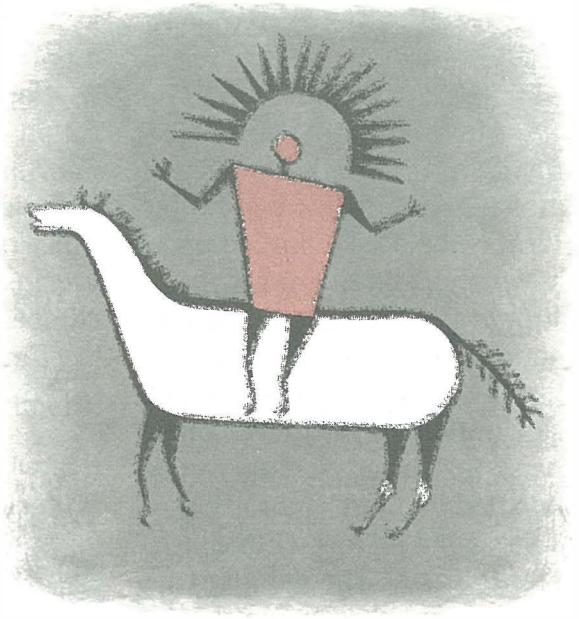
NARF LEGAL REVIEW
Native American Rights Fund
Volume 23, No. 1 Winter/Spring 1998

COURT RULES FOR INDIAN RELIGIOUS FREEDOM

"Our traditional , cultural, and spiritual use of Mato Tipila is vital to the health of our nation and to our self- determination as a Tribe. Those who use the Butte to pray become stronger. They gain sacred knowledge from the spirits that helps us preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership we cannot continue to determine our own destiny." (Romanus Bear Stops, Lakota)

On April 3, 1998, Judge William F. Downes of the U.S. District Court in Wyoming ruled that the National Park Service's climbing management plan at Devils Tower National Monument is constitutional. In his ruling, Judge Downes stated that "...the voluntary climbing ban is a policy that has been carefully crafted to balance the competing needs of individuals using Devils Tower National Monument while, at the same time, obeying the edicts of the Constitution." Judge Downs upheld all aspects of the Park Service's program, stating that "While the purposes behind the voluntary climbing ban are directly related to Native American religious practices, ...The purposes underlying the ban are really to remove barriers to religious worship occasioned by public ownership of the Tower. This is in the nature of accommodation, not promotion, and consequently is a legitimate secular purpose.... The government is merely enabling Native Americans to worship in a more peaceful setting. In doing so, the government has no involvement in the manner of worship that takes place, but only provides an atmosphere more conducive to worship." Judge Downes' ruling is expected to be appealed.



The Native American Rights Fund filed an *amicus curiae* brief last year on behalf of the National Congress of American Indians in the District Court of Wyoming in the case of *Bear Lodge Multiple Use Association et al v. Babbitt* to defend the National Park Service's Climbing Management Plan at Devils Tower National Monument or Mato Tipila (Bear Lodge) from a lawsuit filed by professional climbers that challenged the federal government's ability to voluntarily

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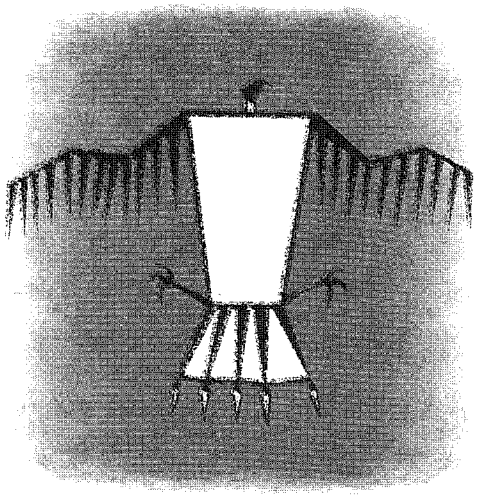
accommodate free exercise of religion by members of the Eastern Shoshone, Kiowa, Crow, Cheyenne, Arapaho, and Lakota Nations. As many as 23 tribes have been identified as being culturally affiliated with Mato Tipila. These tribes have practiced their religious and cultural ceremonies there for centuries.

The National Park Service (NPS) sought to limit disruptive activities at the Devils Tower National Monument which it determined placed a burden upon that worship and to protect the cultural resources of those lands. Among other things, the plan called for a voluntary cessation of rock climbing in the month of June so that tribal worship can be conducted in a peaceful setting not disrupted by rock climbers and/or tourists. The month of June is when tribes gather there to conduct sacred religious ceremonies. The National Park Service was sued by rock climbers contending that NPS's actions unconstitutionally violated the Establishment Clause of the First Amendment and Equal Protection component of the Fifth Amendment.

The Park Service implemented the voluntary climbing ban in 1995, after nearly two years of consultation with American Indians, rock climbers, environmentalists, and others. It did so to balance the competing interests of Indians and rock climbers, and to encourage tolerance and respect for Indian religious practices. To promote compliance with the ban, the Park Service posted a sign at the base of the Tower asking visitors to stay on the trail (and away from Indians conducting ceremonies at off-trail locations) and developed a cross-cultural education program which offers information to visitors about the historical and cultural significance of the Tower to American Indians. The vast majority of rock climbers have shown respect for the Indian ceremonials and have supported NPS's climbing ban.

In its brief, NARF argued that when reviewing Equal Protection and Establishment



Clause challenges to federal action protecting Native American interests, courts do not follow usual legal tests of general application. Instead, courts apply tests which are fundamentally altered by federal law pertaining to Indian tribes, including the Indian trust doctrine. Once the

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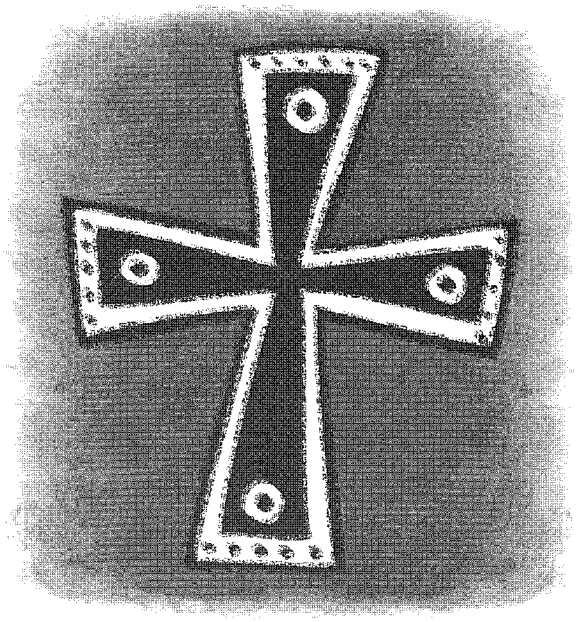
Indian trust doctrine is considered and the altered Equal Protection legal test and its progeny is applied, it becomes clear that NPS's actions are lawful. Under that test, NPS's actions are constitutional so long as "rationally related" to the United States' unique obligations to Indians. Because preservation of Native American culture, including traditional religious practices, is a "legitimate government objective ... such preservation is fundamental to the Federal Government's trust relationship with tribal Native Americans." Thus, NPS's action in this case "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."

NARF continued its argument stating that in today's world where modern government activity is so pervasive, the federal government owns, builds, leases or manages hundreds of religious properties (such as churches, chapels, synagogues, sanctuaries, church camps, etc.) located on federal lands, military reservations, hospitals and correctional institutions across the country. If the Establishment Clause tests were strictly applied, federal ownership of such property might be a facial violation of the Establishment Clause. Of course, such a ruling would not only severely limit the ability of the government to manage such properties, but may also have far reaching consequences regarding the constitutionality of federal ownership of religious property.



It is appropriate that the federal Indian trust relationship necessarily includes cultural and religious protection, because these dimensions of Indian life play a critical role in the overall sovereignty of Indian nations. As found by the courts and Congress, cultural vitality profoundly influences tribal governance and is essential to the internal functioning of Indian tribes. As stated by affected Indians in this case:

> "The well being of the Cheyenne River Sioux Tribe and its members is intertwined with tribal sacred sites like Mato Tipila. We need to teach and preserve our traditional, cultural and spiritual knowledge in order to continue to determine our own destiny as a sovereign nation. Without the opportunity to conduct our traditional ceremonies and gain cultural and spiritual knowledge at our sacred sites, the guidance we need to sustain us as a Tribe and as a people will be lost forever." (Burdell Blue Arm)

Hence, federal action protecting Indian religion is in furtherance of the United States' unique obligations to Indian tribes, rationally related to protecting culture and a fundamental component of the United States' trust relationship with Indian tribes.

NARF believed that plaintiff Bear Lodge Multiple Use Association's complaint and brief did not appear to deny that their activities disrupt Native ceremonial use of Devil Tower. Most religious worship requires some decree of freedom from intrusive, disruptive behavior, and Native worship is no different in that regard. Without proper government management authority in

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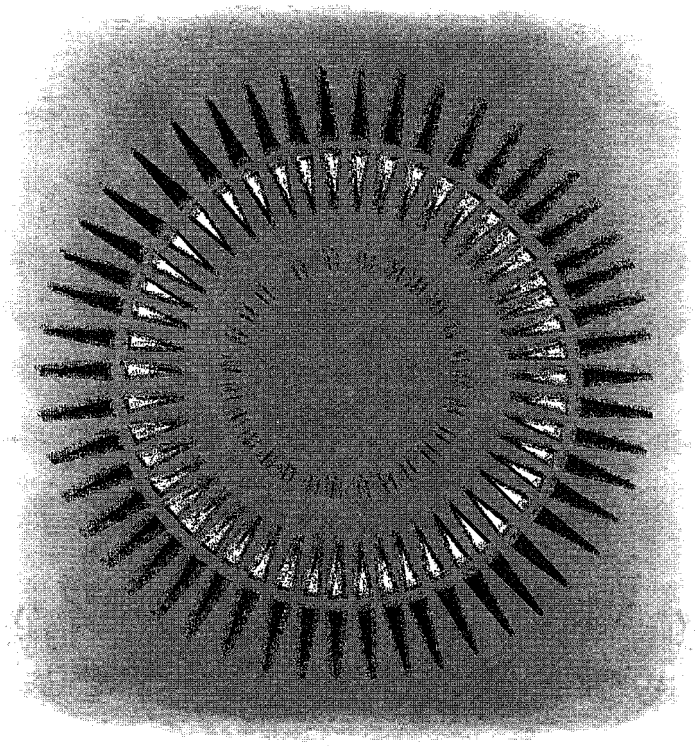
the context of other religious sites owned by the government, it is easy to imagine conduct by thoughtless, insensitive or ignorant visitors at times when these religious places are being used for worship which is highly disruptive and burdensome to religious practice. For examples: citizens could picnic at the pulpit during religious services or play frisbee in the isles; tourists could intrude into confessional booths during confession to photograph, record or videotape the priest or penitent; visitors could swim in the baptismal pool during baptisms; or, climbers could climb on sacred structures when being used by religious practitioners.

While these examples seem absurd in the context of Judeo-Christian religious places due to the public's level of knowledge and respect for those places, similar intrusions occur frequently at Native American religious places due to ignorance and improper management. Indeed, the plaintiffs in this case sought to disrupt the religious solitude and sanctity at Mato Tipila. An Establishment Clause interpretation that prohibits government management of its religious properties in this context presents the danger of unequal treatment of unpopular or unfamiliar religious groups.

"Climbers make lots of noise and come near our people when they are praying. By doing this, they disturb our efforts to obtain spiritual guidance. When climbers hammer objects into the butte, it is like they are pounding stakes into our bodies." (Arvol Looking Horse)



An inability to curtail disruptive activities would severely interfere with worship in some of America's most historic religious properties located within parks or managed by NPS, such as the Ebenezer Baptist Church at the Martin Luther King, Jr. National Historic Site or the San Antonio Missions National Historic Park. Yet, for Native American worship at places like Mato Tipila such a ruling would have created an outright loophole in our constitutional fabric, because such worship is all but impossible without government cooperation.

"Praying at places like Mato Tipila also prepares us for life's challenges and gives us inner strength to go anywhere in the world. No matter how strong our bodies and minds are, we cannot survive in this world as Indian people unless our spirits are also healthy and strong. Our spiritual health help us persevere in an often hostile and foreign world." (Steven Vance)

NARF UPDATES

U.S. Supreme Court issues ruling in Alaska Tribal Sovereignty Case

In a decision decried by one tribal leader as "a breach of honor" the Supreme Court ruled that 1.9 million acres of ancestral lands owned by a remote Alaska Native tribe are no longer under the governmental jurisdiction of the Tribe.

The unanimous and unusually short 13-page decision written by Justice Clarence Thomas came in a much-watched landmark case brought by the State of Alaska twelve years ago to block an outside construction company from paying a tribal tax that funds road repairs, maintenance of a rudimentary airstrip, and other governmental services in the Native Village of Venetie. The ruling reverses a Ninth Circuit Court of Appeals decision that upheld the tribal tax.

Much of the litigation centered on the interpretation of the Alaska Native Claims Settlement Act (ANCSA) -- the largest tribal land claims settlement in American history. Under that Act, Congress extinguished Alaska tribal claims to 340 million acres in return for a cash payment of $962.5 million and secure title to 44 million acres selected and to be divided under a complex formula. In an unprecedented move in federal/tribal relations, Congress directed that the 44 million acres be conveyed not to the Alaska tribes, but to new Native corporations which the tribes were required to establish under state law. At the same time, Congress eliminated some of the federal controls over land development that generally apply on Indian reservations elsewhere. In the end, some 200 village tribes took part in the land claims settlement.

NARF Board members and staff meeting in Artic Village (Alaska). 8/97

The particular conflict that gave rise to the litigation in this case involved the application of ANCSA to the Venetie Tribe of Neetsaii' Gwich'in Indians – a remote Athabascan Tribe that inhabits a vast area north of the Arctic Circle and hundreds of miles away from Alaska's major population centers. Accessible only by air, boat, snowmobile or dogsled, tribal members largely live a traditional life based on hunting, fishing and trapping. The tribal council administers all essential governmental services other than the federally supported local school.

In 1943, the Secretary of the Interior set aside a 1.9 million acre reservation in order to protect the Venetie Tribe from outsiders encroaching on tribal hunting and trapping grounds. During the late 1960s the Tribe opposed the evolving ANCSA legislation. The Tribe wrote to Congress to retain its reservation, even if doing so meant giving up the cash settlement. Congress obliged and the Tribe

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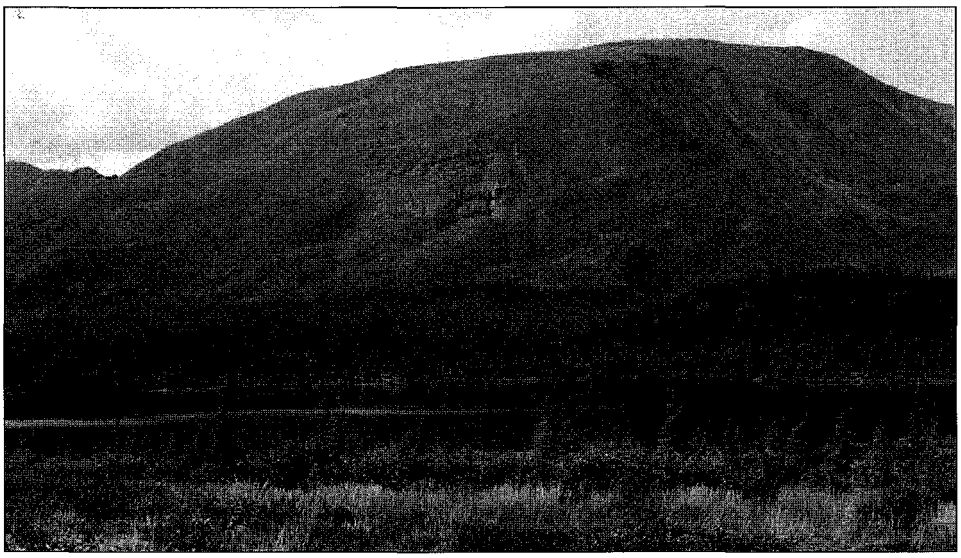


received no share of the monetary settlement. Still, Congress required that the land initially be conveyed to two state chartered corporations established by the Tribe for its tribal citizens. Once the lands were conveyed, the corporations immediately reconveyed the lands back to the Venetie Tribe, which continues to own the land today.

In ruling against the Tribe's continued right to tax, the Supreme Court reasoned that when a reservation does not exist, Indian tribes can only continue to govern their lands if those lands qualify as a "dependent Indian community" under a 1948 federal law known as the "Indian Country" statute. Relying heavily on two Supreme Court cases decided at the early part of the century, the Court interpreted that term narrowly to mean that the federal government must have "set apart" the lands "for the use of Indians as such," and that the government must retain "superintendence" and "control" over how the land is used and developed. The Court then ruled that Venetie's lands could not satisfy this standard because Congress initially conveyed the lands to the corporations for whatever use they might, and because the Congress had deliberately chosen to forego any control over how those choices would be made.

Spokesperson Gideon James, Venetie Tribal Government Administrator, called the high court's action "a breach of honor," adding "we may not have been educated in the white man's ways, but we were promised we would always be able to keep and govern our lands where our ancestors are buried. We were told we could opt out of the Settlement Act. Now we are told it was all a big lie to take our rights away!"

Native American Rights Fund (NARF) attorney Heather Kendall-Miller called the opinion "superficial and poorly reasoned." She remarked that "over thirty years ago Congress abandoned the Court's paternalistic view of keeping Indians under absolute federal control and of being unable to take charge of their own affairs. Instead Congress did everything possible to promote tribal independence and self-governance. The Court's analysis today twists that policy into a cruel and backhanded termination of the very rights it was intended to promote."

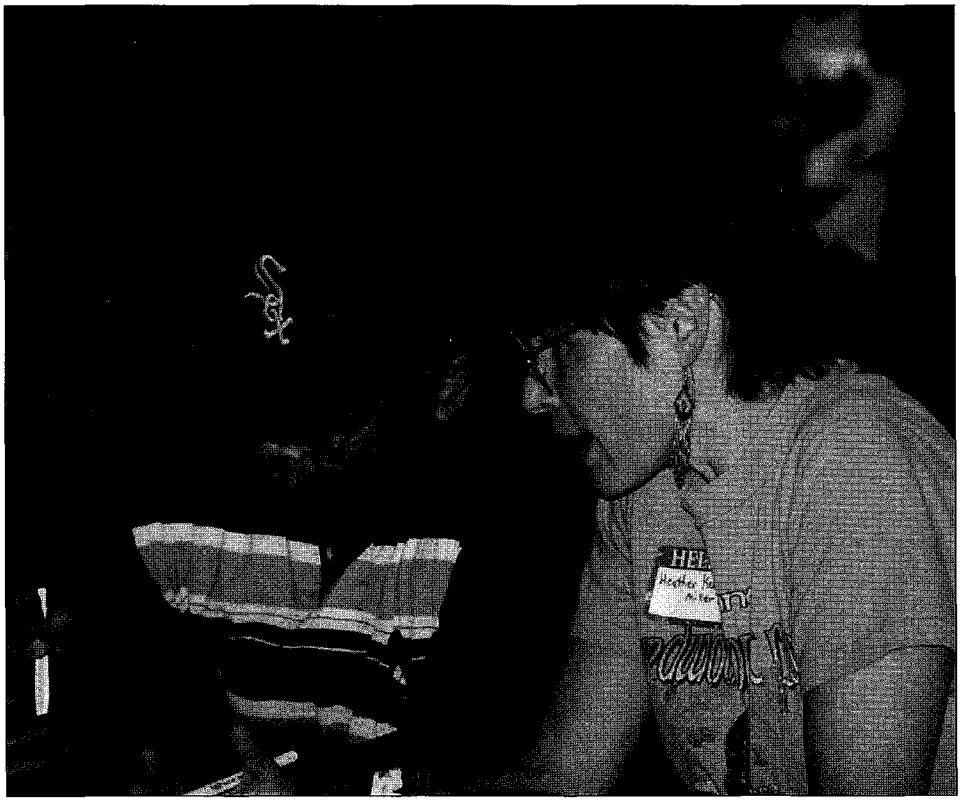
Indeed, the Court's opinion acknowledges the apparent conflict between statutes like the Settlement Act designed to promote greater Native American autonomy, and the Court's conclusion that tribal governmental jurisdiction demands federal control over tribal lands. But Justice Thomas added that the conflict is one "entirely for Congress" to resolve.

In its briefs before the Court, the State of Alaska repeatedly warned of chaos across the state if the Court sustained the Venetie Tribe's claim to govern its lands, and one state legislator went further by calling Alaska Native tribes "an absolute evil." Ms. Kendall-Miller called such statements "irresponsible and

provocative extremes bordering on racism, reflecting a belief that the tribes which have been conscientiously governing their communities according to tribal custom since before recorded history are in fact incapable of continuing to do so responsibly and in cooperation with the state and federal governments." She added that moves by the state courts, the state legislature and the Alaska congressional delegation to weaken the limited Native hunting and fishing rights that survived the 1971 Settlement Act "have so polarized the State that genuine dialogue on issues of tribal self-government has been virtually impossible." She nonetheless expressed hope that a new commission appointed last week by Alaska Governor Tony Knowles to address village government issues would provide the first forum to begin healing the wounds created by the Court's decision . "In the end," she added, "both law and justice will demand that Congress restore what the Court now says Congress took away. Any reconciliation depends on that. Congress must act."

Back in Venetie, Mr. James was asked how life would now change for the tribal community. "It won't," he said, "we are still here, just as our ancestors were, and the views of nine black robes 10,000 miles away cannot change that. People who come here must respect our laws and traditions. We are the only government here, and we will remain the only government here, so long as the wind blows."

The Native Village of Venetie was represented by NARF staff attorney Heather R. Kendall-Miller. She is now assisting Venetie and other Alaska tribes plan legislation strategies to regain as much tribal jurisdiction as possible.



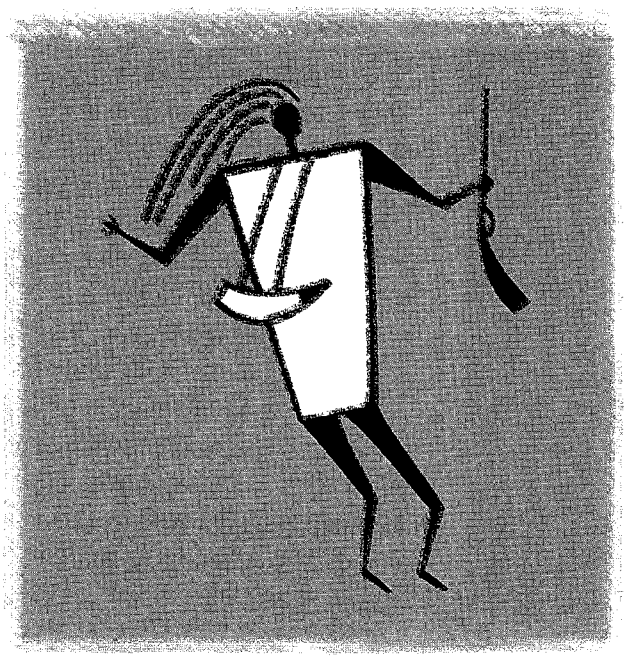
NARF attorney Heather Kendall-Miller meeting at Venetie. 8/97

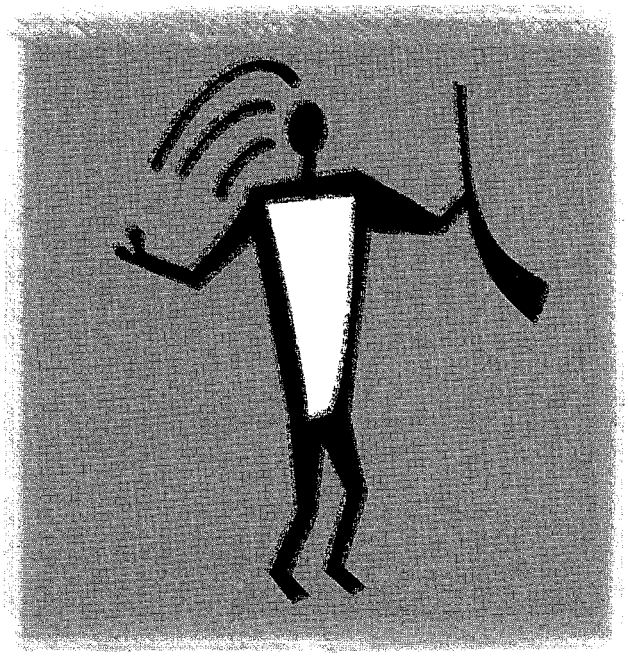
Chippewa Cree Tribe Water Rights Settlement Bills Introduced in Congress

The Chippewa Cree Tribe of the Rocky Boy's Reservation has been involved in water rights settlement negotiations with the Montana Reserved Water Rights Compact Commission and the Clinton Administration for the past eleven years. The Tribe's goal in negotiating a settlement of its water rights claims is to secure an adequate water supply for the Reservation's long term needs. A settlement Compact addressing on-Reservation Tribal water rights was concluded between the Tribe and the State on April 11, 1997 and was been approved by both the Tribe and the Montana Legislature. Negotiations continued over the following months with the Department of the Interior to obtain the Department's approval of the Compact as well as a commitment of federal funds to the cost of the settlement.

On April 1, 1998, a bill to provide for the settlement of the water rights claims of the Chippewa Cree Tribe of the Rocky Boy's Reservation in Montana was introduced in the United States Senate by Max Baucus (D-Montana) and Conrad Burns (R-Montana), and in the House of Representatives by Rick Hill (R-Montana). The bill was referred to the Senate Committee on Indian Affairs and to the House Committee on Resources. The bill is the first Indian water rights settlement that has the support of the Administration as well as the State and Tribe. The parties hope to have hearings scheduled in May or June of 1998, and to have the bill passed before the end of this session of Congress

The bill ratifies the Compact between the Tribe and the State of Montana. The Compact quantifies the Tribe's on-reservation water rights and establishes a water administration

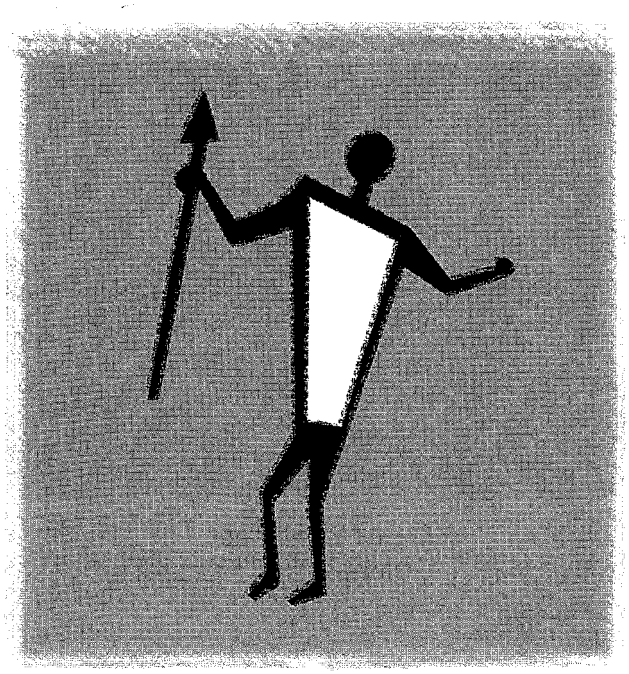




system designed to have minimal adverse impacts on downstream non-tribal water users. A more efficient and effective utilization of Spring snowpack runoff through enlarged or new storage facilities on the Reservation is a critical part of the settlement package. Accordingly, $25 million in the budget of the Bureau of Reclamation is earmarked for development of specified on-reservation water supply projects. Funds are also provided for administration of the Compact ($3 million) and for economic development ($3 million).

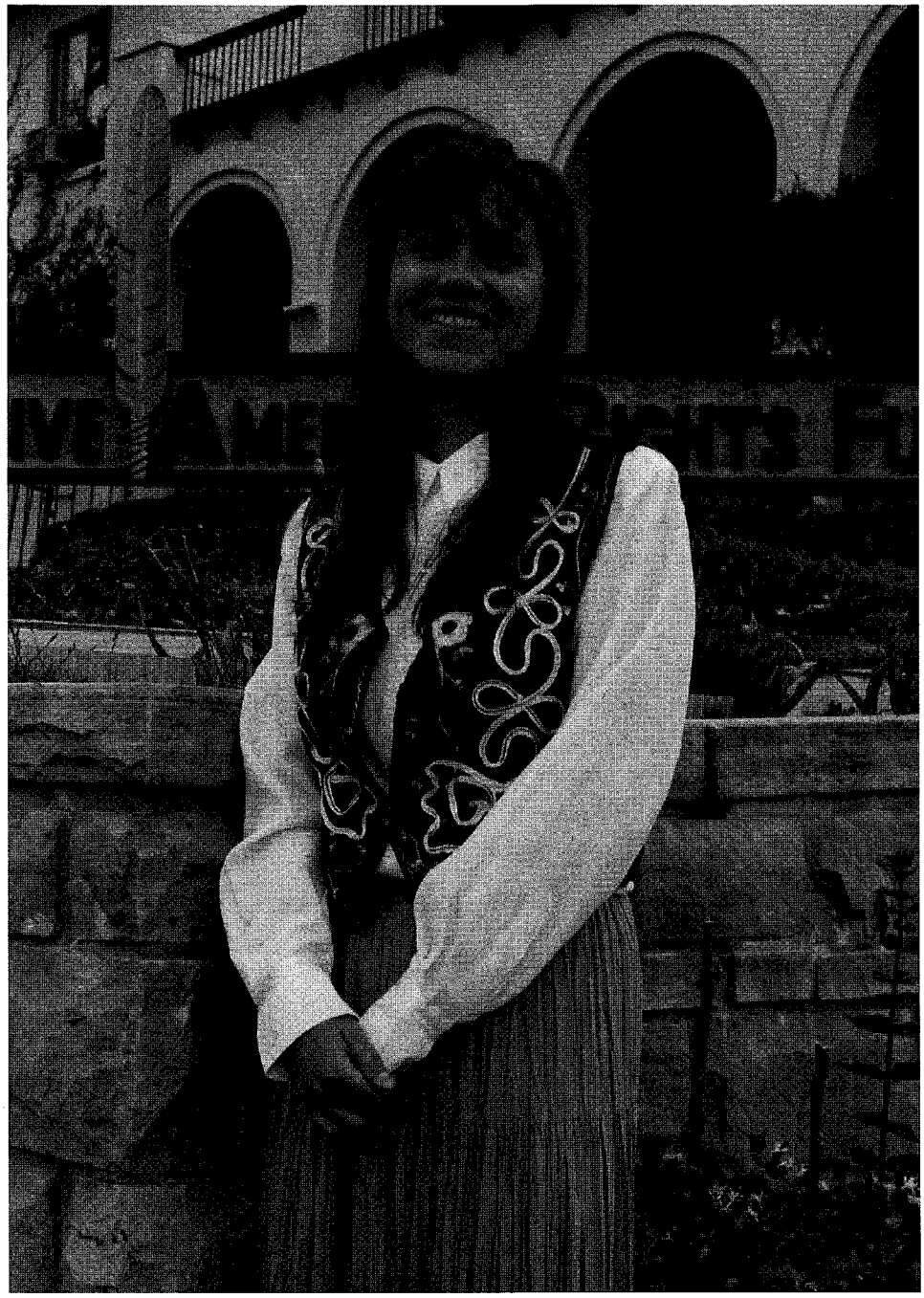
In addition, the bill authorizes the initial steps of a more extensive process of obtaining a long-term drinking water supply for the Chippewa Cree Tribe - a process that is vital to the survival of the Tribe. The Tribe, the State, and the Administration agree that the future drinking water needs of the Tribe can only be provided for by the importation of water to the Reservation. Toward that end, the bill authorizes the following: (1) an allocation of 10,000 acre feet of storage water to the Tribe in Tiber Reservoir, a federal storage facility; (2) seed money ($15 million) toward the cost of a future project to import drinking water to the Reservation; and (3) funds ($1 million) for the Secretary of the Interior to conduct a feasibility study to identify water resources available to meet the Tribe's future drinking water needs, to evaluate alternatives for the importation of drinking water to the Rocky Boy's Reservation, and to assess on-reservation water needs, such as the need for a wastepaper treatment facility. The bill also authorizes funds ($3 million) for a regional feasibility study to evaluate water resources over a broader area of North Central Montana.

The Native American Rights Fund has represented the Tribe in their efforts since 1987.



NARF ATTORNEY

Tracy A. Labin



Tracy A. Labin, a descendant of the Mohawk and Seneca Nations, first experienced NARF as a summer law clerk in the Washington, D.C. office in 1993. She found the work so rewarding that she returned as a Skadden Fellow after graduating from Stanford Law School the following year. Following her fellowship, she joined the NARF team permanently as a staff attorney and law clerk coordinator. Her prior experience includes clerking for the Seneca Nation Department of Justice. Tracy's work at NARF has been varied and includes assisting tribes to secure water rights, handling settlement negotiations for a client regarding damages claims against the United States and working on several tax cases. She has written a number of amicus curiae briefs to the United States Supreme Court and to various Courts of Appeals on behalf of tribes for cases involving tax law, tribal sovereignty, and trust land. She is admitted to the State Bars of both Colorado and California and is a member of the Eighth Circuit Court of Appeals, the Tenth Circuit Court of Appeals, the United States Court of Appeals for the Federal Circuit, the United States Court of Federal Claims and the District Court for the Western District of Oklahoma. Currently she serves as vice-president of the Colorado Indian Bar Association. Tracy received her B.A. from the University of Notre Dame (1991) and her J.D. from Stanford Law School (1994).

NARF RESOURCES AND PUBLICATIONS

THE NATIONAL INDIAN LAW LIBRARY

For the modern-day Indian, information is priceless in helping their fight to keep tribal homelands intact and traditional tribal ways alive. The National Indian Law Library has been providing Indian tribes and Indian law attorneys with a wealth of Indian law materials for the past 25 years. The materials are documents ranging from legal pleadings written in vital Indian law cases (from Tribal court to United States Supreme Court) to a collection of Tribal codes (there are about 510 federally recognized tribes in the United States.)

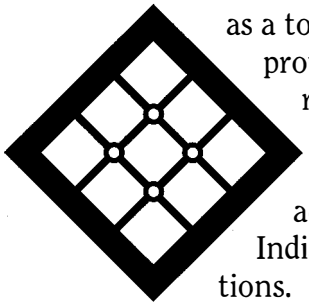
The National Indian Law Library began as a special library project of the Native American Rights Fund. It is designed to serve as a clearinghouse for materials on American Indian Law for tribes, private and tribal attorneys, legal service programs, law firms, federal and state governments and agencies, and for students. Essentially, it was intended to carry out one of the Native American Rights Fund's priorities, the systematic development of Indian law.

The National Indian Law Library has the largest collection of Indian law materials in the nation. The Library fulfills its function by collecting all available materials related to Indian law. These materials are catalogued on a customized library application software database and indexed for inclusion in the National Indian Law Library Catalogue.

The National Indian Law Library Publications For Sale:

(Prices are subject to change, shipping and handling charges are additional)

The Bibliography on Indian Economic Development, 2nd Edition. Designed as a tool for the protection and regulation of commercial activities on Indian reservations. Included in the bibliography are articles, monographs, memoranda, Tribal codes, and miscellaneous materials on Indian economic development. Cost for this title is $30.00.



The National Indian Law Library Catalogue, Volume I. One of The National Indian Law Library's major contributions to the development of Indian law is the creation of this catalogue. It is arranged by subject-matter index, author-title index, plaintiff-defendant index, and NILL number listing. Cost for The National Indian Law Library Catalogue, Volume I is $85.00; the 1985 Supplement is $10.00; the 1989 Supplement is $30.00.

Top Fifty: A Compilation of Significant Indian Cases, compiled by the National Indian Law Library, costs $85.00.

Other Publications Offered For Sale by The National Indian Law Library:

(Prices are subject to change, shipping and handling charges are additional)

American Indian Law: Cases and Materials, 3rd edition, 1991, by Robert N. Clinton, Neil Jessup, Monroe E. Price, price is $45.00.

American Indian Law: Cases and Materials, 3rd edition, 1992 Supplement, by Robert N. Clinton, Neil Jessup, Monroe E. Price, price is $10.00.

American Indian Law in a nutshell, 2nd edition, 1988, by William C. Canby, price is $16.00.

American Indians, Time and the Law, 1986, by Charles F. Wilkinson, price is $13.00.

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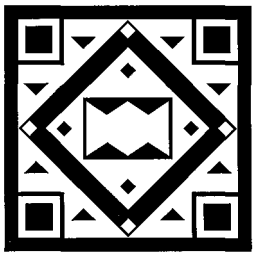
Battlefields and Burial Grounds, 1994, by Walter Echo-Hawk and Roger Echo-Hawk, price is $15.00.

Code of Federal Regulations, Title 25, 1995, published by U.S. Government Printing Office, price is $15.00.



Federal Indian Law, Cases and Materials, 3rd edition, 1993, by David Getches, Charles Wilkinson, and Robert A. Williams, Jr., price is $54.00.

Felix S. Cohen's Handbook of Federal Indian Law, 1992 edition, edited by Rennard Strickland, price is $85.00.

Handbook of American Indian Religious Freedom, 1991 edition, edited by Christopher Vescey, price is $15.00.

The Indian Child Welfare Handbook: A Legal Guide to the Custody and Adoption of Native Americans, 1995, published by the American Bar Association, price is $69.95.

Indian Claims Commission Decisions 1946-1978. This forty-three volume set reports the work of the Indian Claims Commission. Each volume is sold separately at a cost of $25.00. The ICCD Index is sold at $25.00.

Indian Land Area Map, 1992, published by the U.S. Department of the Interior, price is $5.00.

Mending the Circle: A Native American Repatriation Guide, 1996, published by the American Indian Ritual Object Repatriation Foundation, price is $40.00.

The Rights of Indians and Tribes, 2nd edition, 1992, by Stephen L. Pevar, price is $8.00.

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

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ALASKA OFFICE: Native American Rights Fund, 310 K Street, Suite 708, Anchorage, Alaska 99501 (907-276-0680) (FAX 907-276-2466).

OTU'HAN

Native Americans have a custom of giving gifts in the names of those they wish to honor and remember.

In the Lakota language this custom is referred to as Otu'han -- literally translated as "giveaway." Items of value such as shawls, quilts and household items are gathered over a long period of time to be given away during pow-wows or celebrations in honor of births, anniversaries, marriages, birthdays, and other special occasions. The Otu'han is also cutomary in memory of the deceased. The custom of giving in honor or memory of someone is still very much alive among Indian people today. We are honored to list those donors making gifts to the Native American Rights Fund in spirit of the Otu'han. August 1997 - December 1997.

In honor or memory of:

Toni Ackerman .....by Lynne Nerenberg
Daisy Amoros .....by Pamela Drake
Roald Amundsen .....by Harald Holt
Elizabeth A. Baker .....by Dr. Robert Goss
Whitford Baldwin .....by Nancy West
Dorothy Baldwin .....by Nancy West
Linda Bates Jordan .....by Mark Lynch
J.W.B. Bausman .....by John Bausman
Damon R. Binder .....by Leslie & Steven Pond
Loren Bomelyn .....by Ken & Carol Ampel
Velma McCalla Brooks .....by Michael Lane Brooks
Jimmie Vi-Ni-Ta Autry & Richard Bubb .by Nanette M. Bohren
Charles Carrey .....by Mary C. Backus
Andy Celso .....by Jill Ann Silber de Wills
Juanita Centeno .....by Marcelle M. Martin
Mildred Cleghorn .....by Larry & Gisela Brewer
Sharon Cotrell .....by Sherna Berger Gluck
Dr. Charles C. Crittenden .....by Ann C. Witt
Marion Dewitt .....by Lorraine & Joseph Padulo
A. Guido Di Silvestro .....by Gertrude Di Silvestro
Margery Dodge .....by Chris Dodge & Jan DeSirey
Auleen Eberhardt .....by Margaret Wegs
Adelaide Elliott .....by Pamela Drake
Frank Finnegan .....by Carol Yankovich
Rose Flank .....by Dr. William Flank
Rob Franklin .....by Debra McGinnis
Rob Franklin .....by Shana Lussenhop
Rob Franklin .....by Vernona Baker
Rob Franklin .....by Margaret Blake
Rob Franklin .....by Shirley Bassett
Rob Franklin .....by Vera Falk
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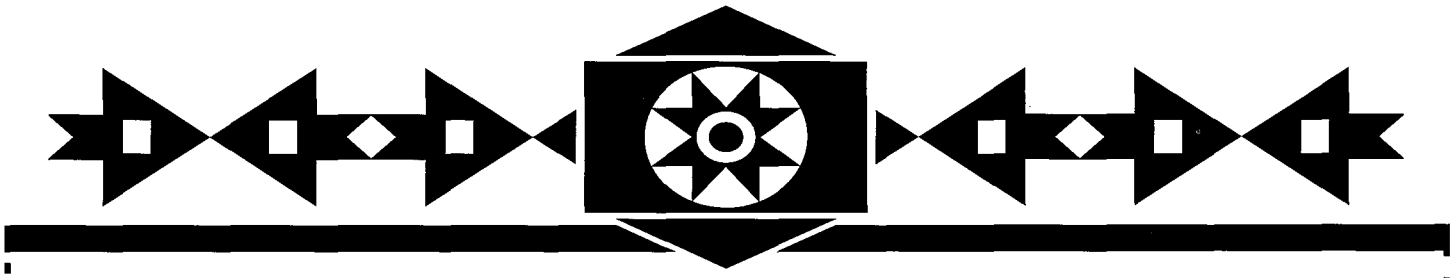

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