, New Mexico from 1974 to 1982. He worked

extensively on numerous jurisdictional issues involving the nearby Mescalero Apache Tribe. At NARF, he has worked primarily on recognition and land claims cases. He was recently elected to a second term to the Litigation Management Committee of NARF. A.B., Fort Hays Kansas State College; J.D., Northwestern University (1974); admitted to practice law in New Mexico, and before the United States Supreme Court, the United States Court of Federal Claims, and the United States Courts of Appeals for the D.C., Eighth, Ninth, and Tenth Circuits.



NEW NARF BOARD MEMBER

Gilbert Billy Blue, Chief of the Catawba Indian Nation of South Carolina, was elected to the Native American Rights Fund Board of Directors, replacing Eddie Tullis who completed his six year term on the Board. Chief Blue was elected Chief of the

Catawba Nation in 1973, and has served in this position since. Chief Blue worked tirelessly for sixteen years to reach a settlement of the Catawba land claim which was finally realized in 1993. Chief Blue has served two years as Chairman of the South Carolina

Commission of Indian Affairs and five years as a member of the State U.S. Civil Rights Commission. Chief Blue is also known for his lectures on Catawba history at various universities, churches, schools and civic groups.

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 are 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 currently the best of its kind 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).

Also available from the National Indian Law Library:

Top Fifty, a Compilation of Significant Indian Cases, \$75.00

Handbook of American Indian Religious Freedom, edited by Christopher Vescey, 1991, \$15.00

American Indian Law: Cases and Materials, Robert N. Clinton, Nell Jessup Newton, Monroe E. Price, Third Edition, 1991, \$45.00

American Indian Law: In a Nutshell, William C. Canby, Jr., Second Edition, 1988, \$16.00

American Indians, Time and the Law, Charles F. Wilkinson, 1986, \$13.00

Federal Indian Law: Cases and Materials, David Getches and Charles Wilkinson, Third Edition, 1993, \$54.00

Felix S. Cohen's Handbook of Federal Indian Law, Felix S. Cohen, edited by Rennard Strickland, 1982 Edition, \$85.00

The Rights of Indians and Tribes, Stephen L. Pevar, Second Edition, 1992, \$8.00

PRICES SUBJECT TO CHANGE

INDIAN LAW SUPPORT CENTER PUBLICATIONS

The following materials are available from the Indian Law Support Center (all prices include postage and handling). **Please send all requests for materials to: Indian Law Support Center, Attn: Debbie E. Thomas, 1506 Broadway, Boulder, Colorado 80302.**

1988 Update to The Manual for Protecting Indian Natural Resources. The Indian Law Support Center is pleased to announce the availability of the 1988 Update to its Manual for Protecting Indian Natural Resources. The Manual covers the developments in natural resource law over the past six years since the publication of the original manual in 1982.

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. (Must be purchased with Update.)

The update is available for the price of \$30.00. The original manual and the update are available for \$50.00.

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, the manual discusses the task of developing reservation economics 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 non-tribal entities. \$35.00

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. (Must be purchased with update.)

1986 Update To Federal Indian Education Laws Manual. The Update is available for \$30.00. The price for original manual and update is \$45.00.

A Manual On The Indian Child Welfare Act And Laws Affecting Indian Juveniles. 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. (Must be purchased with Update.)

1992 Update to the Indian Child Welfare Act and Laws Affecting Indian Juveniles Manual. The 1992 Update provides a section-by-section legal analysis of the Act as well as the developments in Indian Child Welfare Act case law over the past eight years since the publication of the original manual in 1984. The 1992 Update and the original Manual comprise the most comprehensive examination of the Indian Child Welfare Act to date.

The original manual and the 1992 Update are available for \$50.00. If you have the original manual and require only the Update, it is priced at \$35.00.

Prison Law and the Rights of Native Prisoners. This manual focuses on the first amendment religious free exercise rights of Indian prisoners in state and federal penal institutions, with an emphasis in legal forms and pleadings for use by prisoners in *pro se* litigation. \$20.00

The Indian Law Support Center *Reporter* is available to LSC funded programs free of charge. To non-LSC organizations there is a \$36.00 subscription fee for 1 year.

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 biannually by the Native American Rights Fund. Third class postage paid at Boulder, Colorado. Ray Ramirez, Editor. There is no charge for subscriptions, but contributions are requested.

TAX STATUS. The Native American Rights Fund is a nonprofit, charitable organization incorporated in 1971 under the laws of the District of Columbia. NARF is exempt from federal income tax under the provisions of Section 501 (c) (3) of the Internal Revenue Code, and contributions to NARF are tax deductible. The Internal Revenue Service has ruled that NARF is not a "private foundation" as defined in Section 509(a) of the Internal Revenue Code.

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

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).

NARF COMMEMORATES 25 YEARS

In 1995, the Native American Rights Fund enters its 25th year of "standing firm for justice." NARF has successfully represented Indian tribes and individuals in nearly every state in the nation. On behalf of Native Americans,

whose lives are governed by hundreds of treaties, thousands of federal statutes, regulations and administrative rulings, NARF has fought and won hundreds of cases concerning every area and issue in the field of Indian law. NARF's

reputation as a national Indian law advocate is backed by its 25 years of successful legal representation to protect Native rights in today's society.



NARF is offering the following 25th Anniversary commemorative items for sale:

- A:) **Long sleeve shirts** with NARF 25th Anniversary logo in front and list of tribes on the back; available in white, gray and black in sizes L, XL, XXL. (\$15 plus \$2 shipping & handling) (CO add 4.05% sales tax)
- B:) **Canvas bags** (17"x12") with NARF 25th Anniversary logo in blue on a blue and white bag. (\$12 plus \$2 shipping & handling)
- C:) **NARF 25th Anniversary Calendar** (\$7.50 plus \$2 shipping & handling) (CO add 4.05% tax).

All orders will include FREE of charge, a NARF 25th Anniversary button, bumper sticker and key chain.



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B:) Canvas Bags(s) Qty _____ C:) NARF 25th Anniversary Calendar(s) Qty _____

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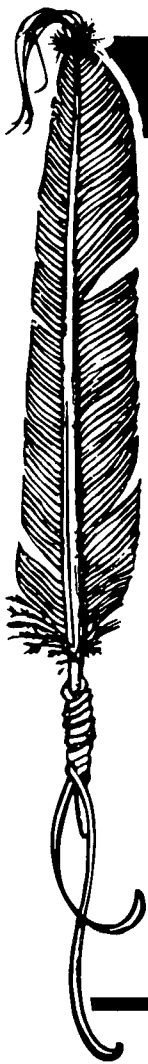
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NATIVE AMERICAN RIGHTS FUNDS

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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NARF LEGAL
REVIEW

*Pila'Mayan...

...to all of you from all of us at the
Native American Rights Fund



Marilyn E. Pourier,
Director of Development

As we begin to commemorate the 25th anniversary of the Native American Rights Fund (NARF) we reflect on the accomplishments and successes NARF has had on behalf of thousands of Native Americans throughout the country.

NARF is proud to have played a major role in the struggle for justice on behalf of this country's First Americans. Our goal to continue to serve Native Americans nationwide is a promise NARF intends to keep — to our clients, to our friends and to our donors.

We are extremely grateful for the thousands of individuals who came forward to support our work during the first 25 years, and to those who have pledged to renew their support so that NARF can continue its dedication to providing legal assistance to tribes on issues that are vital to their existence. Although we receive contributions from foundations, corporations and government entities earmarked for

special projects, it is the dollars from our individual donors that allows us to take on those emergency issues that arise.

Much remains to be done. I believe that together we can and will be able to create an environment for Native Americans that fosters their development to the fullest possible extent. The resource of our people, our children, is what will guarantee a thriving society in the years to come, not only for Native Americans, but for all of the American people.

This issue of "Visions" is intended to show our appreciation for your support by sharing with you NARF's various giving programs — we hope you will identify one that is most convenient and beneficial to you.

Once again — from all of us at NARF, our Board of Directors, and especially our Native American clients — Pila'mayan. Your support is deeply appreciated.

* Pila'mayan
— Lakota word meaning thank you.

Special Giving Opportunities at NARF

Tsanàhwit Circle

Tsanàhwit, pronounced "sa na wit," is used by the Nez Perce Tribe to signify "equal justice." NARF members who form the Tsanàhwit Circle share our dream of equal justice under the law for all Americans, including Native Americans. In pledging to make a small donation each month, NARF Tsanàhwit Circle members play a very important role by providing a regular, predictable source of income. The reassurance of knowing we can rely on these regular contributions to sustain our work has allowed us to make new commitments to Indian tribes that, without NARF, could not afford the costs of seeking justice. To become a member of the Tsanàhwit Circle, all you need to do is pledge to make a monthly contribution to NARF: \$10, \$15, \$25 or any amount you choose. Each month you'll receive a statement with current program information compiled exclusively for Circle members. Of course, you may cancel your pledge at any time.

continued on following page

Special Giving Opportunities at NARF *(continued)*

Peta Uha Council

Peta Uha is a Lakota word meaning “fire Keeper” — that honored tribal member who made a solemn commitment to ensure that the sacred flame, which meant light and life for the people, always be kept burning. You can become a member of NARF’s Peta Uha Council as a Silver Feather Society member by making an annual gift of \$500 or a Gold Feather Society member with an annual gift of \$1000 or more. (Membership benefits vary with each society.) Your gift will provide a solid base of financial support which will enable NARF to take on cases of major importance to all Indian people. Like the firekeepers of old, NARF’s Peta Uha Council members carry on the tradition of vigilance to ensure that the critical work of the Native American Rights Fund continues to move forward.

Matching Gifts

NARF’s Matching Gift Program was started in 1989 with two corporations, Digital Equipment and Lilly Endowment, matching their employees contributions to NARF. Currently 27 foundations and corporations are participating in the Matching Gifts Program. The program gives employers a chance to match their employees gifts, sometimes doubling or even tripling employee contributions. Our

thanks goes out the donors who have nominated NARF to become a part of their employer’s matching gifts program. Check with your employer for a Matching Gifts Program at your job. By doing so, you too, may be able to double or triple the amount of your gift to NARF.

Workplace Campaigns

You can contribute to NARF without using cash, purchasing a money order, or writing a check. Giving to NARF through your workplace is as easy as checking off a box on the workplace contribution/pledge form. NARF is a member agency of National/United Service Agencies (N/USA) and is listed as number 0450 in the Combined Federal Campaign and many state, city, and private sector campaigns throughout the country. We are also listed with other member agencies of Community Shares of Colorado (CSC) in Denver/Boulder area campaigns. If your place of employment has only a United Way campaign you may request a donor choice form and write in NARF’s name and address. Your contribution or pledge is automatically withheld from your pay check and forwarded to NARF on a regular basis.

If your employer doesn’t have a workplace giving program that allows you to contribute to NARF and you would like to have one put in place, call Mary Lu Prosser at NARF to ask about the advantages of starting one or adding N/USA or CSC to your existing one.

Planned or Deferred Gifts

As a way of demonstrating our thanks to NARF friends and donors, we offer a planned giving program. The program provides information about various ways to make planned or deferred gifts to NARF through special brochure mailings and articles in the “Visions” insert to the NARF Legal Review. This information is meant to serve as a way to help you plan for a secure future for yourself and your family and at the same time benefit NARF. A bequest is a convenient way for many people to give to NARF. If you choose to give a gift of stock, please make sure you send a irrevocable stock or bond power form with a medallion signature guarantee under separate cover. This procedure guarantees that NARF has sole ownership of the transferred stock. These lasting gifts are crucial in ensuring our future work on behalf of our clients.

The NARF “Circle of Life”

To personally recognize and acknowledge donors who have provided a lasting legacy to the Native American Rights Fund by including NARF in their estate planning, we have formed a very special club — the NARF “Circle of Life.” The circle is a very important symbol to the Native American because it represents the ideal form for family, tribe, the natural world and the unknown. It stands for unity and strength and the eternal continuity of Life. You can become a member of the NARF “Circle of Life” by including NARF in your estate planning. If you

would like more information about the "Circle," check off the box on the return reply envelope attached to the NARF Legal Review and drop it in the mail.

21st Century Endowment

The Native American Rights Fund has embarked on a campaign to establish a permanent endowment to provide steady income to support the ever-increasing costs of

providing adequate legal representation for our tribal clients. Providing these critically important services requires that NARF make a commitment to staying with a case for however long it takes to reach resolution. Such long-term staying power requires equally long-term financial commitment and stability.

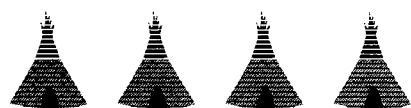
To launch the drive, the Ford Foundation has agreed to commit the first million dollars, on the con-

dition that others provide the additional two million.

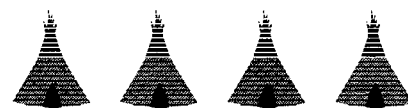
With the assistance of members of our National Support Committee, Board members and staff, we are in the process of soliciting donations, grants and pledges from individuals, businesses, corporations, foundations and other funding sources around the nation. Our goal is to raise \$3,000,000 by September.

Thousands of friends have helped NARF to grow and succeed. Individuals, corporations, foundations, government agencies, religious groups, and tribal organizations support NARF's important work.

"Visions" is published by the Native American Rights Fund, 1506 Broadway, Boulder, CO 80302. For further information contact Mary Lu Prosser, Editor.



*EYAPAHA



**Eyapaha - Lakota word meaning camp crier.*

Don Ragona, Director of Major Gifts

I am honored to have recently been a guest at the homes of several of NARF's donors.

Peta Uha members John Heller and Emily Rhys Davis hosted a reception in Ms. Davis's home followed by a trip to the National Museum of the American Indian in New York City. Ms. Davis is an artist who has recently finished a series of very poignant works about some of the most significant events in Indian history. The individuals who participated in the tour of the Museum were fortunate to have as their guide Emil Her Many Horses, S.J., an Oglala Lakota, who was one of the selectors for the special museum exhibit, "All Roads Are Good."

His candor and the indepth knowledge he shared about the items exhibited was much appreciated.

The Ben Tre family of Rhode Island had a pre-Thanksgiving brunch in NARF's honor at their home in Providence. Gay, Howard and Benjamin Ben Tre spent three days cooking traditional native foods for the reception and it proved to be superior to any native foods I have eaten.

I was invited to make a presentation at both of the events allowing me to share information about the culture of our Native peoples and the work that NARF does on behalf of its Native American clients.

To the Ben Tre family and John Heller and Emily Rhys Davis, we at NARF extend our hands to you and say "Lila Wopila Tunka" (thank you very much), for your generosity and overwhelming support.

Because this issue of "Visions" is dedicated to identify ways to contribute to NARF that might be beneficial to you, I want to add my appreciation to those members that have taken our requests to their family foundations. A number of NARF's individual donors are members of family foundations and have increased their gifts substantially by contributing through the foundation.



(Memorial/Honoring) Program

The Otu'han is a Lakota word literally translated as "giveaway." NARF's Otu'han (memorial/honoring) gift program is fashioned after the Indian giveaway, a traditional way of many tribes, in which a gift is given to honor someone on a special occasion (i.e., birthday, wedding, anniversary) or in memory of a family member or loved one. In the spirit of the Otu'han we would like to encourage you to honor or memorialize a friend or loved one. An Otu'han gift is a unique way for you to share the spirit of the Indian "giveaway" with family, friends and loved ones while supporting NARF in its legal representation to thousands of Native Americans throughout the country.

Otu'han gifts over \$10 are acknowledged with a specially-designed Native American card and gifts are listed in the "Dollars and Sense" insert to the NARF Legal Review.

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MARY JO GROVE	Robin Henry
BETTY M. HENRY	Robin Henry
ROSE FLANK	Dr. William Flank

Please consider making an Otu'han gift in memory of a loved one for the upcoming Memorial Day Holiday, or in honor of NARF to commemorate our 25th anniversary. Thank you.