

NARF

Legal Review

Native American Rights Fund

Kootenai Religious Site Saved

A nine-year battle to stop the construction of a dam and hydroelectric project on a sacred religious site is finally over for the Kootenai Indians of Montana, Idaho, and British Columbia. On June 25, 1987, the Federal Energy Regulatory Commission (FERC) denied a construction license to Northern Lights, Inc., a rural electric cooperative, to build the dam and utility project at Kootenai Falls, Montana. The Falls serves as a sacred center of the Kootenai religion.

In 1978, Northern Lights, Inc., located at Sandpoint, Idaho and seven other rural electric cooperatives from Western Montana applied for a construction license for the dam and hydroelectric facility from FERC. NARF, on behalf of the Confederated Salish and Kootenai Tribes of Montana, the Kootenai Tribe of Idaho, and the Lower Kootenay Band of Canada, as well as, the State of Montana and several conservation groups intervened in the proceedings to stop the construction. In 1983, a thirteen week trial was held before FERC Administrative Law Judge David Miller. In April 1984, Judge Miller issued a recommended decision denying the license. The Commission's decision last week upholds Judge Miller's recommendation.

NARF contended that the license application of Northern Lights should be denied for two related reasons. First, NARF asserted that the project would not serve the public interest under the Federal Power Act (FPA). And second, it contended that the license would seriously impair the free exercise of Kootenai religion and consequently cannot be justified under the First Amendment to the United States Constitution and the American Indian Religious Freedom Act of 1978 (AIRFA). AIRFA preserves the free exercise of Indian religion and provides for the worship at sacred sites to be within the scope of Indian free exercise of religion.

The nine-member Commission reached its unanimous decision based on the public interest principle of the FPA. Section 10 of the FPA states that it is the Commission's duty to "license projects that will be best adapted to a compre-

hensive plan for beneficial public uses of waterways, including *inter alia*, their use for recreational purposes."

The Commission stated that in its decision to issue a license, equal consideration would be given to the power utilities and development purposes, energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities and the preservation of other aspects of environmental quality.

The two recreational purposes identified by FERC were the Falls and the rainbow trout fishery. The Commission ruled that the development would change Kootenai Falls significantly and permanently. They stated that the proposed development would adversely affect the scenic values of Kootenai Falls by reducing the amount of flow of white water, exposing more rock in the area, eliminating the spray, mist and rainbows permanently, and eliminating the daily flow fluctuations. The Commission ruled that Kootenai Falls is one of the last remaining undeveloped waterfalls in the northwest worth saving in the "public interest." The Commission also found that the

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dam would disrupt the biological environment necessary to maintain an adequate stock of trout.

Northern Lights, Inc., contended that any adverse effect on the trout population could be overcome by the restocking of the trout. However, the Commission ruled that the United States government had already spent large amounts of money and effort in maintaining the rainbow trout. They stated that "the substitution of mitigation measure for the trout fishery would, on balance, not be in the public interest."

In the opinion, the Commission held that the proposed area for construction would indeed infringe upon the religious customs and beliefs of the Kootenai people. The Kootenai Indians are the aboriginal inhabitants of the project area and day-to-day life has always been closely bound up with the streams and lakes in their homeland.

In particular, the area surrounding the proposed project site, the Falls itself and areas along the river banks, have been used historically, and still are used by the Kootenai people for fundamental religious purposes. One of their religious practices is known as "vision questing", in which they seek from the "Nupika" visions of revelations that are comparable to visions described in the Bible. Visions are granted only at sites that are consecrated and selected by the "Nupika" and the Kootenai Falls area, is claimed to be "their holiest of temples or shrines." Testimony from tribal members stated that:

"Nupika" has revealed in Visions that its home at the Falls will someday be threatened, and a sacred covenant between Nupika and the people has been established to protect the Falls. If Nupika is disobeyed, the Kootenai believe all communications with and protection from Nupika will be lost, and they will be spiritually destroyed."

Northern Lights contended that construction and operation of a railroad and highway near Kootenai Falls have not destroyed the home of the "Nupika" and its attendant religious significance. The company stated that:

"There is not one shred of evidence, not even a hint, that Kootenai Falls had any significance to Kootenai Indians, despite intensive investigations by three expert anthropologists in the proceeding"

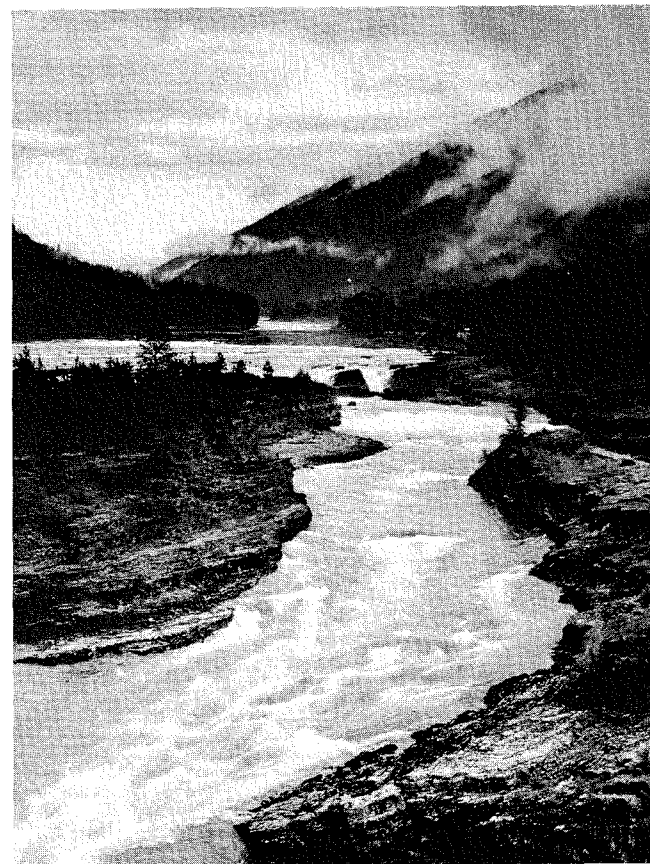
The Commission found that the non-existence of such evidence is adequately explained by the secrecy that surrounds vision quest specifics and sites, among other secrets of the Kootenai religion.

Another issue in the case was whether the power produced by the Kootenai Falls project would be needed by the electric cooperatives or, for that matter, whether the power could be sold anywhere in the Pacific Northwest region. The region has been beset with electric energy surplus for most of the past decade, a scenario projected to continue to the end of the century.

The FERC decision, however, seemed to skirt the issue

FERC chose to assume that the co-ops and the region would have use for the power when the project was projected to come on line, but then ruled that the importance of preserving the recreational, scenic and aesthetic, fishery, and Kootenai religious and cultural values of the Kootenai Falls area outweighed its power generation potential. This approach, argues NARF lawyers Steve Moore and Walter Echo-Hawk, has the advantage of insulating the inherent values of the Falls area over time, when regional power needs are likely to change.

Because the license denial was upheld on federal statutory grounds, FERC did not reach the question of whether the development would have violated the First Amendment free exercise rights of the Kootenai people. Northern Lights, Inc., has announced publicly they will not appeal the license denial thus ending a near-decade long fight by NARF and the Kootenai people to preserve the Falls.



Kootenai Falls (Jim Richardson *The Denver Post*)

Otu'han

Otu'han-Lakota word literally translated as "give-away." The Otu'han is a custom of giving in honor of a friend or loved one.

An Otu'han gift is a unique way to share the spirit of the Indian "give-away" with family, friends and loved ones. At the same time it helps NARF in its efforts to help Native Americans.

May-July Memorials

In the spirit of Otu'han the Native American Rights Fund has received contributions from friends and supporters in memory of:

Janice Hillis by Anagilda and Mort Abramowitz
 Elisabeth Barschel by Hans J. Barschel
 Mrs. Helen Snyder by Franklin P. Bardorf
 Eugenia Matau by Claire Callaway
 Dr. Priscilla Oaks by Shu Yan Chan
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 Billy Jo Hurley by Steve Hurley
 Mary Devane Jacquiel by Edmond C. Jacquiel, Jr.
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 Ethelwyn B. Mayer by F. K. Mayer
 Mr. Charles List by Dr. & Mrs. John McHugh
 Aksel Kofoed by Mrs. Dagny Christine Mork
 Faustena Perry by Clara Myrick
 Ester Chiger by Evelyn Roberts and Agnes Nash
 Jane Saxe Perrin by Mrs. M. Mercer Neals, Jr.
 Conrad Marien by Helen Charbeneau, Wanita Harper & Sheila O'Brien
 Benjamin E. Linder by John M. Otter
 Grant and Annie Fressler by Naomi C. Pancoast
 A. J. Schott by Nicholas A. Patricia

Mother, Father, Sister Mary & Brother Robert by Prof. Joseph M. Portal
 John Amukon by Robert Quick
 Mrs. Sheila Ralston by Gary Ralston
 Jon Brag by John & Jean Richardson
 Bozena Veckova by Bozena Ridley
 Mighty Volga by Mrs. Esther M. Roseig
 Glenwood W. Rouse by Mrs. Glenwood W. Rouse
 Clara and William J. Scanlon by Florence J. Scanlon
 Fanny Puchowitz by Jeffery Alan Schatzberg
 Stephen William Schmitt by A. P. Schmitt
 Libby and Joseph Zarembor by Mr. & Mrs. J. Kreigler & Mr. & Mrs. H. Sidofsky
 Charles Simpson by Carole Anita Simpson
 C. Lynn Strickland by Gail Strickland
 Hazel Delores and Charles R. Littler by Monica E. Styron
 Lester Tapinka by June E. Tapinka
 E. E. Iorgerson by Ruth E. Iorgerson
 Bright Star by Little Tree
 John C. Tritendi by Rose Tritendi
 Thomas Lawrence by Anita Troise
 J. Fred Vaughn by Clara P. Vaughn
 Muriel Fallo by Tamar Diana Wilson
 Vivian Woodruff by Hyla Woodruff



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Just because charity begins at home doesn't mean it should end there.

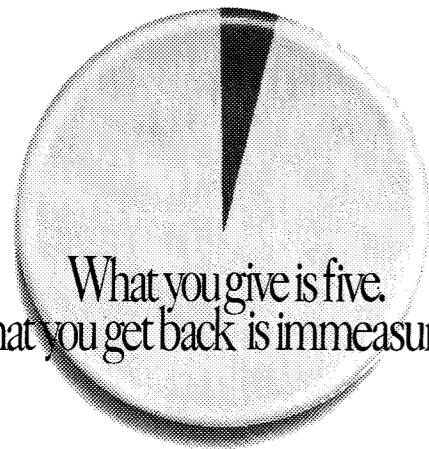
Nobody is suggesting that we should solve the problems of the world at the expense of our own families.

But, when we give less to charitable causes than we spend on frozen dinners and designer jeans, something is out of balance.

Suppose that, instead of the one or two percent most of us are giving now, we all raised our contribution level to five percent. Based on current income figures, we'd generate more than \$175 billion for the causes we say we care about. The homeless. The environment. Religion. And the arts. Just to name a few.

So look at your own giving. And see if you can't find a way to do just a little more.

That minor change in your family budget could be the start of some major changes in your family's world.



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Two Board Members Selected

William A. Thorne, Jr., *Pomo*, and Dan Little Axe, *Absentee-Shawnee*, were recently named to NARF's Board of Directors. The two new board members are actively involved in local, state and national Indian affairs. As board members, they will help decide NARF policies and direction.

Thorne, a member of the Pomo Tribe, is currently presiding as the 5th Circuit Court Judge in West Valley City, Utah. Thorne, a graduate of Stanford Law School, has had extensive Indian law experience as one of the tribal attorneys for the Shoshone-Bannock Tribes at Fort Hall, Idaho, including areas of federal trust responsibility, treaty rights, law and order, taxation and other issues relating to the representation of Indian tribal governments. He is a member of the Utah State Bar Association, Federal Bar Association, American Indian Bar Association and Salt Lake County Bar Association.

Little Axe recently finished up a four-year term as Governor of the Absentee-Shawnee Tribe. He has previously served the Tribe as Chariman for six years. Little Axe has held administrative positions with the Native American Management Association, the Cheyenne-Arapahoe Tribes of Oklahoma, and United Tribes of Western Oklahoma and Kansas. He has been a board member of the Oklahoma Indian Affairs Commission, Central Tribes of the Shawnee Area, United Tribes of Western Oklahoma and Kansas, Oklahomas for Indian Opportunity, Potawatomi County Advisory Board and served as the first president of the United Indian Nations of Oklahoma.

The two new board members replace Bernard Kayate, *Laguna Pueblo* and Lois Risling, *Hoopa*, who had served as board members for six years. NARF extends a warm thank you to Bernard and Lois for their dedication and service.

Dauphinias New Deputy Director

Rick Dauphinias, *Turtle Mountain Chippewa*, was appointed deputy director of NARF in May 1987. Rick joined NARF as a staff attorney in 1979 and has worked in both the Boulder and Washington, D.C. offices. Rick's experience is in litigation and natural resource law. He replaces Jeanette Wolfley who had served as deputy director since December 1985. Jeanette has returned to her position as a staff attorney. As deputy director, Rick is responsible for case intake and litigation coordination, in addition to duties as a staff attorney. Rick received his J.D. degree from the University of Notre Dame and is admitted to practice law in Colorado. He has worked on a number of NARF cases including *Charrier v. Bell*, the Stripper Well litigation and the Swinomish Consolidated Trespass case.



Case Updates

Court Declares That Alabama-Coushatta Tribe Did Not Have Aboriginal Title To Lands In Texas

In May 1987, the United States Claims Court ruled that the Alabama-Coushatta Tribe of Texas did not hold aboriginal title to lands in the State of Texas. The Claims Court Hearing Officer decided that because the Tribe did not exclusively use and occupy the lands at issue before Texas became a State, they did not have aboriginal title to those lands. In the alternative, the Hearing Officer said that if the Tribe ever had exclusive use and occupancy of the lands, it lost such use and occupancy through the influx of white settlers before Texas entered the Union.

NARF is appealing the Hearing Officer's decision to a three judge-panel of the Claims Court.

Magistrate Declares Tribal Court Does Not Have Jurisdiction Over Reservation Contract Suit

NARF is filing an objection to a federal magistrate's recommendation that a federal court decide a reservation contract suit brought by a Turtle Mountain Chippewa Tribal Member against a non-Indian construction company.

In 1981, Twin City Construction company entered into a contract to construct a Tribal high school on the Turtle Mountain Chippewa Reservation. Twin City subcontracted with a Tribal member for part of the construction work. Problems arose and the Tribal member sued Twin City in Turtle Mountain Tribal Court on a breach of contract claim. The Tribal Court ultimately determined that it had jurisdiction to hear the case. Twin City then brought suit in federal district court to prevent the Tribal Court from proceeding.

On June 30, 1987, a federal magistrate recommended that the federal court decide that the Tribal Court did not have jurisdiction over the suit by the Tribal member against Twin City. The magistrate ignored the facts that the contract and sub-contract involved the building of a tribal high school on the Turtle Mountain Reservation and that the jurisdiction of the Tribal Court implicates Tribal sovereignty. In her recommendation, the magistrate said that there was no threat to Tribal self-government or to Tribal control of internal relations.

Fishing Allowed for Native Villagers

For the first time since 1964, members of the Alaska Village of Mentasta are allowed to legally fish in a nearby river. However, the fishing right is for this year only. In the initial suit, *Katy John v. Alaska*, NARF filed suit to protect the right of Alaska Natives to fish at traditional and customary fishing sites. In 1964, the State of Alaska claimed that a ban on fishing was necessary for conservation purposes. The NARF Alaska office will continue to talk with the State about future rights for the Native Village.

Supreme Court to Hear Religious Freedom Cases

NARF will be filing *amicus* briefs in two religious freedom cases that will be decided by the United States Supreme Court in the 1987 Term. In *Lyng v. Northwest Indian Cemetery*, the Court will determine whether the construction of a forest service road in an area of religious significance to the Yurok, Karok and Tolowa Tribes violates those Tribes' First Amendment right to free exercise of their religion. In the second case, *Employment Division, Department of Human Services of the State of Oregon vs. Smith*, the Court will decide if members of the Native American Church who were discharged from their jobs for peyote use during religious ceremonies are entitled to unemployment compensation benefits from Oregon's unemployment compensation fund by virtue of their First Amendment free exercise rights.

NARF Resources & 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, legal treatises, that are available in well stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-copy 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 Catalogue* lists all of NILL's holding and includes a subject index, and author-title table, a plaintiff-defendant table, and a numerical listing. This reference tool is probably the best current reference tool in this subject area. It is supplemented periodically and is designed for those who want to know what is available in any particular area of Indian law (1,000+ pgs. Price: \$75).

Bibliography on Indian Economic Development

Designed to provide aid for 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: \$30.00) (NILL No. 005166)

Indian Claims Commission Decisions

This 43-volume set reports all of the Indian Claims Commission decisions. An index through volume 38 is also available, with an update through volume 43 in progress. The index contains subject, tribal, and docket number listings (43 volumes. Price: \$820.) (Index price: \$25.00). (Available from the Indian Law Support Center).

Indian Rights Manual

(Available from the Indian Law Support Center)

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

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

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

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

1986 Update to Federal Indian Education Laws Manual. (\$30.00) Price for manual and update (\$45.00)

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

NARF Resources & Publications continued...

Films and Reports

"Indian Rights, Indian Law." This is a film documentary, produced by the Ford Foundation, focusing on NARF, its staff and certain NARF casework. The hour-long film is rented from: Karol Media, 22 Riverview Drive, Wayne, NJ 07470 (201-628-9111).

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.

Prices subject to change without notice.



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Native American Rights Fund

The Native American Rights Fund is a nonprofit organization specializing in the protection of Indian Rights. The priorities of NARF are: (1) the preservation of tribal existence; (2) the protection of tribal natural resources; (3) the promotion of human rights; (4) the accountability of governments to Native Americans; and (5) the development of Indian law.

Our work on behalf of thousands of America's Indians throughout the country is supported in large part by your generous contributions. Your participation makes a big difference in our ability to continue to meet the 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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