

NARF

Legal Review

Native American Rights Fund

Tribal Efforts to Protect Against Mistreatment of Indian Dead: The Quest for Equal Protection of the Laws

by Walter R. Echo-Hawk

Introduction

In Kansas, a farmer dug up an entire Indian cemetery located on his land and has put all 146 dead bodies on public display as a roadside "tourist attraction." Despite the fact that the State Legislature has enacted over 70 statutes to comprehensively regulate and protect burial grounds of every imaginable description, the repugnant commercial exploitation of the Indian burial ground is permitted to exist by virtue of an alleged "loophole" in state law. In Nebraska, after the aboriginal Pawnee Nation was removed to a distant state by the federal government, private parties and state archaeologists swept into Pawnee cemeteries and removed hundreds of dead bodies and thousands of burial goods from historic graves. When asked to return these dead to the Pawnee government for a decent burial, the all-white Historical Society first claimed that the dead bodies were "owned" by it, citing federal regulations later admitted to be "non-existent," then loudly decried what it termed an Indian "raid" on museum "property." NARF is presently representing the Indian victims of the grave desecration in Kansas and the massive grave expropriations in Nebraska to secure remedial relief from legislative, administrative, and--if necessary--judicial forums.

These contemporary problems in Kansas and Nebraska are clear examples of brutal ethnocentrism against Indian people which originated in the last century, and which continue to haunt Native people in 1989. The Smithsonian Institution *alone*, for example, warehouses over 18,500 Indian remains. The well-known racial slur that "the only good Indian is a dead Indian," continues to play a stark reality in the lives of Indian people today. After death, American Indians are not secure in their person or property as non-Indians pursue them into the grave, for various motives, in quest of "specimens," "pathological material," or just plain "booty." All tribes throughout Indian country have been victimized by the bodysnatchers, but facts that have begun to emerge in recent years reveal that a shocking systematic expropriation of Native dead has occurred on a national scale over the years.¹ Without belaboring the point, non-Indians have removed and carried away untold thousands

1989
Contents: Vol.14, No.1, Winter 1988

Tribal Efforts.....1

*NARF Resources
and Publications*.....6



of dead Indian bodies and literally hundreds of thousands of associated burial goods from Native graves. This widespread removal and retention of dead Indian bodies and grave goods is one of the most grisly and frightening problems confronting Indian people today.

Regardless of the motive for expropriating Indian graves, the impact of this activity upon the affected Indians is always the same: emotional trauma and spiritual distress. It does not require much elaboration to understand Indian feelings regarding their dead. Mankind has always buried its dead with reverence, religion, and respect. Concern for the dead and the sensibilities of the living is a universal value held by all societies in all ages. That these values are deeply ingrained in the United States is reflected in American common law and in the statutes of all 50 states that strictly prohibit mistreatment of the dead and protect the sanctity of the grave from unnecessary disturbance.

Summary of Available Legal Defenses Against Indian Bodysnatching

Even though Native people, past and present, share these same universal values, they are dramatically excluded in most jurisdictions from the protection that society accords to citizens of other races in matters concerning the dead. Without equal legal protections, Indians and their dead have been singled out for markedly disparate racial treatment, which highlights a dark side of American society: Disturbance of the sanctity of the dead for white people is abhorred and avoided at all costs, while Indian dead are actively searched out, dug up, and put in museums.

This problem has come under increasing Congressional scrutiny in recent years,² and several state legislatures have acted to close loopholes where necessary to bring Indians within the ambit of legal protections afforded to other citizens,³ as society has begun in general to rethink its attitudes toward the treatment of Indian dead. The above changes

in attitudes thus far have been based solely upon the ethical and moral strength of the Indian community's quest for social justice and the strong American sense for fairness. However, strong legal grounds are also necessary to defend Indian tribes against bodysnatchers in those jurisdictions that will not act to protect the tribes from the non-consensual removal and retention of tribal dead.

The court decisions in this area, although few in number, strongly suggest that the American common law, which so strongly protects the legitimate interests of the living in the dead, also includes Native people within its equitable protections. In *Charrier v. Bell*, 496 So.2d 601 (La. App. 1 Cir. 1986), *cert. denied*, 498 So.2d 753 (La. 1986), the court applied basic common law rules to hold that grave goods taken from 300 year old abandoned graves by an amateur archaeologist rightfully belonged to the Indian descendants of the deceased Indians. *People v. Van Horn*, No. 182719 (Sup. Ct., Riverside County, Calif.) (Slip Opinion, Jan. 15, 1988) *appeal pending*, was an action by the State against an archaeologist for unlawful possession of Indian grave goods in violation of a new state law, where the court rejected the so-called "Dr. Frankenstein" defense, i.e., disturbance of the dead is justifiable *per se* if done in the name of science. The Court also ruled that the alleged "right" of archaeologists to retain possession of grave goods has always been a "wholly contingent right, dependent upon the will of others." *Id.* at 7. See also *United States v. Unknown Heirs*, 152 F. Supp. 452 (W.D. Okla. 1957) [When a burial ground was condemned, it was a federal court of equity's duty to see that a Comanche Indian chief was properly reinterred in an appropriate cemetery]; *Matter of Indian Cemetery, Queens County, N.Y.*, 169 Misc. 584 (N.Y. Sup. Ct. 1938) [Indian remains in a long-abandoned burial ground were carefully safeguarded by a court of equity when the area was condemned for highway purposes]. There is no apparent reason why American common law protections do not apply with

full force to protect Native people, regardless of the age or condition of the Indian burials,⁴ the ownership of the land containing the burials,⁵ or even whether the specific identities of the deceased are known.⁶

Similarly, where state action is involved in the removal of remains or in withholding them from reburial by the affected Indian nearest next-of-kin, it seems clear that such interference with religious-based mortuary practices can create a cause of action under the Free Exercise Clause of the First Amendment. See, e.g. *Fuller v. Marx*, 724 F.2d 717 (8th Cir. 1984). Moreover, where such state action is racially motivated--as it facially appears to be in most instances--then denial of rights to sepulcher by the state can also be violative of equal protection guarantees. See, e.g. *Rice v. Sioux City Cemetery*, 349 U.S. 70, 80 (Black J., dissenting).

Rights secured to tribal governments under federal Indian law also supply injured tribes with potentially strong legal grounds to rebury deceased tribal ancestors who have been wrongfully exhumed and withheld from reburial against the wishes of the tribe. One theory is that where remains have been removed from graves located in areas ceded to the United States by treaty, the signatory tribe implicitly reserved the right to rebury the desecrated tribal remains. This result will likely arise when the long-standing canons of Indian treaty construction are applied in many instances. Interpreting the treaties as understood by the Indians, given the practices and customs of the tribes at the time, it generally cannot be said that the signatory tribes intended to cede away all or any legal rights to protect its dead. Similarly, it cannot be said that the United States intended to obtain Indian land for the purpose of snatching Indian bodies from the grave or to rob the dead. At treaty times, the "science" of archaeology was not even born and grave robbing was a common law felony.

Another legal theory arises under federal Indian law. Regardless of whether dead bodies were removed from ceded treaty areas,

tribes also possess the inherent sovereign right to repatriate desecrated remains of deceased members or ancestors--a right that has never been divested by treaty or statute, or by necessary implication. One of the most fundamental attributes of tribal sovereignty is the right to govern the internal affairs and the personal, social, and domestic relations of tribal members.⁷ Proper disposition of tribal dead and protection of the sensibilities of living members clearly falls within this inherent aspect of tribal sovereignty. Such an exercise of tribal control over deceased tribal members desecrated from graves located outside reservation boundaries may properly be argued to exist in certain narrowly-defined circumstances. Such power would be particularly appropriate, for example, where desecration is allowed to exist either because state law has chosen not to regulate or protect tribal remains or fails to accord equal protection. In such instances, the paramount interest at stake is the tribal interest--the state's failure to act to protect basic human dignity does social, cultural, spiritual, emotional, and individual violence to the tribes and their internal and social relations between living and dead members. The exercise of such power by tribes in such narrow circumstances is also implicitly consistent with the federal trust or protectorate relationship: In rare instances where federal or state governments fail to protect basic human decency, or permit a loophole in legal protections to exist, tribes must be deemed to retain the inherent powers to protect their membership.

In *Mexican v. Circle Bear*, 370 N.W.2d 737 (S.D. 1985), the Supreme Court of South Dakota granted comity to a tribal court order determining the disposition of a dead body pursuant to tribal custom, even though that tribal custom was at variance with applicable state statutes and the decedent died within state jurisdiction. Even though the South Dakota Supreme Court was aware that tribal law conflicted with state law, it *nonetheless granted comity to the tribal court order*:

We conclude that the fact that tribal

custom is different from state law. . . is not reason enough to deny effect to an order based upon that custom. . . . Given the diversity of decisions regarding the right to custody of a dead body for burial purposes, *see generally* Annot. 54 A.L.R.3d 1027 (1973), we would be guilty of parochialism if we were to hold that tribal custom regarding that right is so abhorrent to the policy expressed in state law that it may not be given effect. Accordingly, we hold that recognition and enforcement of the tribal court order of March 20, 1985, would not contravene the public policy of this state.

Id. at 742. *The Mexican* decision, which applied international law comity principles to a domestic dependent Sioux Nation, illustrates that the inherent sovereign right over tribal dead is not inconsistent with nor inherently limited by the domestic dependent nation status of Indian tribes.

Caddoan Indian Tribal Efforts To End The Grave Desecration In Kansas

In Kansas, the descendants of the 146 dead Indians on public display at the privately-owned tourist attraction retained NARF to assist them in making it possible for these decedents to be decently buried in accordance with the wishes of the nearest Indian next-of-kin.⁸ Negotiations for this purpose are pending with the landowner, and potential solutions are presently being explored with state and local officials. In addition, state legislation--similar to that in over 13 other states--will be sought in the upcoming Kansas Legislature beginning in January of 1989 not only by the injured Caddoan Tribes, but also by the concerned scientific community, the present-day Indian tribes of Kansas, and other concerned citizens of that state.

Pawnee Efforts To Bury Its Dead Being Withheld From Burial By a Nebraska State Institution

The Pawnee Tribe of Oklahoma retained NARF to represent it in negotiations with the

Nebraska State Historical Society--a state institution--for the return of all reasonably identifiable dead Pawnee bodies and associated grave goods in its control to the Pawnee Tribe for reburial purposes. Over 200 deceased Pawnee Indians are at issue that were removed from historic and protohistoric Pawnee village cemeteries in alleged violation of basic legal rights and religious sensibilities of the Pawnee people and their tribal government. Negotiations with that state agency are pending as the Tribe exhausts all of the administrative remedies that have been made available to it.

In addition, legislation will be sought in the upcoming session of the Nebraska Legislature in January, 1989, to prevent such activity from ever happening again except in accordance with careful regulation by the legislative policymakers of that State. As in Kansas, the Nebraska legislation will provide for a reasonable balancing of legitimate scientific interests in the study of remains before reburial.

Conclusion

Popular ideas that Indian graves are fair game for trophy hunters, that dead Indian bodies are valuable only as "specimens," and that Indian burial objects belong to "finders as keepers" are all vestiges of racism that must be rejected by today's society as repugnant. The legal fiction that has arisen in the minds of many that dead Indian bodies are "property" that can be bought or sold in the marketplace as "chattels" must be dispelled as alien to long-standing principles of American common law. Hopefully, these needed social changes can be brought about by non-Indian society based upon the simple notion that Native American communities are living communities entitled to the same basic decencies that we accord to our own dead.

For more specific information concerning the legislation *now pending* in the Kansas and Nebraska Legislatures and to request a copy of the Bills, please feel free to write or call NARF staff attorneys Robert Peregoy or

Walter Echo-Hawk. For information on how to directly support the legislation in these states, please consult the box below.

CALL TO ACTION

Your personal and direct support for state legislation pending in Nebraska and Kansas is requested. Please send letters of support in January, 1989, to the following State Legislators, with copies to NARF:

Nebraska

If you are supportive of our efforts in Nebraska, we would kindly appreciate a letter to the following Senator thanking him for his and encouraging his continued support:

Senator Ernest Chambers
c/o State Capitol
Lincoln NE 68509

In addition, if you are acquainted with other state senators in Nebraska, please call Walter Echo-Hawk or Robert Peregoy at NARF at 303-447-8760 to inquire about additional letters needed for other senators. Thank you.

Kansas

Representative Jayne Alywood
Representative Ginger Barr
Representative Eloise Lynch
Representative Betty Jo Charlton
Representative Ken Grotewiel
HOUSE OF REPRESENTATIVES
STATE CAPITOL BUILDING
TOPEKA, KANSAS 66612

expropriation of Indian graves have caused identifiable harm to Native religious liberty and cultural integrity. See American Indian Religious Freedom Act Report, Federal Agencies Task Force (August 1979) at 64, 66, 76-81. In the last session of Congress, a number of bills were introduced to rectify some of the very real damage that has been done to living victims of Native grave expropriation, such as, the "Native American Museum Claims Commission Act" (Amendment No. 2124 to S. 187), the "Comprehensive Preservation Act" (S. 2912), and the "Indian Remains Reburial Act" (H.R. 5411), but none passed.

3 Over 13 states have enacted legislation in the last ten years to protect Indian and unmarked graves from unnecessary disturbance. The statutes typically outlaw looting from unmarked graves and provide a reasonable period for legitimate scientific study of remains that are disturbed before the remains are reburied. Tribal enforcement of statutory rights under these new laws through litigation becomes a *pro forma* means to defend tribal graves from desecration. See e.g. Confederated Tribes v. Koch, No. 82-11-63 (Clackamas Cty. Ct., filed 1982) [\$6,300 in damages obtained in settlement of a suit brought against a landowner who dug up and sold Indian bodies from graves located on his lands].

4 Indeed, the older the burial ground, the broader is the legal standing to protect the same from desecration. See generally 25A C.J.S. at 520 n. 51. See also Female Union Band Assoc. v. Unknown Heirs, 403 F. Supp. 540 (D.D.C. 1975), *aff'd*, 564 F.2d 600 (D.C. Cir. 1976); St. Peter's Evangelical Lutheran Church v. Kleinfelder, 8 Pa. Dist. & Co. 612, 29 Daugh Co. 240 (Pa. 1926); Wormley v. Wormley, 64 N.E. 864 (Ill. 1904); Matter of Indian Cemetery, Queens County, N.Y., *supra*.

5 Hamilton v. Individual Mausoleum Co., 80 P.2d 501 (Kan. 1939). See also 25A C.J.S. at 516, 21 A.L.R.2d at 487.

6 See Female Union Band, *supra*; Charrier v. Bell, *supra*.

7 See United States v. Kagama, 118 U.S. 375, 383-84 (1886); Ex Parte Crow Dog, 109 U.S. 556, 570 (1881). As stated in United States v. Quiver, 241 U.S. 602, 605-06 (1916):

... the relations of Indians among themselves--the conduct of one toward another--is to be controlled by the customs and laws of the tribe save when Congress expressly or clearly directs otherwise.

The Supreme Court has frequently recognized the inherent tribal sovereignty of Indian tribes to regulate their internal and social relations. United States v. Antelope, 430 U.S. 641, 645 (1977); United States v. Mazurie, 419 U.S. 544, 557 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973). There are no inherent limitations on tribal powers over members within reservation boundaries, and tribal governments are regarded as having complete authority (except as expressly limited by federal statute or treaty) to regulate the conduct of their own members within reservation boundaries. See, e.g., United States v. Wheeler, 424 U.S. 382 (1976) [criminal jurisdiction to punish crimes committed by members on the reservation]; Fisher v. District Court, 424 U.S. 382 (1976) [exclusive jurisdiction to adjudicate divorce and child custody matters between members living on the reservation]; Jones v. Meehan, 175 U.S. 1 (1899) [power to make laws of inheritance]; Johnson v. Chilkat Indian Village, 457 F. Supp. 384, 388-89 (D. Alaska 1978) [power to determine property rights to artifacts important to tribal culture and heritage]; Wear v. Sanger, 2 S.W. 307 (Mo. 1886) [power to determine property rights]. See also Carney v. Chapman, 247 U.S. 102 (1918); Meeker v. Kaelin, 173 F. 216 (9th Cir. 1909); Unussee v. McKinney, 270 P. 1096 (Okla. 1928); Davis v. Reeder, 226 P. 880 (Okla.).

8 These kin are northern Caddoan Indians--the aboriginal inhabitants of Kansas--who are organized into three tribal governments known as the Wichita and Affiliated Tribes of Oklahoma, the Pawnee Tribe of Oklahoma, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota (Arikara, Mandan, Gros Ventre).

1 See Moore, "Federal Indian Burial Policy?" - Historical Anachronism or Contemporary Policy," 12 NARF L. REV. No. 2

2 Almost ten years ago in 1979, the Carter Administration formally advised Congress that federal and private disturbance and

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, legal treatises, that are available in well-stocked law libraries. The uniqueness and irreplaceable core of the NILL collection is comprised of trial holdings and appellate materials of important cases relating to the development of Indian law. Those materials in the public domain, that is non-copyrighted, are available from NILL on a per-page-cost plus postage. Through NILL's dissemination of information to its patrons, NARF continues to meet its commitment to the development of Indian law.

AVAILABLE FROM NILL

The NILL Catalogue

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

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: \$30.00). (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 listing. (43 volumes. Price \$820). (Index price: \$25.00). (Available from the Indian Law Support Center).

Prices subject to change

INDIAN RIGHTS MANUAL

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

A Manual on Tribal Regulatory Systems. Focusing on the unique problems faced by Indian tribes in designing civil regulatory ordinances which comport with federal and tribal law, this manual provides an

NARF RESOURCES AND PUBLICATIONS

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 businesses undertaken by tribal government, tribal members, and by these groups with outsiders. (Approx. 300 pgs. Price \$35).

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

1986 Update to Federal Indian Education 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).

PUBLICATIONS

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

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

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).

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 of 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.

Board of Directors

Norman R. Ration, Chairman.....Navajo-Laguna
George Kalama, Vice-Chairman.....Nisqually
Ada Deer.....Menominee
Gene Gentry.....Klamath
Richard A. Hayward.....Mashuntucket Pequot
Mahealani Ing.....Native Hawaiian
Danny LittleAxe.....Absentee Shawnee
Calvin Peters.....Squaxin Island
Caleb Pungowiyi.....Siberian Yupik
Anthony L. Strong.....Tlingit
William Thorne.....Pomo
Eddie Tullis.....Poarch Band of Creeks
Verna Williamson.....Isleta Pueblo
Executive Director: John E. Echohawk (Pawnee)
Deputy Director: Rick Dauphinais
(Turtle Mountain Chippewa)



Western History Collections,
University of Oklahoma Library

NARF LEGAL REVIEW
1506 Broadway
Boulder, Colorado 80302

Nonprofit Org.
U.S. POSTAGE
PAID
Boulder, Colorado
Permit No. 589